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TOWARDS A BETTER CONSTITUTION

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CONTENTS

This paper discusses the separation of powers as it relates to the New Zealand Constitution. The author argues that the New Zealand Constitution contains insufficient separation of powers, and suggests options for reform.

I. INTRODUCTION.

The point of constitutionalism, and its application in this paper is not to engage in politics. Rather, it is to set out rules upon which politics can be based.[1] As Professor Bruce Ackerman succinctly put it, "the first great theme of modern constitutionalism is democracy; the second is its limitation."[2] The object is to adapt democratic government to the interests of the people and the preservation of liberty.[3] Therefore, in the constitutional state there must be a set of rules that restrain government power to prevent its abuse.[4] As Madison pointed out, it is no alleviation that unlimited power is exercised by a plurality of hands; many despots will surely be as oppressive as one.[5] Therefore the theory of how to limit power is an essential consideration in forming a constitution.

In contrast to the American and Australian Constitutions,[6] the development of the New Zealand Constitution has not been driven by theory.[7] At least with respect to the

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[1] It is accepted that liberal thought, on which this paper is based is not universally accepted. Unfortunately because of space constraints the merits of liberal thought cannot be addressed here, and the paper will proceed on the premise that liberal thought is of benefit. For a leading critique of liberalism see the work of Roberto Unger, in particular R M Unger *Knowledge and Politics* (The Free Press, New York, 1975); R M Unger *Law In Modern Society* (The Free Press, New York, 1976); R M Unger *Passion An Essay on Personality* (The Free Press, New York, 1984). Similarly there are arguments that politics cannot be separated from constitutionalism. Again the merits of this debate cannot be canvassed adequately in this paper, and discussion will proceed on the premise that the division of constitutionalism and politics can be made. For a critique of this premise see Barber N W "Prelude to the Separation of Powers" [2001] CLJ 59, 67 – 71.

[2] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 634, 688; see also M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 1.

[3] W Wilson *Constitutional Government in the United States* (Columbia University Press, New York, 1908) 2.

[4] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 8.

[5] Madison *Federalist 48* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washinton DC) in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washinton DC) 324.

[6] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 4. For example in the case of the USA the *Federalist Papers* of Hamilton, Jay and Madison in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washinton DC) provide an excellent example of a thorough discussion and debate as to how the constitution should be arranged.

[7] G Palmer, above, 4.

relationship between Parliament and the executive, our Constitution has generally been created with little attention to overall structure.[8] Given the lack of critical analysis behind much of our constitution's development, the Constitution should now be critically analysed to assess its suitability.

Of the theories attempting to find a solution to balancing the interests of efficient and limited government the separation of powers has been the most influential, standing as one of the great pillars of western thought.[9] It is on that basis that this paper proposes to examine firstly how power is distributed in the New Zealand Constitution, and secondly whether and how this should be changed to safeguard individual liberties.

Although the separation of powers has become somewhat confused over time,[10] the doctrine essentially argues that the legislative, executive and judicial branches of government should be separated so that one cannot accumulate too much power and act in a tyrannical fashion. This is complemented by the doctrine of checks and balances, which holds that the branches need to have the ability to restrain each other. In tandem these two theories provide the basis for the modern theory of separation of powers, which strives to create balance between the three branches of government.

The separation of powers is particularly apposite as a tool of analysis in New Zealand because of the unusually close relationships between the three central organs of government. In New Zealand it is possible for the executive to use its control over Parliament to change the law to suit its own ends and do so in a fashion that the Courts cannot question. For example in 1982 the National government granted itself water consents for the Clyde Dam,[11] and more recently the Labour Government retrospectively

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[8] R Mulgan *Politics in New Zealand* (2nd edn, Auckland University Press, 1997) 54; G Palmer , above, 4.
[9] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 1.
[10] M J C Vile, above, 12.
[11] Clutha Development (Clyde Dam) Empowering Act 1982; see detailed discussion in Part III A 2 Uncontrolled Lawmaking below.

suspended electoral law to avoid a member of the Labour Caucus having to vacate his seat.[12]

By permitting this unusually close relationship between the executive and legislative branches, unrestrained by the courts, New Zealand's Constitution does not contain sufficient separation of powers safeguards to protect citizens from abusive or careless use of state power. To remedy this situation the executive legislative and judicial branches of government need to be further separated, and rearranged so that they check and balance each other more than they presently do.

The best solution cannot be found in either Westminster or Washington.[13] Rather the best solution is some form of constrained parliamentarianism.[14] With respect to the executive-legislative relationship the proposed optimal solution is as follows:[15] A bicameral legislature, the lower house being the same as the current House of Representatives, except that its members are selected on a proportional basis. The upper house should be constituted of representatives from the current electorates. Cabinet government should continue, drawing its membership exclusively from the lower house.

An alternative, but also beneficial option is to maintain a unicameral legislature, but to require ministers to resign from Parliament upon accepting a post in Cabinet. Their seats in Parliament would then be allocated to the next candidate on their party list. While this arrangement is a second choice, it is still endorsed as a highly beneficial change.

The judiciary should continue to be separate from the other branches of government. Furthermore, they should be entrusted with enforcing an entrenched and supreme

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[12] Electoral (Vacancies) Amendment Act 2003; see detailed discussion in Part III A 2 Uncontrolled Lawmaking below.
[13] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 640.
[14] See B Ackerman , above.
[15] This is only a brief outline for the purposes of introduction only. Almost all of the features of the government outlined are subject to qualifications and additions. For a more detailed description refer to part IV A Separating the Legislative and Executive Branches below.

constitution. Ideally the supreme constitution would include both the Constitution itself and the New Zealand Bill of Rights Act 1990 ("Bill of Rights").

II. THE SEPARATION OF POWERS.

A. Aristotle to Montesquieu: The Development of the Separation of Powers.

The separation of powers date backs to Aristotle, who first considered the allocation of different roles to separate branches of government.[16] Specifically, Aristotle saw Constitutions as having three elements, a deliberative element, the magistracies, and a judicial power.[17] However, Aristotle did not suggest that the roles of government should be divided to limit the power of the state. Rather, his concern of constitutional design was to have popular control of government,[18] and a proper balance in government between the classes.[19]

Essentially, from Aristotle until the renaissance, there was no progression towards what is now known as the separation of powers.[20] Throughout this period the courts essentially exercised the legislative power,[21] and the division of roles between Monarch and Parliament were generally unclear.[22] Constitutional concerns through this period were directed at balancing the interests of the classes rather than separating the offices of government,[23] principally limit the Monarch generally, not to confine him or her to an executive role.[24]

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[16] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 22, 316.
[17] Aristotle *The Politics IV, 14* in S Everson (ed) J Barnes (trans) *Cambridge Texts in the History of Political Thought: Aristotle The Politics* (Cambridge University Press, Cambridge, 1988) 102.
[18] M J C Vile, above, 22.
[19] See for example Aristotle's assertion that not having classes represented will lead to oligarchy; Aristotle *The Politics IV, 6* in S Everson (ed) J Barnes (trans) *Cambridge Texts in the History of Political Thought: Aristotle The Politics* (Cambridge University Press, Cambridge, 1988) 91.
[20] M J C Vile, above, 24.
[21] M J C Vile, above, 24.
[22] M J C Vile, above, 26 – 29.
[23] M J C Vile, above, 33.
[24] M J C Vile, above, 37 – 38.

The concept of three separate branches of government serving different functions seems to have first arisen in Dallison's *Royalist Defence* of 1648.[25] Similarly the separation of powers played a part in Marchamaunt Nedham's 1656 *The Excellence of the Free State.*[26] However, the separation of powers fell into the background after the monarchical Humble Petition and Advice of 1657.[27]

The development of the Separation of Powers in its own right was primarily achieved through the work of Locke and Montesquieu, although as both were building on previous thought, neither is the sole origin of the doctrine.[28] Locke's contribution was to make it clear that the power to make and enforce laws should be separated,[29] and more importantly, to expound the idea that power should be divided to prevent concentrations of power that would lead to temptation for its abuse;[30] the essence of the separation of powers.[31] However, Locke's emphasis on legislative supremacy,[32] and lack of a separate judicial power,[33] left him short of articulating the doctrine, which not only has three separate bodies, but also implies a degree of co-ordinate status among them.[34]

It was Montesquieu who then consolidated the doctrine and established its remaining basic elements. Montesquieu recognised the judiciary as a separate branch for the first time, emphasising that they should be treated on par with the other branches, and operate

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[25] Cited in M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 45.
[26] M J C Vile, above, 50.
[27] M J C Vile, above, 51.
[28] M J C Vile, above, 58.
[29] Locke *Second Treatise on Government XII, 143 and XIV, 159* in P Laslett (ed) *Cambridge Texts in the History of Political Thought: John Locke Two Treatises of Government* (2nd ed, Cambridge University Press, Cambridge, 1988) 364 and 374.
[30] Locke *Second Treatise on Government XII, 143* in P Laslett (ed) *Cambridge Texts in the History of Political Thought: John Locke Two Treatises of Government* (2nd ed, Cambridge University Press, Cambridge, 1988) 364.
[31] M J C Vile, above, 61.
[32] Locke *Second Treatise on Government XI, 134 – XI, 142* in P Laslett (ed) *Cambridge Texts in the History of Political Thought: John Locke Two Treatises of Government* (2nd ed, Cambridge University Press, Cambridge, 1988) 354 – 363.
[33] Locke only recognised that the judiciary should be indifferent, upright and authorised but does not conceive of them as being a separate part of the state on par with the legislative and executive; Locke *Second Treatise on Government IX, 131 and XI, 136* in P Laslett (ed) *Cambridge Texts in the History of Political Thought: John Locke Two Treatises of Government* (2nd ed, Cambridge University Press, Cambridge, 1988) 354 and 358.
[34] M J C Vile, above, 62.

independently of them.[35] This allowed him established the three branches of government; legislative, executive and judicial,[36] and to turn them into a form of division and balancing between the constituent bodies of the Constitution.[37] Like Locke, Montesquieu was firm in asserting that the doctrine intended to protect liberty.[38]

Montesquieu though was vague on the details of his theory, neglecting to include any analysis of how the political functions should be classified as legislative, executive or judicial.[39] Furthermore, his use of the English Constitution as a model of the separation of powers is questionable. Given that in 1688 England lost the separation of powers that had existed during the interregnum, it seems that Montesquieu either miss-appreciated the nature of the English Constitution, or imposed attributes on it that he wanted to find.[40] None the less, even if Montesquieu did not name it himself, the separation of powers was now an identifiable train of political thought.[41]

B. Pure Separation of Powers and Checks and Balances.

While Montesquieu did not articulate what is now known as the pure doctrine himself, his work forms the basis for the elementary form of the separation of powers; a blunt division of power between the executive legislative and judicial branches. As M J C Vile, formulated it the pure doctrine is that:[42]

> It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government,

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[35] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 88.
[36] M J C Vile, above, 87.
[37] G H Sabine *A History of Political Theory* revised by J L Thorson (4th ed, Dryden Press, Hinsdale Illinois, 1973) 514.
[38] Montesquieu *The Spirit of the Laws* book XI ch 4 para 2 in A M Cohler, B C Miller, and H S Stone (eds and trans) *Cambridge Texts in the History of Political Thought* (Cambridge University Press, Cambridge) 155 – 156.
[39] G H Sabine *A History of Political Theory* revised by J L Thorson (4th ed, Dryden Press, Hinsdale Illinois, 1973) 515.
[40] G H Sabine, above, 515.
[41] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 85.
[42] M J C Vile, above, 13.

> legislative executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able t control the machinery of the State.

The pure doctrine is the basic, but not immutable, starting point of the separation of powers. In practice though, it has proved to be impractical and impossible to maintain a clear distinction between the three branches of government postulated by the pure theory.[43] Because of the encroaching nature of power,[44] unless governmental bodies are sufficiently connected to each other so that each can check the others' natural tendency to expand, the unchecked branch will encroach upon the others, and disturb the balance between the branches.[45] Therefore, unless the branches are fused to a certain extent, the necessary degree of separation between them cannot be protected.[46]

Hence, the first object of checks and balances is to stop one branch exceeding its proper mandate and exercising powers that do not properly belong to it so as to overbalance other branches.[47] Secondly, such checks and balances are necessary if all powers are to be subordinate to the constitution.[48] If constitutional government is to be maintained, then there must be a mechanism by which one branch can prevent the excesses of the other branch. Thus in the USA, it is deemed necessary for the President

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[43] G Palmer *Unbridled Power* (2nd ed, Oxford University Press, Auckland, 1987) 7; Madison *Federalist* 47 in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 312 – 320; M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 144.

[44] Madison *Federalist 48* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 321; see also the above discussion in Part III A

[45] Madison *Federalist 48* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 321.

[46] Madison *Federalist 48* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 321.

[47] Madison *Federalist* 47 in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 312 – 320; Hamilton *Federalist 78* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 502 – 511; M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 289.

[48] M J C Vile, above, 240.

to be able to veto acts of the legislature,[49] and for the judiciary to strike down Acts of the legislature beyond the power allocated in the constitution,[50] and impugn acts of the executive which are past their respective mandate.[51]

The tendency to accumulate power is most pronounced in the legislative branch.[52] Because of the legislature's function of making law, the natural tendency is for the legislature to assume a dominant position under a strict separation of powers.[53] This applies *a fortiori* in a Westminster system where the legislature is generally under the control of the executive.[54] Hence, in constitutions adhering to the separation of powers the central check on government is the power of the judiciary to strike down acts of the legislature beyond the authority of the constitution.[55] As Hamilton wrote:[56]

> No legislative act... contrary to the Constitution can be valid. To deny this, would be to affirm, that the deputy is greater than the principle; that the servant is above the master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.
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> If it be said that the legislative body are themselves the constitutional judges of their own powers... this cannot be the natural presumption... It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the later within the limits assigned to their authority.

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[49] Constitution of the United States of America Art I § 7, although a two thirds majority vote in both houses will overturn the presidential veto; Art I § 7.

[50] In law the power to judicially review legislation originates from *Marbury v Madison* (1803) 1 Cranch 5 US 137, and was also emphasised as necessary by the founding fathers. See in particular Hamilton *Federalist 78* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 502 – 511, especially at 505 – 506, 508 and 510.

[51] United States Federal Administrative Procedure Act, 5 USC § 708.

[52] Madison *Federalist 48* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 322.

[53] The experience of the state constitutions of the American States before the federal constitution is a poignant example of this tendency M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 144; also 119 – 175 generally. Even where there have been checks and balances this has been the experience of the USA for much of the Federations history M J C Vile, above, 265.

[54] See Part III A Fusions of Power in the New Zealand Constitution below.

[55] For an example of the potency of this see the judgment of Scalia J in *Morrison v Olson* 487 US 654, 697 – 734 (USSC) Scalia J.

[56] Hamilton *Federalist 78* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 505 – 506.

Thus the courts are the bulwarks of a limited constitution.[57] Consequentially in the USA the courts have the power to prevent the exercise of legislative power not authorised by the constitution,[58] in addition to sharing with English courts the ability to impugn acts of the executive that do not have proper legal authorisation.[59]

Friction between the branches is an inevitable effect of checks and balances and the division of power in a balanced. This is openly contemplated by the separation of powers.[60] As Brandeis J wrote in *Myers v US* the purpose of the separation of powers:[61]

> [W]as not to avoid friction, *but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments*, to save the people from autocracy.

Because such checks and balances necessarily involve the fusion of powers between the branches of government, and checks and balances are apposite to the doctrine of the separation of powers it is impossible to consider each theory in isolation. Hence, the subsequent analysis of the New Zealand constitution will consider the appropriateness of checks and balances as well as separations of powers.

C. *Liberty: The Driving Force of the separation of Powers.*

The driving force behind the separation of powers is the idea that government should not interfere with individual liberty.[62] The argument is that liberty can only exist in

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[57] Hamilton *Federalist 78* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 508.
[58] This jurisdiction originates from *Marbury v Madison* (1803) 1 Cranch 5.
[59] In the USA this is done under the United States Federal Administrative Procedure Act, 5 USC § 553; 5 USC § 706. In New Zealand this is under the doctrine of ultra vires, see *Peters v Davison* [1997] 2 NZLR 164, 205 – 210 (CA) Tipping J. The importance of judicial review is discussed further below in Parts III B Checks and Balances in the New Zealand Constitution and IV B Expanding the Power of the Judiciary below.
[60] E Barendt "Separation of Powers and Constitutional Government" [1995] PL 599, 602 – 603.
[61] *Myers v US* (1926) 52 US 272, 293 (USSC) Brandeis J (dissenting, emphasis added).
[62] E Barendt , above, 601.

moderate governments,[63] whereas tyrannical governments will naturally lead to liberty being compromised.[64]

To achieve moderate government, the separation of powers argues that the amount of power any member or body of government should be limited, because human frailty would lead whoever acquired power to abuse it. As Montesquieu wrote:[65]

> [I]t has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits.... Even virtue is in need of limits.

Similarly Madison described power as being of an "encroaching nature,"[66] summarising the dilemma as follows:[67]

> If men were angels, no government would be necessary. If angels were to govern men, neither external not internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; *but experience has taught mankind the necessity of auxiliary precautions.*

The problem of human fallibility is also reflected in Lord Acton's maxim that "power tends to corrupt, and absolute power corrupts absolutely,"[68] which has been described as having an "uncomfortable degree of truth" in New Zealand.[69]

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[63] Montesquieu *The Spirit of the Laws* book XI ch 4 para 1 in A M Cohler, B C Miller, and H S Stone (eds and trans) *Cambridge Texts in the History of Political Thought* (Cambridge University Press, Cambridge) 155.

[64] E Barendt "Separation of Powers and Constitutional Government" [1995] PL 599, 601.

[65] Montesquieu *The Spirit of the Laws* book XI ch 4 para 1 in A M Cohler, B C Miller, and H S Stone (eds and trans) *Cambridge Texts in the History of Political Thought* (Cambridge University Press, Cambridge) 155.

[66] Madison *Federalist 48* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 321.

[67] Madison *Federalist 51* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 337 (emphasis added).

[68] Quoted in A T Vanderbilt *The Doctrine of the Separation of Powers and its Present Day Significance* (University of Nebraska Press, Nebraska, 1953), 37; Great Thinkers on Liberty http://www.libertystory.net/LSTHINKACTON.html (last accessed 20 August 2003).

[69] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992), 51. Although this comment was made before the introduction of MMP, the author suggests that this is a comment on human nature, which a political system can only guard against, and cannot change.

The solution offered by the separation of powers to ensure moderate government was that government should be divided so that power will check power,[70] preventing the accumulation of power in one branch of the state, thus protecting individual liberty.[71] Conversely, if governmental power is accumulated, liberty will suffer.[72]

Specifically, the three branches of government (legislative, executive and judicial) should be separated, so that no one person, body or institution can exercise all governmental functions and rule in a tyrannical fashion.[73] Hence it was suggested that power be divided into several offices so that it each would check each other, and ambition would counteract ambition.[74] The resulting tripartite division government would have symmetry of form ensuring preservation of individual liberty.[75]

The separation of powers does not merely argue that the fusion of government powers gives rise to the possibility of tyranny, rather the fusion of the power to legislate, govern and judge is the definition of tyranny itself, and is mutually exclusive to liberty.[76] This is because the combination of these three basic functions of government in one body will necessarily give autocratic powers to that body. Thus however, pretty the statute book

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[70] Montesquieu *The Spirit of the Laws* book XI ch 4 para 2 in A M Cohler, B C Miller, and H S Stone (eds and trans) *Cambridge Texts in the History of Political Thought* (Cambridge University Press, Cambridge) 155 – 156.

[71] See Montesquieu *The Spirit of The Laws* book XI ch 4 para 1 – 2 in A M Cohler, B C Miller, and H S Stone (eds and trans) *Cambridge Texts in the History of Political Thought* (Cambridge University Press, Cambridge) 155 – 156; Madison *Federalist 47* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 313.

[72] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 93.

[73] Madison *Federalist 47* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 313. It is noted that there is substantial debate as to the accuracy of these labels in contemporary government. This will in part be discussed below in when discussing suggested modifications of New Zealand's constitution. For a detailed discussion of a functional analysis see M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 294 – 315.

[74] Madison *Federalist 51* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 337.

[75] Madison *Federalist 47* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washington DC, 1961) 312 – 313.

[76] Montesquieu *The Spirit of the Laws* book XI ch 6 paras 4 – 6 in A M Cohler, B C Miller, and H S Stone (eds and trans) *Cambridge Texts in the History of Political Thought* (Cambridge University Press, Cambridge) 157.

may look, tyranny will always be the practical implication,[77] a truth that Professor Bruce Ackerman described as "common sense."[78]

The separation of powers does not so much act to prevent the possibility of tyrannical government coming to power,[79] as to form the basis of a constitution, which if maintained, will not permit a government in an autocratic function. For example, the considerable degree of separation of powers in the Weimar Republic did not stop absolutist Nazi regime from coming to power.[80] Rather constitutional government in the Weimar Republic was ended by the legislature giving the cabinet power to deviate from the constitution at its leisure and to revoke acts at the demand of the Reichstag,[81] and later giving cabinet unlimited power to determine matters of constitutional law.[82]

The crucial point is, that in order to become an absolutist power, the Nazi party effectively abolished any meaningful separation of powers.[83] Thus separation of powers on its own is not self-perpetuating. However, the lack of divided governmental power is a necessary precondition to absolutist government.

The basis of the separation of powers then is to provide a system of government in which a tyrannical government cannot exist and liberty will be preserved.[84] Under a strict theory of separation of powers of the amalgamation of any two bodies of government creates a situation in which liberty cannot exist.[85] Thus a central point of the

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[77] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 634, 689.
[78] B Ackerman, above, 689.
[79] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 310.
[80] A T Vanderbitt *The Doctrine of the Separation of Powers and its Present Day Significance* (University of Nebraska Press, Nebraska, 1953), 13 – 17.
[81] Law for the Relief of the People and of Reich Act of 1933, cited in A T Vanderbitt *The Doctrine of the Separation of Powers and its Present Day Significance* (University of Nebraska Press, Nebraska, 1953), 18.
[82] Law for the Reconstruction of the Reich Act 1934, cited in A T Vanderbitt *The Doctrine of the Separation of Powers and its Present Day Significance* (University of Nebraska Press, Nebraska, 1953), 17.
[83] A T Vanderbitt *The Doctrine of the Separation of Powers and its Present Day Significance* (University of Nebraska Press, Nebraska, 1953), 13 – 17.
[84] E Barendt "Separation of Powers and Constitutional Government" [1995] PL 599, 601.
[85] Montesquieu *The Spirit of The Laws* book XI, ch 6, para 4 – 12 in A M Cohler, B C Miller, and H S Stone (eds and trans) *Cambridge Texts in the History of Political Thought* (Cambridge University Press, Cambridge) 157 – 158.

separation of powers is that liberty, and a tyrannical government of fused powers are mutually exclusive.

Recently though, the traditional rationale for the separation of powers of preserving liberty has come under criticism. N W Barber[86] proposes that the core goal of the doctrine is not liberty, but efficiency.[87] Barber's central objection to the liberty rationale seems to be that it would mean that the three powers would have to be more evenly balanced than they are in England, implying that the courts would need to have substantially more power than they currently do, probably having the power to strike down Acts of Parliament.[88] It is accepted that Barber is correct insofar as he argues that the separation of powers requires courts to have increased power.[89] However, this is an effect of the doctrine rather than an argument that it has a basis other than liberty.

While, as Barber notes, Locke did establish some theoretical basis for the efficiency rationale,[90] it is submitted that this does no more than provide a supplementary basis of the doctrine. As Vile has shown,[91] an analysis with which Barber agrees,[92] Locke was also concerned with the protection of liberty. Hence, although not without dispute, the dominant view of commentators, endorsed by the author, is that the preservation of liberty is the touchstone of the separation of powers.

D. Problems With Previous Conceptions of the Separations of Powers.

Particularly in the last century, with the rise of the welfare state, the role of government has changed dramatically. Therefore, changing ideals and requirements of government must be considered when using the separation of powers to critique a modern constitution.

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[86] See Barber's article on this point; N W Barber "Prelude to the Separation of Powers" [2001] CLJ 59.
[87] N W Barber "Prelude to the Separation of Powers" [2001] CLJ 59, 59.
[88] N W Barber, above, 62.
[89] See Part IV B Expanding the Power of the Judiciary below.
[90] N W Barber "Prelude to the Separation of Powers" [2001] CLJ 59, 63 – 66.
[91] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 63 – 74.
[92] N W Barber, above, 63

The rise of the welfare state and concepts of social justice mean that demands are now just for freedom *from* government but also demand *for* government to deal with pressing social and economic problems.[93] Strict separations of powers and strong checks can be quite detrimental to efforts to help prevent private business abusing their market position at the detriment of citizens.[94] This was demonstrated in 1918 when the USSC struck down a statute enforcing an eight-hour working day for children as unconstitutional.[95]

Hence, it is apparent that in today's society where government serves a vital *protective* role it is necessary to have a government that is strong enough to protect people's interests. In the USA this was at least in part resolved by the strengthening of the Presidency through Presidents such as Woodrow Wilson and Franklin D Roosevelt.[96]

When considered against first principles this is entirely appropriate. The object of the separation of powers is to preserve liberty.[97] Hence, a reduced separation of powers or a reconfiguration of the balance between the powers to maximise liberty fits within the purpose of the doctrine. Whether giving effect to the purpose of protecting liberty leads to a strengthening or a weakening of government is merely the result of this analysis.[98]

In response to the need for efficient government and increased complication in the modern administrative state, modern theories of the separation of powers no longer cling to the tripartite division of government.[99] It is no longer possible to advocate a pure separation of powers, even if tempered with a theory of checks and balances.[100]

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[93] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 264.
[94] M J C Vile, above, 263.
[95] *Wilson v Receivers of the Missouri, Oklahoma & Gulf Railway Company* (1918) 234 US 332 (USSC). The need of governmental protection in New Zealand can be seen in the enactment of the Commerce Act 1986, which intends to prevent abusive use of dominant market position.
[96] M J C Vile, above, 271 – 272, 276 – 278; A T Vanderbilt *The Doctrine of the Separation of Powers and its Present Day Significance* (University of Nebraska Press, Nebraska, 1953), 73.
[97] See Part II A above.
[98] The appropriate balance in New Zealand is the subject of Part V Constitutional Reforms to Remedy Breaches of the Separation of powers below.
[99] See M J C Vile, above, 315 – 350; B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 634, 727 – 729.
[100] M J C Vile, above, 317.

Furthermore, structures of government are now multifunctional.[101] For example if administrators are to be consistent they have to decide cases, create some sort of rules to act consistently, and implement decisions.[102] In short they must exercise all three functions.[103] Similar arguments apply to the judicial function if judicial decisions are to be consistent.[104] Therefore, it is not possible to argue for a separation of powers in all cases because it becomes too hard to categorise every governmental function into one of the three branches.[105]

E. The Modern Requirements of the Doctrine of the Separation of Powers.

While some have argued that the problems with the separation of powers have removed the relevance of the doctrine,[106] this is an overreaction. There is no need to insist on a total separation of powers.[107] The basic idea is sound, only its full implementation is no longer possible or desirable.[108] The following points remain valuable insights into constitutional design that are still salient in contemporary society.

1. Protecting Liberty.

Liberty remains a concern of society and the touchstone of the separation of powers.[109] The issue is not whether liberty is desirable but how the balance should be struck between protecting liberty and allowing effective government. The separation of powers will necessarily determine how this balance is struck. If government is fused and

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[101] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 317.
[102] M J C Vile, above, 319.
[103] M J C Vile, above, 319.
[104] M J C Vile, above, 318.
[105] M J C Vile, above, 315 – 350; B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 634, 727 – 729; N W Barber "Prelude to the Separation of Powers" [2001] CLJ 59; G Palmer *Unbridled Power* (2nd ed, Oxford University Press, Auckland, 1987) 7.
[106] P A Joseph *Constitutional and Administrative Law in New Zealand* (2nd edn, Butterworths, Wellington, 2001, See also the attempt to find a new rationale in N W Barber "Prelude to the Separation of Powers" [2001] CLJ 59.
[107] M J C Vile, above, 315 – 350; B Ackerman , above, 727 – 729; N W Barber, above, 59; G Palmer, above, 7.
[108] E Barendt "Separation of Powers and Constitutional Government" [1995] PL 599, 601 and 605 – 608.
[109] E Barendt, above, 599.

consolidated without effective checks then there can be little practical protection of liberty. The key task in using the separation of powers in constitutional analysis is to determine whether the Constitution under consideration has too much fusion of power, and too inadequate checks on power to protect liberty.

2. *Balanced Government.*

Modern theories of the separation of powers do not strive to separate power totally;[110] indeed it has been powerfully argued that a properly limited system of parliamentary government is acceptable under the separation of powers.[111] The key is to create a system where all bodies of government check and balance each other, partly by their separation and partly by their interrelationships in the form of checks so that no one body may exercise its power in an autocratic fashion.

The focus is not to categorise government into three branches and divide it along those lines. Rather, the key for separation of powers in the modern state is to create balance within government avoiding concentrations of power.[112] This necessarily requires a balancing of the main bodies of government.[113]

The basic aim remains the same; to avoid concentrations of power.[114] Hence the legislature executive and judicial branches should be balanced so that they counteract each other. While the three branches should maintain a degree of separation from each other, they should also retain a certain degree of control over each other to ensure that no one branch exercises too much power. As between the three central branches of government the crucial issue is how they balance each other in the division of power.

3. *External Checks and Balances.*

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[110] E Barendt "Separation of Powers and Constitutional Government" [1995] PL 599, 607.
[111] See B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 634; E Barendt "Separation of Powers and Constitutional Government" [1995] PL 599, 607.
[112] E Barendt, above, 607.
[113] See M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 335.
[114] E Barendt, above, 607.

Modern administrative controls such as the Ombudsmen, which do not fit within the traditional governmental division, are also important as a limitation on governmental power. Because these bodies control the exercise of governmental power the role of these bodies must be considered in assessing the level of balance that should be struck between the three central branches of the state. Such administrative controls are essential in assessing the degree of balance within the constitution. Balance can not only be provided by the relationship between the three principle branches of government, but also by the external administrative bodies which check the excess of government.

Hence the comments of Mulgan that the purpose of limiting government is better served by external checking agencies[115] mis-appreciates modern conceptions of the separation of powers. Under the conception of the separation of powers proposed in this paper the checks Mulgan proposes are *part* of the doctrine of the separation of powers.[116] The modern separation of powers argues for much more than the separation of the traditional three branches of government.[117]

F. Concluding Remarks.

A pure separation of powers whether or not supplemented by checks and balances strictly applied cannot be an adequate tool to analyse a modern constitution. However, the basic aspirations of the separation of powers remain apposite to constitutional analysis. The focus of the doctrine has expanded. The touchstone remains checking power to prevent its arbitrary use thereby promoting liberty.

The analysis should begin with the interrelationship between the three branches of the state. However, it must also extend to the consideration of checks on the three

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[115] R Mulgan *Politics in New Zealand* (2nd edn, Auckland University Press, 1997) 70 – 71.
[116] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 634, 639.
[117] It is also respectfully argued that Mulgan is incorrect to dismiss the separation of powers as an argument for rearranging the main bodies of government. As is discussed in Part V Constitutional Reforms to Remedy Breaches of the Separation of Powers, a better application of the separation of powers can improve the New Zealand constitution.

braches of government that are external to the separation of powers, in order for the separations to be considered in context. Therefore analysis under the separation of powers urges a broad enquiry focusing on whether constitutional arrangements are sufficient to protect liberty.[118]

III. ANALYSIS OF THE NEW ZEALAND CONSTITUTION AGAINST THE DOCTRINE OF THE SEPARATION OF POWERS.

A. Fusions of Power in the New Zealand Constitution.

While the New Zealand Constitution is not without checks on the exercise of state power, these must be considered in light of the overwhelming fusion of power in the central bodies of the state. Because it is these central organs that they must check, it is necessary to first appreciate the power of the central government.

1. Cabinet Government.

Cabinet Government is at the root of the principal offences to the separation of powers in New Zealand. Cabinet is a body created by convention consisting of the senior ministers of the governing party/parties.[119] Although the precise number of Cabinet members fluctuates, the number is usually around 20.[120] Because all ministers are part of the executive and ministers must be members of Parliament ("MPs") by law,[121] the leading members of the executive branch must all be MPs.

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[118] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 634, 639.
[119] G Palmer and M Palmer *Bridled Power: New Zealand Government Under MMP* (3 ed Oxford University Press, Auckland, 1997) 5. Note also that in addition to Cabinet ministers there will also be ministers who are not part of Cabinet.
[120] J Boston *The Future of Cabinet Government in New Zealand: The implications of MMP for the Formation Organization and Operations of Cabinet* (GSBGM Publications, Wellington, 1994) 8.
[121] Constitution Act 1986, section 6.

However, it is not the direct fusion of legislative and executive powers in ministers, so much as the control that Cabinet exercises over Parliament, that offends the separation of powers. As Walter Bagehot described Cabinet:[122]

> A cabinet is a combining committee – a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state. In its origin it belongs to the one, in its functions it belongs to the other.

While the Westminster system as Bagehot knew it depended on MPs voting according to their judgment,[123] the rise of the party system, Caucus and party discipline, now forces MPs to vote along party lines.[124] Hence, Bagehot's description has come to be a very accurate description of the modern Cabinet.[125] The tight functioning of party discipline and parties' openly stated objective of capturing and controlling Parliament means that Cabinet exercises a huge amount of control over Parliament.[126]

Cabinet's power stems from the process of governmental decision-making. Decisions are first made secretly in Cabinet.[127] After Cabinet makes its decision all members of Cabinet are bound by the convention of collective responsibility to support Cabinet's decision.[128] Provided a Prime Minister is in a secure position, breaches of collective responsibility will usually result in the forced resignation of the member who speaks out against the government's policies.[129] For example Derek Quigley lost his position for criticising the "Think Big project."[130] Similarly, despite some delay, Winston Peters was also forced to leave Cabinet after criticising government decisions in 1992.[131]

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[122] W Bagehot *The English Constitution* (Garland Publishing, London, 1978) 14.
[123] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 103.
[124] G Palmer, above,103.
[125] G Palmer, above, 105.
[126] G Palmer, above, 130.
[127] G Palmer and M Palmer *Bridled Power: New Zealand Government Under MMP* (3 ed, Auckland University Press, Auckland, 1997) 62.
[128] R Mulgan *Politics in New Zealand* (2nd edn, Auckland University Press, Auckland, 1997) 87.
[129] R Mulgan, above, 87.
[130] R Mulgan, above, 88.
[131] R Mulgan, above, 88

The next level of decision-making is made in Caucus (all the MPs of the party), by majority vote at a private weekly meeting.[132] However, once a decision reaches Caucus Cabinet will have already reached a decision, and by dint of collective responsibility will speak with one voice in Caucus. Furthermore, Cabinet members will normally be the most senior and influential party members. Therefore when Caucus comes to make a decision it will be significantly influenced by the views of the 20 most senior members in the party who have all reached the same conclusion. Hence it is highly unlikely that Caucus will challenge cabinet decisions.

Once Caucus has come to a decision, all the members of the party are bound by extremely tight party discipline to vote for that decision in Parliament.[133] In contrast to other party systems such as in the United Kingdom virtually every piece of legislation put before Parliament is whipped, meaning that the party member must vote for it or beware the consequences.[134]

The result of this streamlined decision-making process is that Cabinet will generally control the voting of however many seats the ruling party or coalition has in the House. Because of the tight regime of party discipline, the seniority of cabinet ministers and the fact that Cabinet will speak with one voice in Caucus, Cabinet largely decides the content of Bills, and will almost always have the support of the party to ensure their passage.[135]

After *Fitzgerald v Muldoon*[136] it is clear that Ministers cannot suspend law without legislative authority.[137] However, the influence, bordering on control, that the executive exercises over the legislature via cabinet means that the executive can use Parliament to

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[132] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 106.
[133] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 106.
[134] G Palmer, above, 141. While parties in the United Kingdom will whip most legislation, there is a graded system of whipping which allows more flexibility than the New Zealand whipped or not-whipped regime.
[135] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 227.
[136] *Fitzgerald v Muldoon* [1976] 2 NZLR 615.
[137] For emphasis on the importance of this point see G Palmer "New Zealand and the Glorious Revolution" [1997] NZLJ 265.

change the law. Thus Cabinet fuses executive and legislative power in a way that allows the executive to control Parliament.

Under the old First Past the Post ("FPP") electoral system the power of Cabinet was extremely pronounced. Because FPP was biased towards single party majority government,[138] Cabinet, by virtue of the decision making process outlined above, would generally be able to control majority support in the House. Thus in the usual state of affairs, Cabinet would have virtually total control over both the executive and legislative branches of government.

The result was that we had a monolithic government, restrained only by the blunt instrument of triennial elections.[139] In between elections the only restraint on the government was maintaining enough popularity to recapture more than half the house, which, because of FPP's bias towards major parties would not even require a majority of the popular vote.[140] Electoral politics had essentially replaced Parliamentary politics,[141] making Parliament a rubber stamp for the executive,[142] and destroying the balance and symmetry that might otherwise exist within the Constitution.[143] As was said in 1992:[144]

> [T]here is a lack of balance between the three components of the system – the executive, Parliament and the courts. The situation now is one of overwhelming executive power. New Zealand prides itself on being a democracy, but the system of government is such that the claim is somewhat hollow. It is true that we have elections, but what do they determine? ...The crisis of the New Zealand Constitution lies in the maldistribution of power between its component parts.

Under MMP, although single party majority governments are still possible, the most likely types of government under MMP are single part minority governments, or

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[138] J Boston *The Future of Cabinet Government in New Zealand: The implications of MMP for the Formation Organization and Operations of Cabinet* (GSBGM Publications, Wellington, 1994) 3.
[139] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 135.
[140] See the analysis of electoral results in G Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2 ed, Oxford University Press, Oxford, 1987) 242 – 243.
[141] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 129.
[142] G Palmer, above, 143.
[143] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 228 – 229.
[144] G Palmer, above, 12.

coalitions who have either a majority or minority in Parliament.[145] Therefore, the degree of fusion which was formerly present under FPP will generally not exist in MMP Parliaments.

Particularly in minority governments parties will enjoy substantially less control than they previously had. In a minority government the executive no longer has de facto control over the legislature.[146] Consequentially if the Government wants to pass legislation it must find support in the house for the legislation from other parties.[147] Therefore, a genuine distinction can now be drawn between Parliament and the executive.

The possibility of a majority coalition government complicates matters somewhat. If there is a majority coalition, then so long as the coalition holds together, Cabinet can function much as it did under FPP, with the caveat that the coalition will probably be harder to hold together than a party because of the diverse interests in the coalition.[148] The extent of the Cabinet's power though will depend on the nature of the coalition.[149]

However, the extent that MMP has separated executive and legislative power by removing some of the executive's de facto control over Parliament should not be overstated. Although under MMP single majority governments are unlikely, Cabinet, by definition, will be made up of the party that can control the House on matters of confidence and supply, whether alone, in coalition, or as a minority government. Therefore, a substantial degree of control over Parliament is inherent in a parliamentary system, even under MMP. Additionally, a strong coalition would probably allow the system to function much as it did under FPP.

Furthermore, because Proportional Representation ("PR") legitimises parties by giving them their respective representation in the house directly, rather than through

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[145] J Boston *The Future of Cabinet Government in New Zealand: The implications of MMP for the Formation Organization and Operations of Cabinet* (GSBGM Publications, Wellington, 1994) 3.
[146] J Boston, above, 7.
[147] J Boston, above, 7.
[148] J Boston, above, 7.
[149] J Boston, above, 7.

members, party discipline is unlikely to decline.[150] Thus while Cabinet's influence is diluted, Cabinet remains an exceedingly influential body. Indeed, Professor Joseph argues that MMP has only required new political management skills from politicians.[151]

Hence while MMP alleviates some of the separation of powers issues of parliamentary government, it is not a cure-all.[152] Even with a minority government there is still an uncomfortable degree of fusion of powers, and in that there is little to stop a coalition forming which will have the same monolithic nature as FPP Cabinets. While MMP has changed the process of decision-making and sometimes the outcome of decisions, the basic structure of Cabinet government still remains. Therefore, notwithstanding improvements under MMP the effect of Cabinet government is to destroy much of the balance and symmetry that might otherwise exist between the legislative and executive branch.

2. *Uncontrolled Law Making.*

In New Zealand the legislative branch consists of a single House of Representatives and the Governor General,[153] which has "full power" to make laws in New Zealand.[154] Under the doctrine of Parliamentary supremacy the power of Parliament is entirely without restraint. Hence the power of Parliament, at least on a positivist view, is absolute.

Alone the unchecked nature of the legislature is dangerous because the legislature can unilaterally dictate the terms of the constitution. In such a situation Parliament overbalances the other branches of government. Cabinet control over Parliament makes the problem worse. This uniting of Parliament and the executive means that the already

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[150] B Ackerman "The New Separation of Powers" 113 Harv Law Rev 633, 665.
[151] P A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Butterworths, Wellington, 2001) 246. This may in fact be understating the position.
[152] G Palmer & M Palmer *Bridled Power – New Zealand Government Under MMP* (3 ed, Oxford University Press, Auckland, 1997) 307.
[153] P A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Butterworths, Wellington, 2001) 237.
[154] Constitution Act 1986, s 15.

overbearing power of Parliament not only is not balanced by an independent executive, but is in fact *controlled* by the executive. In this situation balance cannot and does not exist.

To a large extent, the concept of the sovereignty of Parliament owes its origins to Thomas Hobbes.[155] Hobbes' theories are best understood in the context in which he lived, directly after the English civil war.[156] Hobbes' aversion to war can probably best be seen in Chapter XIII of *Leviathan,* where Hobbes said that in times of war there:[157]

> [I]s no place for industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation... no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society' and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty brutish, and short.

It is against this abject fear of war that Hobbes' constitutional thought should be considered.

Hobbes advocated a sovereign that was powerful enough to maintain a state of peace.[158] In Hobbes' words "a Kingdome divided in its selfe cannot stand."[159] This unification of power was embodied in the powers of a Sovereign, which were essentially unlimited. Hobbes' Sovereign was unquestionably supreme over essentially all

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[155] G Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (John McIndoe, Dunedin, 1992) 42 – 43. For the work of Hobbes, see in particular Hobbes' principal work *Leviathan;* T Hobbes *Leviathan* in R Tuck (ed) *Cambridge Texts in The History of Political Thought: Hobbes Leviathan* (Cambridge University Press, Cambridge, 1996).

[156] R Tuck "Introduction" in R Tuck (ed) *Cambridge Texts in The History of Political Thought: Hobbes Leviathan* (Cambridge University Press, Cambridge, 1996) x – xi; M J Sodaro *Comparative Politics: A Global Introduction* (McGraw Hill, New York, 2001) 122.

[157] Hobbes *Leviathan* XIII, 62 in R Tuck (ed) *Cambridge Texts in The History of Political Thought: Hobbes Leviathan* (Cambridge University Press, Cambridge, 1996) 89 (original spelling and grammar preserved).

[158] Hobbes *Leviathan* XVII, 85 in R Tuck (ed) *Cambridge Texts in The History of Political Thought: Hobbes Leviathan* (Cambridge University Press, Cambridge, 1996) 117.

[159] Hobbes *Leviathan* XVIII, 93 in R Tuck (ed) *Cambridge Texts in The History of Political Thought: Hobbes Leviathan* (Cambridge University Press, Cambridge, 1996) 127 (original spelling and grammar preserved).

matters,[160] controlled all of the branches of government,[161] and could do as it liked to a subject without injustice or injury because every subject is the author of every action of the sovereign.[162]

It is no criticism of Hobbes himself to say that his theories are out of place in New Zealand in the twenty-first century. Hobbes was responding in a decisive manner to years of civil war between King and Parliament. Given the dramatically different context between today and Hobbes' time, the continuing validity of Hobbes' emphasis on the unlimited powers of the sovereign requires careful scrutiny.

While arguments still persist that Parliament should remain unchecked in its lawmaking power,[163] two recent examples are sufficient to demonstrate the potentially abusive nature of the unchecked nature of the powers of Parliament.

The Criminal Justice Amendment Act (No 2) 1999 had the potential effect of retrospectively increasing the maximum prison sentences of people who had committed murder in the context of home invasion. Where Section 82(2A) applied, the Judge was required to impose a prison sentence of not less than 13 years, notwithstanding the fact that the offence was committed at a date before the duty to impose the minimum period existed.[164]

As Thomas J noted the legislation was very close to being (if it was not in fact) a bill of attainder.[165] There was only a small group of people affected by the section whose names were readily available, and it would be unsurprising for Parliament to have known

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[160] See the description of the sovereign's powers in Hobbes *Leviathan* XVIII in R Tuck (ed) *Cambridge Texts in The History of Political Thought: Hobbes Leviathan* (Cambridge University Press, Cambridge, 1996) 121 – 129.

[161] Hobbes *Leviathan* XVIII, 91 – XVIII, 93 in R Tuck (ed) *Cambridge Texts in The History of Political Thought: Hobbes Leviathan* (Cambridge University Press, Cambridge, 1996) 125 – 127.

[162] Hobbes *Leviathan* XXI, 109 in R Tuck (ed) *Cambridge Texts in The History of Political Thought: Hobbes Leviathan* (Cambridge University Press, Cambridge, 1996) 148.

[163] For example see J Allen "No to a Written Constitution" in C James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 391; and J McLean "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] NZ Law Review 421, 448.

[164] *R V Pora* [2001] 2 NZLR 37, [25] (CA) Elias CJ.

[165] *R v Poumako* [2000] 2 NZLR 695, 712 (CA) Thomas J.

who would be affected.[166] Thus, Parliament effectively exercised a judicial function by prescribing a punishment, retrospectively no less, for a select group of people.[167] Despite the warning of Thomas J to the government not to provoke the Court into a constitutional conflict,[168] there was no question of the validity of the provision, although the worst of its effects were ultimately mitigated.[169]

Similarly, Parliament showed its power in passing legislation in anticipation of the pending decision in *Taito v R.*[170] The legislation was intended to retrospectively make all illegal and invalid determinations of appeals and applications for appeal valid.[171] Thus rather than let the Judiciary apply the law, Parliament passed a law effectively judging the status of a group of individuals.[172]

Although the full effect of the two Acts mentioned were reduced and nullified by the courts,[173] they are indicative of the potential for abuse that can still be exercised at popular demand. Pursuant to the separation of powers, the Constitution should be organised so that such dangers to liberty are eliminated where possible.

While disturbing, the two preceding examples only show the problems that have occurred in New Zealand recently from having an unchecked legislature. Further problems arise from the executive's excessive control over Parliament, and the use of that control to pass autocratic legislation.

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[166] *R v Poumako* [2000] 2 NZLR 695, 713 Thomas J.
[167] *R v Poumako*, above, 713 Thomas J.
[168] *R v Poumako,* above, 713 Thomas J.
[169] *R V Pora* [2001] 2 NZLR 37 (CA).
[170] *Taito v R* (2002) 6 HRNZ 539.
[171] Section 13 Crimes (Criminal Appeals) Amendment Act 2001. The precise number of people who were denied legal aid is unknown. However, counsel for Mr Taito (Antony Shaw) estimates that the number is most likely in the thousands. In a twist to the saga the Privy Council's judgment in *Taito v R*, above was expressed on much wider terms than Parliament had intended, thus rendering the legislative validation ineffective; *R v Smith* (19 December 2002) Court of Appeal Wellington CA 315/96.
[172] Admittedly the group of individuals affected by the Crimes (Criminal Appeals) Amendment Act was much larger than the group affected by the Criminal Justice Amendment Act 1999. However, the basic nature is constant.
[173] *R v Smith*, above; *R V Pora*, above; *R v Poumako*, above.

The paradigm example of constitutionally abusive legislation ignoring all notions of the separation of powers was the Clyde Dam saga. Having received a decision from the Planning Tribunal ruling against granting the water right necessary to build the Clyde Dam, the Government promptly passed the Clutha Development (Clyde Dam) Empowering Act 1982, granting itself the rights to build the Dam decisions of the Planning Tribunal notwithstanding.[174] This demonstrates the power of the executive to control Parliament, and in turn control the judiciary, inherent in our unbalanced Constitution.

While MMP makes constitutional abuses such as the Clyde Dam saga less likely, there are still insufficient mechanisms to stop the government from depriving people of liberty and abusing the rule of law. All MMP does is make abuse less probable.[175] It is still too easy for a government to find sufficient numbers in Parliament to pass improper legislation.

The recent Duynhoven saga illustrates that under MMP Parliament can still be used for the benefit of a political party, and gives a "little taste"[176] of the dangers of having partisan control of unrestrained power. By Sections 4 and 5 of the Electoral Vacancies Amendment Act 2003, Parliament, at the behest of the governing Labour party, retroactively suspended section 55(1)(c) of the Electoral Act 1993, which provided that the seat of any member of Parliament shall become vacant if that member does any act whereby the member becomes entitled to rights privileges or immunities of a foreign state.

Mr Duynhoven (a Labour MP) had unwittingly offended section 55(1)(c) by renewing his Dutch citizenship, and but for the retroactive legislation, would have had to

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[174] M Chen and G Palmer *Public Law in New Zealand: Cases, Materials, Comments, and Questions* (Oxford University Press, Auckland, 1993) 60 – 62.

[175] It is readily conceded that no system can provide total protection. However as is argued in this part, our current safeguards are insufficient.

[176] J Waldron " Retroactive Law: How Dodgy was Duynhoven?" (Public Lecture Victoria University of Wellington Law School, Wellington, 21 August 2003).

vacate his seat.[177] The principal submission made on Mr Duynhoven's behalf was that retroactive legislation conferring a benefit is not objectionable.[178] However, as Professor Waldron has pointed out, conferring this benefit on Mr Duynhoven necessarily meant that whoever may have otherwise taken Mr Duynhoven's seat would be adversely affected, therefore the legislation was not only beneficial.[179]

Even if the legislation was not constitutionally objectionable for its retroactive nature, it still demonstrates the disturbing way in which Parliament, under executive control, can be used for partisan ends. It should not be forgotten that this was a retroactive change to electoral law (an essential part of our Constitution) passed under urgency, giving partisan benefit to the governing party.[180] It is not surprising that Steven Franks of the ACT party expressed bitter resentment at the manner in which the legislation was passed, and the precedent that such conduct sets.[181]

While this is a comparatively minor example of improper use of Parliament,[182] as compared with attempts at redistricting electorates,[183] it illustrates the ability of the executive to use Parliament to change the Constitution to suit its own ends without pretence of consensus.

While now subject to increased controls,[184] delegated legislation is a further means by which the executive through its control of Parliament can upset the separation of powers. Delegated legislation refers to secondary and tertiary legislation, which derives their authority from Acts of Parliament, but is made by the Minister or Minister in Council to

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[177] J Waldron " Retroactive Law: How Dodgy was Duynhoven?" (Public Lecture Victoria University of Wellington Law School, Wellington, 21 August 2003).

[178] Submissions by Sir Geoffrey Palmer to the Parliamentary Privileges Committee quoted in J Waldron , above. See also J F Burrows *Statute Law in New Zealand* (3 edn, Butterworths, Wellington, 2003) 403

[179] J Waldron, above.

[180] J Waldron, above.

[181] Comments of Steven Franks made at J Waldron, above. Interestingly Mr Franks expressed less objection to the content of the retroactive legislation.

[182] J Waldron, above. It is also accepted that the degree of objectionability is less than that in the *Pora/Poumako* situation. However, the events are still clearly unsettling.

[183] See for example the efforts of the Republican members of the Texas state legislature to redraw electoral district boundaries in their favour; E Walsh K Brulliard "Hunch Launched Second Flight of Texas Democrats" (2 August 2003) *Washington Post* Washington A03.

[184] See the discussion in part III B 6 Control of Delegated Legislation below.

whom the authorising Act refers.[185] The offence to the separation of powers is that members of the executive, rather than members of the legislative exercise what is essentially legislative power.[186]

Because of Parliamentary supremacy it is within Parliament's power to delegate the power to make regulations under an Act.[187] The central questions are how much control Parliament should exercise over delegated legislation, thus retaining its law making power,[188] and how much supervision the courts should exercise.

The most striking example of this in New Zealand was the incredibly broad regulation making power conferred under the Economic Stabilisation Amendment Act 1982, which effectively allowed the government to rule by regulation.[189] "Henry VIII clauses," such as parts of the Economic Stabilisation Amendment Act, give rise to further problems by providing for the possibility of making delegated legislation that will overpower Acts of Parliament.[190]

While Henry VIII clauses as wide as those in the Economic Stabilisation Amendment Act have been discouraged,[191] both Henry VIII clauses and excessive delegations of power raise separation of powers issues. Delegations that are so wide as to be legislative in character have the effect of transferring legislative authority to the executive branch. This is particularly true with Henry VIII clauses, as when exercising such powers the executive will not be bound to obey listed acts.

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[185] M Chen and G Tanner *Delegated Legislation* (New Zealand Law Society Seminar, Wellington, 2002) 3.
[186] Note that the Interpretation Act 1999 includes regulations as well as Acts in the definition of "enactment" in s 29.
[187] M Chen and G Tanner *Delegated Legislation,* above, 47.
[188] G Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 29 VUWLR 1, 2.
[189] P A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Butterworths, Wellington, 2001) 247.
[190] M Chen and G Tanner, above, 47.
[191] Regulations Review Committee "Inquiry into the Resource Management (Transitional) Regulations 1994 and the principles that should apply to the use of empowering provisions allowing regulations to override primary legislation during a transitional period" [1995] AJHR I16C, 15. The government generally agreed with the recommended limited use of Henry VIII clauses R Malone *Regulations Review Committee Digest* (New Zealand Centre for Public Law, Wellington, 2003) 65 – 66.

Therefore, to the extent that the executive controls Parliament, it can first create law to suit its own ends. This is not to say that checks do not exist in our constitution. However it is against this background of fused executive and legislative power that the effectiveness of the checks and balances in our Constitution must be analysed.

B. Checks and Balances in the New Zealand Constitution.

Owing to space constraints not all of the checks on governmental power can be covered in this paper. However, six areas have been given detailed treatment; democratic restraints, the Official Information Act 1982 ("OIA"), the Ombudsmen, judicial interpretation of constitutionally offensive legislation, judicial review of executive action, and controls over delegated legislation.[192]

1. Democratic Restraints.

The primary control over government in New Zealand is the need to maintain electoral support.[193] This is driven first by the electoral process itself.[194] If a party wants to be re-elected at the next election then they must ensure that their policies are popular enough to ensure renewal of the party's tenure. Hence, overall strategy for all parties is determined by a desire to win the next election.[195] In the first instance this will prevent many unpopular proposals from being implemented.[196] This in itself is an important check on power.

Further, Parliament plays a central role in this aspect of the democratic process as the key institution of democratic accountability, where the government is regularly obliged to answer for their actions.[197] Parliament is the focal point for public opinion outside of

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[192] Other checks on the state include the Police Complaints Authority, the Human Rights Commission, the Parliamentary Commissioner for the Environment, and the Privacy Commissioner.
[193] R Mulgan *Politics in New Zealand* (2nd ed, Auckland University Press, Auckland, 1997) 70.
[194] R Mulgan, above, 70.
[195] R Mulgan, above, 265.
[196] R Mulgan, above, 266.
[197] R Mulgan, above, 99.

election campaigns, and is the primary venue for the opposition to attack government policies.[198]

Challenging government policies in Parliament acts as a continual restraint on government. Cabinet depends on the continuing support of backbench members to retain its control over Caucus and therefore over Parliament.[199] As all MPs will be continuously focused on winning the next election, Cabinet is always exposed to a backbench revolt if the party's popularity drops too much.[200] Even dominating leaders such as Margaret Thatcher were subject to this phenomenon.[201] Therefore, the imminent threat of elections serves to constantly check ministers from taking unpopular actions.

Ministerial responsibility also places an ongoing check on Cabinet members. Ministerial responsibility obliges ministers to answer in Parliament for the problems in the ministries under their control, remedy the problems, and share their departments culpability.[202] Because Parliament meets regularly and opposition members will take ministers to task over the failings in their departments though parliamentary questions, the executive is not only responsible to the electorate on a tri-annual basis. Rather, they are responsible to the people's representatives, and hence the people themselves, *daily*.[203]

The duties imposed on Ministers by ministerial responsibility tie into the need to retain the support of Cabinet. If a minister is hurting the party's popularity, desire to maintain popularity to ensure re-election will pressure the minister to improve his or her performance, or risk having Caucus demand a resignation. While the force of ministerial

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[198] G Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2nd ed, Oxford University Press, Auckland, 1987) 17.
[199] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 658.
[200] B Ackerman, above, 658.
[201] B Ackerman, above, 658.
[202] G Palmer and M Palmer *Bridled Power New Zealand Government Under MMP* (Oxford University Press, Auckland, 1997) 72.
[203] For a discussion of the contours of ministerial responsibility see M S R Palmer "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complaint" (Analysing and Understanding Crucial Developments in Public Law, Wellington, 4 April 2001) 6 – 13; G Palmer and M Palmer *Bridled Power New Zealand Government Under MMP* (Oxford University Press, Auckland, 1997) 72 – 77.

responsibility is under pressure,[204] it serves an important purpose of pressuring ministers to maintain competence in their departments.

However, while democracy is a vital check on government its ability to effectively restrain government should not be overstated. Most importantly, the restraints which democratic controls place upon government will generally only stop unpopular actions. Protecting liberty will not necessarily fall into this category. For example the retrospective increases in sentences discussed above[205] would be unlikely to raise popular dissatisfaction such as to force Parliament not to pass such legislation. Further, elections are a blunt tool, forcing electors to make a general assessment of a party's performance.[206] A government may act in an unpopular way on one matter, but still retain sufficient popularity to return to power. This limits the effectiveness of elections as an institution of control.

2. *The Official Information Act.*

The purpose of the OIA is to increase the availability of information to people, to enable their more effective participation in making and administration of laws and policies and promote accountability of government.[207] By making official information available to the public the OIA changed the position that had existed prior to 1982 where government information was off limits to the public.[208]

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[204] Mistakes of Ministers departments are more often being dealt with by department members. For example in defending the inadequate Official Information Act disclosure regarding "Corngate" while Miss Clarke was questioned in Parliament; it was not the Prime Minister, but Mark Prebble himself, who defended his actions on national radio. Interview with Professor Colin James (Sean Plunket, Morning Report, National Radio, 3 September 2003); Interview with Dr Mark Prebble (Sean Plunket, Morning Report, National Radio, 29 September 2003).

[205] See Part III A 2 Uncontrolled Lawmaking above.

[206] G Palmer *Unbridled Power An Interpretation of New Zealand's Constitution and Government* (2nd edn, Oxford University Press, Auckland, 1987) 15.

[207] Official Information Act 1982, s 4.

[208] This had been the case under the Official Secrets Act 1951, repealed by the Official Information Act 1982, s 51; P A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Butterworths, Wellington, 2001) 148 – 149.

Official information is defined broadly to include any information held by a department.[209] Although the OIA provides for circumstances where information should not be made available,[210] the basic principle of the OIA is that all official information should be made available unless there is good reason for it.[211] If a request is denied then, following a written complaint, the Ombudsmen may investigate the decision to refuse to release requested information.[212] The Ombudsman may then recommend that the information be disclosed,[213] which will become a public duty if the Governor-General in council does not direct otherwise within 21 days.[214]

The open access to information facilitated by the OIA allows people to enquire much further into the propriety of government decisions than they might otherwise be able to do.[215] In the first instance citizens have a cheap and effective means of accessing government decisions affecting them. Second, the ability to obtain official information makes it easier to take formal actions against the state. In this way the OIA "significantly altered the balance between the citizen and the state."[216]

Additionally, the knowledge of government that its decisions can easily be open to public scrutiny alone fosters responsible government. This is now buttressed by opposition parties using the OIA to obtain documents to investigate and hold the government to account over its policies.[217] While this was not contemplated as a purpose for enacting the OIA, it is consonant with the OIA's purpose of promoting responsible government.[218]

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[209] Official Information Act 1982, s 2.
[210] Official Information Act 1982, ss 6 and 9.
[211] Official Information Act 1982, s 5.
[212] Official Information Act 1982, s 28.
[213] Official Information Act 1982, s 30(1).
[214] Official Information Act 1982, s 32. However, this power has never been used.
[215] P A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Butterworths, Wellington, 2001) 149.
[216] *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290, 305 (CA) McMullin J
[217] P A Joseph, above, 160.
[218] P A Joseph, above, 160.

However, while beneficial, the effectiveness of the OIA in checking government is limited in that it only promotes open government. This is effective for exposing unpopular and illegal actions that can then be remedied by public pressure on the government or judicial review. The OIA does not directly limit the concentration of power in the hands of the Cabinet, rather it only provides an informal means to make it less likely government will act in an unpopular or improper way. Thus while useful, the OIA is best viewed as a supplementary check, tying into and reinforcing other checks such as judicial review and democratic accountability.

3. *The Ombudsmen.*

The primary purpose of the Ombudsman is to ensure that good standards of administration are observed.[219] Internationally, Ombudsmen have been an increasingly popular response to the enlarged administrative state, and the associated fear of individual citizens' rights being "accidentally crushed by the vast juggernaut of the government's administrative machine."[220] The purpose of the Ombudsman is to work alongside more traditional avenues dealing with claims that do not fit traditional administrative remedies, or would not ordinarily be brought because of the prohibitive cost of litigation.[221]

Each Ombudsman may investigate any matter relating to administration affecting a person or body made by any of the bodies listed in the First Schedule to the Ombudsmen Act 1982,[222] either following a complaint, or on his or her own volition.[223] Pursuant to wide grounds[224] the Ombudsman may recommend that the decision be rectified,

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[219] JUSTICE "All Souls Review of Administrative Committee Report" *Administrative Justice* (1988) 94.
[220] D C Rowat "An Ombudsman Scheme for Canada" (1962) Can. J. Econ. & Poli Sc. 543, 543.
[221] A Sataynand "The Office of the Ombudsman in New Zealand" (1997) 6 Cant LR 470, 471; *BC Development Corp. v Friedmann (Ombudsman)* [1984] 2 RCS 447, 460 (SCC); Case Number A6710, Anand Satyanand, *12th Compendium of Casse Notes of the Ombudsmen* (Butterworths, Wellington, 2001), 33; Case Number W36117, Anand Satyanand, *11th Compendium of Casse Notes of the Ombudsmen* (Butterworths, Wellington, 2000), 18.
[222] Ombudsmen Act 1975, s 13(1). This is a wide group of bodies including entities such as the Pesticides Board, the New Zealand Symphony Orchestra and the New Zealand Lotteries Commission as well as government ministries.
[223] Ombudsmen Act 1975, s 13(3).
[224] Ombudsmen Act 1975, ss 22(1) and 22(2).

cancelled, altered or varied.[225] Although the recommendations the Ombudsmen make on matters other than official information are non-binding, the vast majority of cases will see the Ombudsmen's recommendations followed, if not in the sort term then in the medium and longer terms.[226]

The Ombudsmen's cost effectiveness and their broad jurisdiction makes them a check on government that can go above and beyond formal redress through the courts.[227] Ombudsmen are "an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated."[228] For example in 2000 the Ombudsmen stopped the Inland Revenue Department sending mail unnecessarily as a result of the inadaptability of their computer system.[229]

The Ombudsmen have also been involved in more substantive checking of government power. For example in 2001 an Ombudsman investigation led to a school reversing its decision to expel a pupil, and to change its procedures for expulsions.[230] This is indicative of the larger scale work the Ombudsmen have carried out helping set standards for schools to follow in expelling or suspending students.[231] Therefore despite the existence of parallel judicial review remedies (as exist in the case of school expulsions) the Ombudsmen prove to be a cost effective solution.

The Ombudsmen have had a "healthy effect on decision making in New Zealand government.[232] However, there are limitations to the Ombudsmen's capacities. At present because Ombudsmen do not have coercive powers, they rely on their reputation

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[225] Ombudsmen Act 1975, s 22(3).
[226] A Sataynand "The Office of the Ombudsman in New Zealand" (1997) 6 Cant LR 470, 479.
[227] A Sataynand, above, 471.
[228] *BC Development Corp v Friedmann (Ombudsman)* [1984] 2 SCR 447, 463 (SCC) Dickson J.
[229] Case Number W36117, Anand Satyanand, *11th Compendium of Case Notes of the Ombudsmen* (Butterworths, Wellington, 2000), 18.
[230] Case Number A6557, Anand Satyanand, *12th Compendium of Case Notes of the Ombudsmen* (Butterworths, Wellington, 2001), 49.
[231] G Palmer and M Palmer *Bridled Power New Zealand Government Under MMP* (Oxford University Press, Auckland, 1997) 226.
[232] G Palmer and M Palmer, above, 227.

and fear of public criticism for compliance with their recommendations.[233] The need to maintain a high reputation means that the Ombudsmen are not institutionally suited to do more than control bureaucracy, rather than limit the state's substantive power. For more substantial matters the courts are more institutionally suited for restraining government because of their coercive powers and established procedure.[234]

4. *Judicial Interpretation as a Limitation on Parliamentary Sovereignty.*

While there is no judicial review of legislation in New Zealand[235] the courts still act as a restraint on Parliament via their ability to interpret legislation. The courts' construction of legislation in a constitutionally appropriate fashion serves to restore some balance within our Constitution.

For example in *Reade v Smith*[236] the Court followed an extremely narrow interpretation of two provisions of the Education Act 1914, one which would have allowed the Minister of Education an unfettered discretion, and another that would have given the Governor General in Council a power to make regulations inconsistent with the principal act.[237] Had the Court not read down the Education Act in this way, the effect would have been to transfer unchecked power to the executive,[238] and to allow the executive to exercise legislative power.[239]

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[233] G Palmer and M Palmer *Bridled Power New Zealand Government Under MMP* (Oxford University Press, Auckland, 1997) 72 – 77.

[234] While the Ombudsmen Act does make provision for parties to be heard whom the Ombudsmen intend to make adverse comment against, in the context of the inquisitorial process of the Ombudsmen, this cannot substitute carefully established procedural safeguards developed by the courts; Ombudsmen Act 1975, s 22(7). Of particular note among Ombudsmen procedure problems for dealing with more substantive matters are the un-reviewable nature of Ombudsmen recommendations (except as relating to the OIA) and the secrecy of the proceedings; Ombudsmen Act ss 25 and 21(2) respectively.

[235] *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA). See also New Zealand Bill of Rights Act s 4 which maintains the right of Parliament to legislate contrary to the fundamental rights and freedoms contained in the Bill of Rights.

[236] *Reade v Smith* [1959] NZLR 996 (SC).

[237] *Reade v Smith*, above, 1002 and 1004 Turner J. While *Reade v Smith* is now an old case dealing with a statue which has now been substantially altered, the case is still of use as an example of the Courts' powers of interpretation. Moreover *Reade v Smith* retains considerable validity with respect to interpretation given the analogous approach followed in the *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL) line of cases also discussed in this section.

[238] *Reade v Smith*, above, 1002 Turner J.

[239] *Reade v Smith*, above, 1004 Turner J.

As Turner J candidly noted the Court strove to give the act a restrictive interpretation to mitigate Parliament's surrender of its powers.[240] Under the separation of powers this was an entirely proper approach for the Court to take. To do otherwise would allow the executive to act in a legislative fashion and unduly restrict the Court's supervisory jurisdiction. Hence *Reade v Smith* demonstrates a means, which within the confines of our Westminster system, allows some balance to remain between the branches of government by presenting resistance to the combined weight of Parliament and the executive.

Similarly in *Bulk Gas Users Group v Attorney-General*[241] the Court of Appeal adopted the *Anisminic v Foreign Compensation Commission*[242] approach to the construction of ouster clauses.[243] Under the *Anisminic* doctrine a tribunal of limited jurisdiction has no jurisdiction to make an error of law, hence the decision can always be reviewed if it contains an error of law, notwithstanding an ouster clause purporting to exclude the general courts' review jurisdiction.[244] Again, this approach strives to protect the proper functions of the branches of government.[245] As such it strives to maintain balance in the constitution and is appropriate under the separation of powers.

This approach to interpretation has been given added emphasis by the requirement of the Bill of Rights to interpret legislation consistently with the Bill of Rights where such an interpretation is possible.[246] Under *Moonen v Film and Literature Board of Review*[247] it is now clear that the Courts will give legislation as consistent an interpretation with the

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[240] *Reade v Smith* [1959] NZLR 996, 1004 (SC) Turner J.
[241] *Bulk Gas Users Group v Attorney-General* [1980] 2 NZLR 130 (CA). This reasoning has also been affirmed recently in *Peters v Davison* 2 NZLR 164 (CA) 205 – 210 Tipping J.
[242] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
[243] *Bulk Gas Users Group v Attorney-General*, above, 133 Cooke J.
[244] *O'Reilly v Mackman* [1983] 2 AC 237 (HL) 278 Lord Diplock.
[245] As Richardson P, Henry and Keith JJ said in *Peters v Davison,* the constitutional role of the Court is to rule on questions of law; *Peters v Davison* 2 NZLR 164, 188 (CA) Richardson P, Henry and Keith JJ.
[246] New Zealand Bill of Rights Act, ss 4 and 6.
[247] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

Bill of Rights as is possible without going past a tenable interpretation of the conflicting legislation, or giving the right in question an unjustifiably large ambit.[248]

Hence the courts are have put a substantial gloss on the supremacy of Parliament so far as Parliament attempts to violate the separation of powers, the rule of law and the protection of these concepts in judicial review. Moreover, in doing so the judiciary act to preserve the separation of powers by refusing to yield their proper jurisdiction to Parliament. While such vigorous exercise of judicial review in reading down legislation conflicts with notions of Parliamentary supremacy, from a separation of powers point of view, this is an essential check on the power of the legislature in a parliamentary system.

As Hamilton advocated, the Courts should be the bulwarks of the Constitution against legislative encroachments.[249] Therefore, such liberal interpretations of Parliament's words are a central and necessary check that is placed upon the legislature. This is particularly so when the Courts cannot review legislation. If anything the Courts should be more aggressive in their reading down of legislation which conflicts with the separation of powers.[250]

5. *Judicial Review of Executive Action.*

While the courts must follow the intent of Parliament, judicial review ensures that the executive acts within the authority that they have under law.[251] Even some prerogative powers of the Crown can now be subject to judicial review,[252] although some powers

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[248] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 – 17 (CA) Tipping J.

[249] Hamilton *Federalist* 78 in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washinton DC, 1961) 508.

[250] It seems that this emphasis may have been given added vigour following the adoption of the 'principle of legality' stemming from *R v Secretary of the State for the Home Department ex p Pierson* [1998] 2 AC 539 (HL); *R v Secretary of the State for the Home Department ex p Simms* [2000] 2 AC 115 (HL); *R (Daly) v Secretary of the State for the Home Department* [2001] 2 WLR 1622 (HL), and endorsed in *Drew v Attorney-General* [2002] 1 NZLR 58 (CA). As the status of the doctrine is as yet still uncertain it is discussed below as a suggested modification of judicial review.

[251] *Peters v Davison* 2 NZLR [1999] 164, 205 – 210 especially 209 (CA) Tipping J.

[252] *Council of Civil Service Unions v Minister for The Civil Service* [1985] 1 AC 374, 411 (HL). The issue of whether the Crown or a Minister of the Crown can be compelled to act in a certain way still remains something of a vexed issue; see *M v Home Office* [1994] 1 AC 377 (HL).

remain non-justiciable.[253] The primary grounds of judicial review as described by Lord Diplock in *Council of Civil Service Unions v Minister for The Civil Service*[254] are illegality, irrationality and procedural impropriety.[255]

After *Peters v Davison*[256] the ground of illegality is the touchstone of judicial review in New Zealand. Under the doctrine of *ultra vires* the relevant body cannot act outside of its legal mandate.[257] Even if there is a broad discretion given the courts will not give an open ended license to the decision maker, rather the discretion will be read as limited to promoting the purpose of the policy and objects of the act.[258] The recent approach of the House of Lords[259] and now the New Zealand Court of Appeal[260] has been to adopt an extended version of this doctrine whereby Parliament will be presumed to not legislate contrary to the rule of law unless there is clear evidence to the contrary. This includes presuming minimum standards of fairness both procedural and substantive.[261]

Under the head of irrationality or unreasonableness a decision may be impugned which "is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere,"[262] or an act which "no sensible person could ever dream lay within the powers of the authority."[263] It seems that despite some calls for a liberalisation

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[253] The classic example is national defence; see *Council of Civil Service Unions v Minister for The Civil Service* [1985] 1 AC 374, 418 (HL) Lord Roskill; *Curtis v Ministry of Defence* (25 February 2002) Court of Appeal Wellington, CA 289/01, 13 Tipping J.
[254] *Council of Civil Service Unions v Minister for The Civil Service*, above.
[255] *Council of Civil Service Unions v Minister for The Civil Service*, above, 410 Lord Diplock.
[256] *Peters v Davison* 2 NZLR [1999] 164 (CA).
[257] *Peters v Davison* 2 NZLR [1999] 164, 205 – 210 (CA) Tipping J.
[258] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030 (HL) Lord Reid.
[259] *R v Secretary of the State for the Home Department ex p Pierson* [1998] 2 AC 539 (HL); affirmed in *R v Secretary of the State for the Home Department ex p Simms* [2000] 2 AC 115 (HL); *R (Daly) v Secretary of the State for the Home Department* [2001] 2 WLR 1622 (HL).
[260] *Drew v Attorney-General* [2002] 1 NZLR 58, 70 (CA) Blanchard J.
[261] *R v Secretary of the State for the Home Department ex p Pierson*, above, 591 (HL) Lord Steyn.
[262] *Associated Provincial Picture Houses ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (HL) Lord Greene.
[263] *Associated Provincial Picture Houses ltd v Wednesbury Corporation* , above, 229 Lord Greene.

of this standard,[264] the "strict" *Wednesbury* standard remains the present law of New Zealand.[265] Hence judicial review, at least in theory, remains distinct from merits review.

Under the head of procedural impropriety, courts ensure that decisions are made in the observance of natural justice and proper decision-making considerations.[266] Therefore the decision maker is required to let sufficiently interested parties be heard,[267] consider all relevant factors and exclude from consideration all irrelevant factors,[268] provide the necessary information to affected parties before an adverse decision is made,[269] and give reasons for a decision.[270]

While judicial review is a violation of a pure separation of powers, it is a necessary check on the power of the executive branch, and the excessive delegation of legislative functions.[271] Furthermore, because the judiciary lack the power to directly enforce their judgments and are institutionally unsuited to govern, they will always be the weakest branch of government.[272] Hence there is no need to fear increased judicial power overbalancing the other elements of the Constitution.[273]

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[264] *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, 401 (CA) Thomas J. See also the comments of Lord Cooke in *R (Daly) v Secretary of the State for the Home Department* [2001] 2 WLR 1622, 1636 – 1637 (HL) Lord Cooke.

[265] *Wellington City Council v Woolworths New Zealand (No 2)* [1996] 2 NZLR 537, 552 (CA) Richardson P; *Waitakere City Council v Lovelock*, above, 389 (CA) Richardson J. Note though that it has been argued that there is a sliding scale of scrutiny depending upon the subject matter; M Taggart "Review: Administrative Law" [2003] NZ Law Rev 99, 116 – 117; P Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Butterworths, Wellington, 2001) 837 – 839.

[266] *Council of Civil Service Unions v Minister for The Civil Service* [1985] 1 AC 374, 410 (HL) Lord Diplock.

[267] *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347, 365 – 366 & 370 (HC) Hammond J; *Coal Producers' Federation of New Zealand Incorporated v Canterbury Regional Council* [1998] NZRMA 257,271 – 274 (HC) Chisholm J.

[268] *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 183 (CA) Cooke J.

[269] *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 143 (CA) Cooke J

[270] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 567 (CA) Elias CJ.

[271] See the above discussion on the *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL) approach to ouster clauses, and the general approach to interpreting constitutionally odious legislation in *Reade v Smith* [1959] NZLR 996, 1004 (SC). For the most recent expansion in this area see *R v Secretary of the State for the Home Department ex p Pierson* [1998] 2 AC 539 (HL) and the associated line of cases discussed below.

[272] Hamilton *Federalist 78* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washinton DC, 1961) 504; G Palmer and M Palmer *Bridled Power: New Zealand Government Under MMP* (Oxford University Press, Auckland, 1997) 242.

[273] Hamilton *Federalist 78* in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washinton DC, 1961) 504 It is submitted that this is preferable to the contra comments of Montesquieu;

Therefore, from the point of view of balance, one should not be concerned with the judiciary exercising increasing supervision over the other branches of government. This is subject to the caveat that supervision remains checking the constitutional propriety of governmental actions, instead of digressing into the proper domain of the other arms of government.[274] Thus the Courts are the guardians of the constitution, and as such should be exacting in checking other bodies, acting as the balance wheel of the constitution.[275] As Woodrow Wilson argued:[276]

> So far as the individual is concerned, a constitutional government is as good as its courts; no better no worse... It keeps its promises or does not keep them in the courts.

Alarmingly, the judiciary seems to be shying away from some of their constitutional duties of supervision rather than embracing them. This is particularly topical with respect to the protection in the Bill of Rights against unreasonable search and seizure.[277] The Court of Appeal has retreated from its appropriately exacting approach in *R v Jeffries*[278] to an overly submissive approach to executive abuse of power in *R v Gardiner*[279] where the Court went so far as to state that the police did not need positive authority in law to justify their invasion of the privacy of a private home.[280]

The non-requirement of positive legal authority in *Gardiner* conflicts with the Court's role to ensure the executive remains within the bounds of the law, and balancing and

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Montesquieu, *The Spirit of the Laws* Book XI, Ch 4, paras 13 – 14 in A M Cohler, B C Miller, and H S Stone (eds and trans) *Cambridge Texts in the History of Political Thought* (Cambridge University Press, Cambridge) 158.

[274] The importance of a doctrine of due deference in this regard is discussed in Part VI C below.

[275] W Wilson *Constitutional Government in the United States* (Columbia University Press, New York, 1908) 142.

[276] W Wilson, above, 17.

[277] New Zealand Bill of Rights Act 1990, s 21.

[278] *R v Jeffries* [1994] 1 NZLR 290 (CA)

[279] *R v Gardiner* (1997) 4 HRNZ 7 (CA) 11 Blanchard J.

[280] For a detailed criticism of *R v Gardiner* and other associated search and seizure cases see Hart Schwartz "The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act" [1998] New Zealand Law Review 259, 293 – 303. The principal cases in this line of authority, which make for interesting reading are *R v Gardiner* (1997) 4 HRNZ 7 (CA); *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA); *R v Fraser* (1997) 3 HRNZ 731 (CA); *R v Bradley* (1997) 4 HRNZ 153 (CA).

checking the other branches of government.[281] While there are some policy areas where the Courts should for good reason be reluctant to enter into, but due deference does not extend to permitting conduct for which there is no justification.[282]

Furthermore, the position in *Gardiner* has the added fault of directly impairing individual liberty by allowing a video camera to focus on the inside of a private home using a zoom lens continuously for a period of six and a half months.[283] The purpose of the Bill of Rights was to give added protection to the individual against the powers of the state,[284] affirming protecting and promoting human rights.[285] Therefore, the courts should use the Bill of Rights to vigorously protect human rights. This is consonant with the separation of powers, which also seeks to protect individual liberty.[286]

6. *Control of Delegated Legislation.*

Because of the vast and diverse nature of the modern state delegated legislation has to be accepted as necessary.[287] However, as the National government demonstrated in the 1980s delegated legislation has significant potential for abuse.[288]

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[281] See the above discussion of illegality and *ultra vires* in this part.

[282] The concept of due deference and how the courts should approach policy charged areas bearing in mind their constitutional function is discussed in Part VI B 4 Judicial Review of Executive Action below.

[283] *R v Gardiner* (1997) 4 HRNZ 7, 9 – 10 (CA) Blanchard J. It may be the case however, that after the introduction of *Shaheed* balancing instead of the prima facie exclusion rule that, while *Grayson and Taylor* remains good authority the courts will be more stringent in what constitutes unreasonable search and seizure for the purposes of Bill of Rights, section 21. See *R v Shaheed* [2002] 2 NZLR 377, 418 (CA) Blanchard J; *R v Maihi* (2002) 19 CRNZ 453, 461 (CA) Tipping J.

[284] Rt Hon G Palmer (14 August 1990) 510 NZPD 3449

[285] New Zealand Bill of Rights Act 1990, Long title.

[286] See Part II C Liberty The Driving Force of the Separation of Powers and Part II E 1 Protecting Liberty above. For an alternative approach to *Gardiner* see *Halford v United Kingdom* (1997) 24 EHHR 523, [49] – [51]; *Kopp v Switzerland* (1998) 27 EHHR 91, [62] – [64] and [75]; *Valenzuela Contreras v Spain* (1998) 28 EHHR 483, [46]; *Amann v Switzerland* (2000) 30 EHRR 843 [55] – [56]. In particular note the emphasis the Strasbourg Court places on the importance of the judge's role. For a discussion of the importance of liberty and its place in the home see the judgment of Kennedy J for the majority in *John Geddes Lawrence and Tyrone Garner, Petitioners v Texas* (2003) US Lexis 50013 (USSC).

[287] M Chen *NZLS Seminar Delegated Legislation*, 95.

[288] See Part III A 2 Uncontrolled Lawmaking above with respect to Henry VIII clauses and the Economic Stabilisation Amendment Act 1982.

The courts provide valuable control of regulations through judicial review.[289] Like any act authorised by law, regulations may be reviewed for being *ultra vires,* which may now extend to prohibiting the making of regulations so unreasonable that Parliament would not have contemplated there being made.[290] Furthermore, under *Drew v Attorney-General,*[291] empowering legislation will be construed in accordance with section 6 of the Bill of Rights, making all regulations breaching the Bill of Rights *ultra vires* except if there is specific legislative authorisation.[292] Similarly, under the Local Government Act 2002 local government bodies may not make bylaws that conflict with the Bill of Rights.[293] Additionally, there is an obligation to consult groups mentioned in the empowering legislation or groups who are uniquely or specially effected by the regulation.[294]

However, the cost of litigation, limitations of remedies available, problems of evidential burdens, and a narrow range of applicable grounds to challenge delegated legislation mean that judicial review alone is an insufficient restraint on delegated legislation.[295]

Possibly more important than judicial review for controlling regulations though has been the Regulations Review Committee and the Regulations Disallowance Act 1989.[296] The Regulations Review Committee, a select committee of Parliament, examines all

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[289] For a discussion of judicial review of regulations see M Chen and G Tanner *Delegated Legislation* (New Zealand Law Society Seminar, Wellington, 2002) 21 – 37.

[290] *Turners & Growers Exports Ltd v Moyle* (15 December 1988) High Court Wellington CP 720/88, 49 McGechan J. There is debate as to whether unreasonableness exists as a separate ground of review of regulations in its own right; see G Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 29 VUWLR 1, 13 – 17.

[291] *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

[292] *Drew v Attorney-General*, above, 73Blanchard J

[293] Local Government Act 2002, Section 155(3). However, given the approach of *Drew v Attorney-General*, above to Bill of Rights Section 6 and bylaws section 155(3) may not have changed anything.

[294] *Fowler & Rodrique Ltd v Attorney –General* [1987] 2 NZLR 56, 78 (CA) Casey J; *Turners & Growers Exports Ltd v Moyle* (15 December 1988) High Court Wellington CP 720/88, 61 – 62 McGechan J. See M Chen and G Tanner *Delegated Legislation* (New Zealand Law Society Seminar, Wellington, 2002), 23 – 25.

[295] M Chen and G Tanner *Delegated Legislation* (New Zealand Law Society Seminar, Wellington, 2002) 61.

[296] P A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Butterworths, Wellington, 2001) 247.

regulations, and may consider any matter relating to regulations.[297] The purpose of the Regulations Review Committee's examination is to determine whether, under wide grounds,[298] the regulation should be brought to the attention of the House.[299] The government must then respond within 90 days to the recommendations of the committee.[300]

The Regulations Review Committee also works in conjunction with the Regulations (Disallowance) Act 1989.[301] Under the Regulations (Disallowance) Act all regulations must be placed before the House.[302] The House may then disallow the regulation.[303] Furthermore, if a member of the Regulations Review Committee makes a motion of disallowance, the regulation will be deemed disallowed if the motion is not disposed of in 21 sitting days.[304] This is particularly important because the Government must act to prevent the regulations from being disallowed.[305]

Therefore the Regulations (Disallowance) Act is a powerful statute,[306] which although not often used itself,[307] has helped the Regulations Review Committee enjoy considerable success,[308] with its recommendations being adopted approximately 84 per cent of the time.[309] Such Parliamentary oversight does much to reconcile delegated legislation with Parliament's role as the legislature. While Parliament's role as the

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[297] *Standing Orders of the House of Representatives* (1999) Standing Order 381; M Chen and G Tanner *Delegated Legislation* (New Zealand Law Society Seminar, Wellington, 2002) 65.
[298] The grounds are set out in *Standing Orders of the House of Representatives* (1999) Standing Order 382. For a summary of the jurisprudence surrounding the nine standing order grounds see R Malone *Regulations Review Committee Digest* (New Zealand Centre for Public Law, Wellington, 2003) 18 – 55.
[299] M Chen and G Tanner *Delegated Legislation* (New Zealand Law Society Seminar, Wellington, 2002) 67.
[300] *Standing Orders of the House of Representatives* (1999) Standing Order 248(1).
[301] M Chen and G Tanner *Delegated Legislation* (New Zealand Law Society Seminar, Wellington, 2002) 68.
[302] Regulations (Disallowance) Act s 4.
[303] Regulations (Disallowance) Act s 5(1).
[304] Regulations (Disallowance) Act s 6(1).
[305] R Malone *Regulations Review Committee Digest* (New Zealand Centre for Public Law, Wellington, 2003) 11.
[306] G Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 29 VUWLR 1, 9.
[307] G Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 29 VUWLR 1, 10.
[308] R Malone *Regulations Review Committee Digest* (New Zealand Centre for Public Law, Wellington, 2003) 11.
[309] M Chen and G Tanner *Delegated Legislation* (New Zealand Law Society Seminar, Wellington, 2002) 70.

legislature is reinforced, specialist bodies are still allowed to substantively make law, and Parliament and the courts (by way of judicial review) ensure the constitutional propriety of the law.

While the Regulations Review Committee has been a success, it can be improved further.[310] Suggestions for reform by increasing the autonomy of Parliamentary bodies scrutinising regulations are discussed below.[311]

C. Concluding Remarks.

Notwithstanding the valuable checks within our Constitution, there are insufficient safeguards against the arbitrary use and abuse of governmental power. This is primarily because of the fusion between the executive and legislative branches, and the lack of any proper restraint on the legislature. Together these factors do not permit genuine balance between the branches of the New Zealand constitution.

To have such power as this residing in the executive, even if it is not as abused means, that as a matter of principle, New Zealand's constitution is unbalanced. The fact that the opportunities for abuse have not been exploited in the way former governments have done only suggests the system can, to an extent, work in spite of itself. The basic problem remains – the Constitution lacks sufficiently robust safeguards to abuse.

The constitutional checks outside of the three principal branches of the Constitution are of undoubted benefit. However, they remain peripheral checks on the system, not relating directly to the central problem; the excessive fusion and consolidation of insufficiently restrained power in the executive and legislative branches. As M J C Vile concluded his analysis of the Westminster constitution:[312]

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[310] The argument has been put stronger by one commentator who has suggested that the legislative branch's deterrents against arbitrary or inappropriate regulations are still insufficient; G Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 29 VUWLR 1, 35.
[311] See Part IV A 3 A Second House of Parliament below.
[312] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 238.

> The 'separation of powers' remains, therefore, a central problem.... If our system is to remain essentially a system of government by 'law' then some form of control must be exercised over the agents of government. If we abandon this philosophy of law how do we prevent mere expediency from degenerating into arbitrary government?... The fragmentation of constitutional thought in Britain, and the rejection, for good reasons, of older political theories, without their being replaced by any comprehensive view of the structure of our system of government and the values it is intended to safeguard, leaves us to drift before whatever wind of expediency may blow.

The separation of powers should not be abandoned. Rather our constitution should be reformed to give effect to the doctrine to guard against autocratic use of state power. The proposed changes in the next part suggest ways of reconfiguring the main bodies of the Constitution in a manner that will give better protection to liberty.

IV. CONSTITUTIONAL REFORMS TO REMEDY BREACHES OF THE SEPARATION OF POWERS.

A. Separating the Executive and Legislative Branches.

This section considers three options for separating the executive and legislative branches, to remedy problems in the Constitution outlined above.[313] The first model constitutional arrangement considered is a Presidential system. This is considered to illustrate the problems of a strict separation of powers, demonstrating why such a system should not be adopted in New Zealand.[314]

The remaining two options considered are intended as beneficial reforms for New Zealand. Both options are based around the separation of powers within a parliamentary

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[313] Because of space constraints this paper will not consider what degree of Separation of powers is suited to New Zealand's political economy. Rather the analysis is focused on reforms by which a better separation of powers may be achieved in New Zealand. Further, only three options will be specifically considered. There are of course an infinite number of other potential systems. For example the Swiss constitution has two equally powerful houses of Parliament, which together elect a seven member Federal Council (the executive) which cannot be removed from office during its four-year term; B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 678.

[314] For a complete analysis and comparative critique of the United States/French separation of powers see B Ackerman, above.

system. Of the second and third set of reforms, the third option, based around the addition of an upper house of Parliament is preferable.[315]

1. A Presidential System.

Under this system the President would control the executive government,[316] Parliament would be the legislature,[317] and the courts would be separate from both.[318] The President would be elected separately to Parliament. Separate voting would be required for the President and for Parliament.[319] Therefore, the President would receive a democratic mandate that is quite independent of Parliament,[320] encouraging a strong executive that is distinct from Parliament in both personnel and in mandate.[321] As such the President would not need to maintain the confidence of Parliament.[322] However, the legislators will also have democratic legitimacy, giving them a standing on which to challenge the authority of the President.[323]

While additional checks can be added such as judicial review of legislation[324] and a presidential veto of legislation[325] can be added, these cannot remedy the fundamental flaws of the system and are not directly considered. While presidential systems can

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[315] See Part IV C A Second House of Parliament below.
[316] As in for example the US Constitution, Art II.
[317] As in the US Constitution, Art I. This can be supplemented with a presidential veto. However, it is submitted that the addition of a veto is unnecessary to consider because as is discussed below presidential systems are unsuitable for New Zealand.
[318] As in the US Constitution, Art III. This paper does not enter into the debate as to whether the Privy Council should be abolished. The only issue considered with respect to the courts is the appropriate degree of separation that they should have from the other branches of government. This can be achieved under either a New Zealand Supreme Court or under the Privy Council.
[319] J J Linz "Presidential or Parliamentary Democracy: Does it Make a Difference?" in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 6.
[320] J J Linz "The Perils of Presidentialism" in A Lijpart (ed) *Parliamentary Versus Presidential Government* (Oxford University Press, Oxford, 1992) 118, 119.
[321] J J Linz "Presidential or Parliamentary Democracy: Does it Make a Difference?" in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 3, 6.
[322] J J Linz, above, 6.
[323] J J Linz "The Perils of Presidentialism" in A Lijpart (ed) *Parliamentary Versus Presidential Government* (Oxford University Press, Oxford, 1992) 118, 120.
[324] Such as under *Marbury v Madison* (1803) 1 Cranch 5.
[325] For example US Constitution, Art I 7.

work, as arguably has happened in the USA,[326] presidential systems are institutionally flawed.[327] As such one should not be adopted in New Zealand.

The first major set of defects of a presidential system flow from the necessity of winning multiple elections to get plenary control over government.[328] In a classical Westminster system a party needs to win only one election.[329] However, in a presidential system, gaining control over the three principle branches of government requires winning successive elections across the executive and legislative branch.[330] This will rarely happen. For example in the USA, the last time there was full authority in the hands of one party was in the 1960's (with the Democrats).[331] A similar situation is probably close to being in place today, particularly if Sandra O'Connor is replaced with a conservative Republican on the Supreme Court.[332]

Therefore the most common result is that governmental control will be distributed among more than one party.[333] The result is that conflict can and will occur between the branches, both of whom have a legitimate mandate to take part in government.[334] It is

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[326] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 642.

[327] The following will be a summary of the inherent flaws in Presidential systems. For a more detailed analysis see B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633; J J Linz "Presidential or Parliamentary Democracy: Does it Make a Difference?" in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 3; G Sartori " Neither Presidentialism nor Parliamentarism in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 106; J J Linz "The Perils of Presidentialism" in A Lijpart (ed) *Parliamentary Versus Presidential Government* (Oxford University Press, Oxford, 1992) 118; J J Linz "The Virtues of Parliamentarianism" in A Lijpart (ed) *Parliamentary Versus Presidential Government* (Oxford University Press, Oxford, 1992) 212; F W Riggs "Presidentialism: A Problematic Regime Type" in A Lijpart (ed) *Parliamentary Versus Presidential Government* (Oxford University Press, Oxford, 1992) 217 A Lijphart *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, New Haven, 1999).

[328] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 643.

[329] B Ackerman, above, 643.

[330] B Ackerman, above, 643 - 644. This assumes that the judiciary will be appointed by the executive and legislative branches on a partisan basis, which has been the case in the USA.

[331] B Ackerman, above, 651

[332] It would seem that this would depend on President Bush being re-elected and Republicans retaining their majorities in Congress, as the controversy surrounding a Supreme Court appointment would make it unlikely for President Bush to appoint an extreme conservative until after he is re-elected.

[333] B Ackerman, above, 645 and 651

[334] J J Linz "The Perils of Presidentialism" in A Lijpart (ed) *Parliamentary Versus Presidential Government* (Oxford University Press, Oxford, 1992) 118, 120.

almost certain that this conflict will divide and limit the power of government.[335] Regardless of whether impasse occurs or not, impasse being the usual state of affairs naturally leads to an unsatisfactory situation.

If one party does acquire such "full-control" of all three branches substantial problems arise.[336] Parties in separation of powers systems are well aware that the opportunity to operate in full authority mode will seldom arise. Therefore, having won control over all of government the party will be inclined to implement as many reforms as possible as fast as possible,[337] knowing that the "constitutional clock" is ticking.[338] This is aggravated by the inevitable desire of the party with full authority to entrench their ideas, knowing that it will be extremely hard for the opposition to win the successive elections necessary to gain sufficient control to repeal the laws passed.[339]

The result is that full control encourages the passage of ideologically driven legislation.[340] Hence, ironically while the separation of powers is designed to produce balanced and moderate government, if one party acquires full authority there is a natural inclination towards immoderate government.

In contrast, parliamentary systems, give less inclination to take advantage of a position of domination. First, Cabinet is always exposed to a revolt by the backbench members if the party's popularity drops too much.[341] Presidents however, have a fixed term in office.[342] Hence, there is not the possibility of losing the confidence of

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[335] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 645 – 648.
[336] B Ackerman, above, 650 – 651.
[337] B Ackerman, above, 650 – 653.
[338] B Ackerman, above, 651.
[339] B Ackerman, above, 652.
[340] B Ackerman, above, 651.
[341] B Ackerman, above, 658.
[342] J J Linz "Presidential or Parliamentary Democracy: Does it Make a Difference?" in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 3, 6

Parliament that there is in a parliamentary system, giving the President far more less reason to be responsive to public criticism.[343]

Second, in parliamentary systems the government has far less incentive to entrench their policies. Given their knowledge that another party could have the power to change their policies after the next general election, it is in the Government's interest to make the policies work so that they will be maintained.[344]

While the most common situation in a presidential system is impasse,[345] this does not necessarily improve the situation. Impasse will generally lead to one of three alternatives. The first is constitutional breakdown where nothing is done, and one branch reacts by assuming so much constitutional power as to destroy the separation of powers.[346] At the other extreme there is the possibility that government will function amicably despite impasse.[347] Alternatively, in a middle ground the branches of government will quarrel continually each trying to further their own partisan goals.[348]

None of the options is particularly attractive. Even the best alternative during impasse, where there is some genuine co-operation seems certain to lead to "pork-barrel-politics" where favours must be traded to secure important government policies. Moreover, given the strong party culture in New Zealand, substantial acrimony between the President and Parliament would be expected if they were divided along party lines.[349]

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[343] J J Linz "The Perils of Presidentialism" in A Lijpart (ed) *Parliamentary Versus Presidential Government* (Oxford University Press, Oxford, 1992) 118, 119.
[344] B Ackerman, above, 651.
[345] B Ackerman, above, 645.
[346] B Ackerman, above, 645. J J Linz "Presidential or Parliamentary Democracy: Does it Make a Difference?" in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 3. This seems to have been a cause of the breakdown of democracy in South American Presidential systems; See J J Linz "Presidential or Parliamentary Democracy: Does it Make a Difference?" in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 3.
[347] B Ackerman, above, 645.
[348] B Ackerman, above, 647.
[349] For a discussion of the strength of the Party system in New Zealand see G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 129 – 149. Compare this to the weak, fractured and clientalistic nature of parties in Presidential systems; J J Linz "Presidential or Parliamentary Democracy: Does it Make a Difference?" in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 3, 42.

One would expect a situation at least as acrimonious as when Bill Clinton had to deal with a Republican legislature.[350]

Furthermore, even where there is not full authority, there is a tendency for the President to make a substantial number of political appointments in the executive to ensure that the his or her policies are implemented.[351] This hinders the effective functioning of the public service in that public servants will have limited time to become adept at their jobs,[352] have a short term focus,[353] and will also prevent impartial advice being given.[354] New Zealand presently has a tradition of limited political appointments in the public service.[355] This should not be disturbed.

While a President may not have the same power over legislation as a Prime Minister who happens to have a strong hold on Cabinet does, there is still an unhealthy concentration of power in one person. The first problem is the "cult of personality" that the President's personal mandate tends to bring.[356] This carries the additional problem of people inexperienced in government being able to run for high office.[357]

Furthermore, the President will be the dominant figure on the political scene, being a *primus* rather than a *primus inter pares*.[358] Unlike parliamentary government, the loosing candidate will not have a formal role in the opposition, removing the opportunity for the

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[350] For former President Clinton this created substantial problems passing health care legislation, and at one stage federal government had to close for 6 days while the President and Congress quarrelled over the budget; M J Sodaro *Comparative Politics: A Global Introduction* (McGraw Hill, New York, 2001) 122.
[351] B Ackerman, above, 703.
[352] B Ackerman, above, 706 – 708.
[353] B Ackerman, above, 707 – 708.
[354] G Scott *Public Management in New Zealand: Lessons and Challenges* (New Zealand Business Roundtable, Wellington, 2001) 79.
[355] G Scott, above, 76 – 81.
[356] B Ackerman, above, 657; D Verney "Parliamentary Government and Presidential Government" in A Lijphart (ed) *Parliamentary Versus Presidential Government* (Oxford University Press, Oxford, 1992).
[357] J J Linz "Presidential or Parliamentary Democracy: Does it Make a Difference?" in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 66 – 67. For a recent examples consider the bid of Actor Arnold Schwarzenegger for Governor of California, who seems unable to point to any other political experience than promoting "Proposition 49" (which related to after school programs for children); Arnold for Governor http://www.arnoldgovernor.net (last visited 14 September 2003).
[358] G Sartori " Neither Presidentialism nor Parliamentarism in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 106, 110.

public to evaluate how the opposition would perform if they were in government.[359] Instead the opposition is largely forgotten.[360]

Additionally, ministerial responsibility is largely incompatible with Presidential systems, owing to a lack of a rival shadow executive and the non-requirement of maintaining the confidence of Parliament. While the it is a small step to force members of the executive to report before Parliament to justify their actions, ministerial responsibility will be weaker where ministers are not members of Parliament. Because the executive would be appointed separately of the parliamentary elections they would have their own independent mandate, and are thus not responsible to Parliament, and do not need to maintain the support of Caucus.[361] Therefore, presidential systems cannot allow Parliament to exert the same pressure on ministers to perform, and will generally not preserve integrity in the public service as well as parliamentary systems.[362]

For example, President Bush has yet to be examined by the legislature regarding the accuracy of his claims that Iraq was seeking to acquire nuclear weapons from Niger, while Tony Blair has been rigorously examined by Parliament.[363] This also ties back into the inclination of MPs within a party to call for the resignation of Minister who hurt the party popularity. In a parliamentary system there is genuine pressure for Ministers to perform when questioned by Parliament.

Furthermore, Presidential systems raise problems of democratic legitimacy by the appointment of unelected people to Cabinet, whose identities are often not known until after the election. For example John Ashcroft lost his Senate seat to a candidate who had died a month before the election only to be given the post of Attorney-General by George

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[359] J J Linz "Presidential or Parliamentary Democracy: Does it Make a Difference?" in J J Linz and A Valenzuela (eds) *The Failure of Presidential Democracy* (Johns Hopkins University Press, Baltimore, 1994) 3, 67.
[360] J J Linz, above, 14.
[361] J J Linz, above, 6
[362] Compare to the discussion of how ministerial responsibility works in a parliamentary system discussed in Part III B 1 Cabinet Government above.
[363] D E Sanger and Warren Hoge "After the War; War's Rationale; Bush Escapes Fury that Batters Blair" (26 June 26 2003) *New York Times* (Late Edition) Section A , Page 14 , Column 4.

Bush Jr.[364] This is a substantial affront to democratic legitimacy, and deprives the people of knowing precisely what they are voting for when they cast their vote.[365]

Finally, a presidential system will perform even more poorly if Parliament is elected by PR.[366] First, a Parliament fragmented into multiple parties, which PR is disposed to produce, will tend to allow a President dominate, destroying the balance the system should promote.[367] Second, inclinations to vote along party lines in a PR Parliament make dealings between President and Parliament to prevent impasse more difficult than if the legislators had individual FPP mandates.[368] This would make a Presidential system even more unworkable.

Hence, a Presidential system should not be adopted. Instead, the separation of powers is maximised within the current parliamentary system of government.[369]

2. *A Parliamentary System with a Separate Executive Branch.*

Under this system Cabinet would be separated from Parliament.[370] There would be a single, triennial MMP election. While Ministers would still stand for Parliament,[371] upon

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[364] E A Hutchison "Ashcroft Poses a Mortal Threat to Civil Rights" (28 December 2000) *San Francisco Chronicle* San Francisco.

[365] There is a process of confirmation in the Senate (US Constitution art II sec 2), however this is only useful if a different party than the President's controls the Senate, and even then there is potential for constitutional crisis if the advice and consent powers are overused. While there is potential for analogous situations to arise under MMP, for example the election of Max Bradford via the party list after he lost his electorate seat in 1996, party lists are known in advance letting people know who they are voting for.

[366] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 656.

[367] B Ackerman, above, 656.

[368] B Ackerman, above, 665.

[369] What is advocated in the next two sections is effectively a form of constrained parliamentarianism, building principally on the ideas of Professor Bruce Ackerman in B Ackerman, above.

[370] This system is built upon the suggestions proposed in G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 171 –174; G Palmer (6 September 1990) 510 NZPD 4396; J Boston *The Future of Cabinet Government in New Zealand: The implications of MMP for the Formation Organization and Operations of Cabinet* (GSBGM Publications, Wellington, 1994) 14 – 15; and J Boston and N Roberts "Bringing in the Outsiders" (6 March 1994) *The Dominion* Wellington 6.

[371] This is unlike the system proposed by Boston and Roberts. See J Boston and N Roberts in J Boston *The Future of Cabinet Government in New Zealand: The implications of MMP for the Formation Organization and Operations of Cabinet* (GSBGM Publications, Wellington, 1994) 14 – 15; and J Boston and N Roberts "Bringing in the Outsiders" (6 March 1994) *The Dominion* Wellington 6.

accepting a place in Cabinet, Ministers would have to resign from Parliament.[372] This would create a separation of personnel between the executive and the legislative branches that does not exist at the present,[373] while keeping a parliamentary system.

If the member leaving Parliament for Cabinet were a list MP then the vacant seats would be filled by MPs from the party list.[374] If the Cabinet member elect is a territorial member, then a by-election could be held.[375] However, the system would work much better if potential members of cabinet were on the party lists, primarily because it is undesirable to have a series of by-elections following the general election.

Boston's and Roberts' concern of finding competent ministers can easily be served by including such people on the party lists.[376] This strikes a balance between allowing people with specialist skills to be elected and ensuring democratic legitimacy by letting voters know prior to the election whom the ministers are likely to be.

The principal benefit of the system would be that ministers would be separate from Parliament and would thus loose some of their control over it. As Sir Geoffrey Palmer said in his valedictory address to Parliament:[377]

> [Ministers] should not be part of this place. If they are a part of this place, assuredly, they will continue to dominate it, and they will find means to continue their domination of it.

The real difference in this system would be an increased fear of a backbench revolt by Cabinet, caused by the diluted control Cabinet would have over MPs. While it is naïve to suggest Cabinet, collective responsibility, Caucus and party discipline would disappear,[378] the manner in which Caucus would function would change dramatically. At

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[372] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 173.
[373] G Palmer, above, 173.
[374] G Palmer, above, 173.
[375] G Palmer, above, 173.
[376] For example how National included Donald Brash on the party list for the 2002 general election.
[377] G Palmer (6 September 1990) 510 NZPD 4396; repeated in G Palmer, above, 173.
[378] J Boston *The Future of Cabinet Government in New Zealand: The implications of MMP for the Formation Organization and Operations of Cabinet* (GSBGM Publications, Wellington, 1994) 13.

present Cabinet consists of 20 members,[379] who will generally make up somewhere between a half to a third of Caucus, all of whom are the senior members of the party, and will, by dint of collective responsibility, speak with one voice in Caucus. This ensures that Cabinet has an overpowering influence in Caucus.

In contrast, under the system suggested here, Cabinet would have far less numerical control over Caucus, because there would be an extra MP in Caucus for every Cabinet member. It would be expected that a party in New Zealand could not govern without having 40 seats in Parliament (one third of the 120 seats). Therefore, even within a government with the smallest workable margin, and therefore the smallest party size, Cabinet would probably only account for a minority (one third) of Caucus.[380]

MPs' primary concern is re-election.[381] This drives one of the central benefits of the Parliamentary system, namely that MPs will be inclined to dispense with failing ministers and other members of the Party who are hurting party popularity.[382] In New Zealand though, the control of MPs over Cabinet has been limited by the small size of the Parliament, and the large percentage of Caucus controlled by the Cabinet. Under the system suggested here, Cabinet would have diluted control. Therefore the interests and desires of the executive would have a diminished influence on Caucus in comparison to the interests of MPs. Hence control over the party would be spread wider, lessening the power of Cabinet to control it, which in turn would reduce executive dominance over Parliament.

The increased power of MPs vis-à-vis Cabinet could also serve to increase the potency of ministerial responsibility. As discussed above, Cabinets in parliamentary systems do not have an automatic tenure.[383] Rather their existence depends on maintaining the confidence of Parliament, which in turn depends on maintaining

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[379] J Boston *The Future of Cabinet Government in New Zealand: The implications of MMP for the Formation Organization and Operations of Cabinet* (GSBGM Publications, Wellington, 1994) 8.
[380] Note though that this could vary depending on the existence and makeup of the coalition (if there was one).
[381] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 658.
[382] B Ackerman, above, 658; see also the discussion in Part III A 1 Cabinet Government above.
[383] See Part III A 1 Cabinet Government above.

popularity. Because MPs would have greater control within the party, they would be less likely to have to suffer losses in popularity for not disciplining a minister who had failed and caused the party to lose popularity. As ministers would still have to answer questions in Parliament, they would still be subjected to public criticism, which would create the necessary pressure on MPs to insist that ministers ensure their portfolios are managed competently.

Additionally, there are valuable collateral benefits not directly related to the separation of powers that this system would bring. At present, ministers have to work in their electorates, perform general MP duties, and manage executive portfolios: an unmanageable workload.[384] Under this system ministers would be free of electorate work and some of the burdens of Parliament. Furthermore, there would be incentive for capable people to seek public office who did not want to have to concern themselves with electorate work.[385] These are significant improvements on the present system.[386]

However, once matters come out of Caucus and are introduced into Parliament, MPs would still be strongly inclined to vote along party lines. This is because in a PR Parliament MPs owe strong allegiance to their party, as parties take the central role in determining the makeup of Parliament under MMP.[387] This is particularly true of MPs who come to Parliament from party lists, as they do not have a separate democratic mandate from the party.

Therefore, ruling parties would be able to use Parliament in much the same way as they presently do provided the party can reach agreement, notwithstanding the Cabinet's separation from Parliament. Hence, while this system would be a substantial

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[384] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 18.
[385] This is possibly happening to a certain extent already, for example Donald Brash being elected to Parliament from the National Party list, wanting to be Minister of Finance, but not a constituent MP.
[386] Indeed these are the central reasons driving Boston's and Roberts' arguments that Ministers should be able to be appointed from outside of Parliament; J Boston and N Roberts in J Boston *The Future of Cabinet Government in New Zealand: The implications of MMP for the Formation Organization and Operations of Cabinet* (GSBGM Publications, Wellington, 1994) 14 – 15; and J Boston and N Roberts "Bringing in the Outsiders" (6 March 1994) *The Dominion* Wellington 6.
[387] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 665.

improvement, the amount of improvement it is capable of is limited. The Senate option described below would be of further benefit.

3. *A Second House of Parliament.*

Under this model the legislature should be divided into two houses. The lower house (herein referred to as the "House") should be elected entirely by PR, without any electorate MPs. Cabinet government would continue, and draw its membership exclusively from the House. The upper house (herein referred to as the "Senate") would be a purely legislative body, elected by FPP. Its approval would be necessary for all matters except confidence and supply. Therefore the government would only need to maintain the confidence of the House.

Thus, the current electorate seats would all be transferred up to the Senate, and the House would become an entirely proportionate body. Voting would retain its present format. The present "party" vote would determine proportionately the membership of the House, and the present representative vote would determine the member who would represent each present electorate in the Senate.

The Senate should have full equality with the House. Rather the "one and a half house" solution of Professor Ackerman,[388] and the similar recommendations of Dr Stockely[389] are endorsed. The Senate's purpose is to check the government and protect against bad legislation.[390] Therefore, it is unnecessary to consult the Senate with matters of supply and confidence. Moreover, not having such powers in the Senate removes the potential for an equivalent of the Whitlam crisis to emerge where the Senate, under the control of a different party to the lower house holds the government to ransom.[391]

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[388] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 671 – 680.
[389] A Stockley "Bicameralism in the New Zealand Context" (1986) 16 VUWLR 376, 397 – 400.
[390] A Stockley, above, 396, also 383 – 386
[391] A Stockley, above, 398 – 399. However, it is suggested that a limited power to delay matters of finance suggested by Dr Stockley is unnecessary. For a narrative of the Whitlam affair see P A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, 2001, Butterworths, Wellington, New Zealand) 687 – 689 (although the discussion is directed towards the role of the Crown the description of the events and the discussion is useful).

However, if the Senate is to be a powerful body which can act as a genuine check on the legislature it should be able to prevent the passage of non-money legislation.[392]

As discussed above, a central idea of modern doctrines of the separation of powers is arranging government so that the various institutions check and balance each other.[393] If the legislature is to become a genuine check on the other branches of government, rather than its current status as a hunted object, it must have some mind of its own. A second chamber, with substantial power, whose members will no doubt have party affiliations, but will have a democratic mandate to act on their own volition, would best achieve these goals. In such circumstances the legislature will be able to function as an effective check on the executive.[394]

Hence, this system was in part designed to create a system where the legislature, or at least part of it, specifically the Senate, is not bound by rigid party discipline. If party discipline can be weakened, then the legislature can become an autonomous body in its own right, independent of the executive. Furthermore, a weakening of party discipline will make it harder for one party to exercise dominion across the legislature and executive even if the same party controls both branches, because there is less discipline in the Senate. This will lead to a balancing of power thereby restricting it.

If the Senate is to be an effective body its members must be elected.[395] First, elected Senators will have the necessary democratic mandate to give the Senate the legitimacy to

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[392] It is accepted that this is contrary to the recommendations of the Royal Commission on the Electoral System, and the recent moves towards reform of the House of Lords. However, if the Senate is to be more than a revising chamber then it should have more than a power of delay. See Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, Wellington, 1986) 281; Joint Committee on House of Lords Reform *House of Lords Reform: Second Report* (The Stationary Office, London, 2003) 9; Government Response to the Royal Commission *The House of Lords Completing the Reform* (The Stationary Office, London, 2000) 13 – 14.

[393] See Part II E 2 Balanced Government above.

[394] The potential of a second chamber to act as an effective check was recognised by the Royal Commission on the Electoral System. See Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, Wellington, 1986) 281.

[395] Royal Commission on the Electoral System, above, 281, A Stockley "Bicameralism in the New Zealand Context" (1986) 16 VUWLR 376, 397 – 400.

function autonomously necessary to check government.[396] Second, if the members are appointed then there is the risk that the party in the lower house will flood the Senate with their nominees.[397] This would totally compromise the independence of the Senate.[398]

The failings of an appointed upper house can be seen in the history of the New Zealand Legislative Council.[399] The Legislative Council had become redundant long before it was abolished, because appointments had ruined its independence and legitimacy.[400] Similarly, the national government's appointing members to the Legislative Council who would vote to end bicameralism demonstrated that appointed members compromises the independence of the upper house.[401]

The dynamics of PR and party discipline dictate that the Senate must be elected by FPP.[402] Whenever MPs are elected proportionately, there will be inclinations towards party discipline.[403] Hence, to give Senators an independent mandate, and therefore the legitimacy to cross party lines, they should be elected directly as individuals by their electorate. Additionally, the party members of each electorate should choose the Senators to stand their party at the general election. This will help ensure that Senators will not be servile to the party cause but will owe their legitimacy primarily to their electorate.

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[396] A Stockley "Bicameralism in the New Zealand Context" (1986) 16 VUWLR 376, 399.
[397] A Stockley, above, 398.
[398] A Stockley, above, 398.
[399] For a history of the demise of the Legislative Council see W K Jackson *The New Zealand Legislative Council, A Study of the Establishment, Failure and Abolition of the New Zealand Legislative Council* (University of Otago Press, Dunedin, 1972) 154 – 212.
[400] W K Jackson *The New Zealand Legislative Council, A Study of the Establishment, Failure and Abolition of the New Zealand Legislative Council* (University of Otago Press, Dunedin, 1972) 183.
[401] W K Jackson, above, 195 – 197.
[402] As is discussed in this part, this is particularly true when the lower house is elected by MMP. The author suggests the need to have different electoral methods for the two houses explains that the most recent major consideration given to a Senate in New Zealand considered a Single Transferable Vote method of election the Senate and FPP for the House preferable. See Electoral Reform Bill 1992 and the relevant Parliamentary debates; (15 December 1992) 532 NZPD 13157 – 13177.
[403] See Part IV A 1 A Presidential System above.

Additionally, if both houses were elected by PR, the most likely result would be identical representation in each house.[404] Having PR in the House and FPP in the Senate would give a different balance in party representation between the two houses. Such is in accordance with the law of off-setting symmetries, common in federal states which have two houses.[405] This is essential to the functioning of the Senate, as having both chambers elected in the same fashion would prevent the Senate from being an effective check on the government, because the same parties would dominate both houses.[406]

Furthermore, an upper house will tend to work better if party discipline is not so rigid as to stifle independent judgment necessary to make the upper house a genuine check.[407] Indeed, even if the houses were offset in a PR system, the encouragement to vote along party lines in PR systems would render the system less workable than if the upper house was FPP where party discipline stands a better chance of being broken down.

Senator's membership of a party will still encourage them to vote along party lines. However, their democratic mandate will be personal, having been elected at all stages by members of their electorate. Furthermore, being in the Senate will prohibit them from being given a Cabinet portfolio. Therefore, there will be less political incentive for them to vote along party lines to get promotion. Senators would answer first and foremost to the members of their electorate; hence they could legitimately act autonomously.

Furthermore, because the Senate would be a pure legislative body it would be ideal for reviewing regulations made by the executive whose leadership would be drawn from the lower branch. This would retain pure legislative control over a quasi-legislative function exercised by the executive. If regulations could be disallowed by the upper

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[404] There is the potential for creating minor differences by having different voting ages for the chambers, and by having some appointed members in the upper house, as is the case in Italy. B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 685.
[405] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 686.
[406] B Ackerman, above, 686.
[407] A Stockley "Bicameralism in the New Zealand Context" (1986) 16 VUWLR 376, 399

house alone the independence and pure legislative nature of the Senate would give the power to review regulations would be given added vitality.[408]

Additionally, Senators, because of their independence from the legislative branch would be ideally placed to critique government policy and work on committees.[409] This would be a welcome change from the present situation where because of excessive workloads and deference to party Caucuses, select committees have not been independent reviewers of the executive.[410] Essentially, the independence of the Senate would further the separation of the executive from Parliament begun by MMP, and increase the benefits that have been gained from that reform.

However, it would be hard to persuade New Zealand to adopt this model.[411] To maintain electorate sizes close to the present it would be necessary to have a upper house of about 60 MPs.[412] To give MPs of the House more time and let them do their job better, membership should remain at its 120.[413] Given the resistance to expanding Parliament by 20 MPs,[414] when MMP was introduced, having 60 more MPS will undoubtedly be an unpopular suggestion.

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[408] This would also be a suitable response to claims that the Regulations are inadequately controlled; G Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 30 VUWLR 1.

[409] A Stockley "Bicameralism in the New Zealand Context" (1986) 16 VUWLR 376, 385.

[410] R Mulgan *Politics in New Zealand* (2 ed, Auckland University Press, Auckland, 1997) 126 – 127.

[411] It is notable that with the exception of the Rt Hon Jim Bolger Parliament showed little enthusiasm for a Senate when it was tabled as a consideration in 1992. However, a reading of the debates indicates this was in part driven by a desire to focus attention on MMP rather than a Senate at that stage of New Zealand's constitutional reform. See (15 December 1992) 532 NZPD 13157 – 13177.

[412] At present electoral sizes average approximately 54,300. Having a cap of 60 electorates would probably mean this would change to about 62,000 depending on other variables such as population, South Island North Island split. Information from Elections New Zealand "New Zealand's Electoral System" http://www.elections.org.nz/elections/esyst/boundaries_drawn.html (last accessed 14 September 2003)

[413] Although, if there was too much opposition to having 60 new MPs, the number of MPs in the house could be revised back to about the 100 mark, as members of the House would not have to juggle electorate work with national matters.

[414] J Vowles, J Karp, S Banducci P Aimer, R Miller "Reviewing MMP" in J Vowles, P Aimer, J Karp, S Banducci R Miller, A Sullivan *Proportional Representation on Trial: The 1999 New Zealand General Election and the Fate of MMP* (Auckland University Press, Auckland, 2002) 175, 177.

The main drawback of this option is that PR would be diluted by the FPP Senate, which the major parties would be expected to dominate. However, the loss of PR should not be overstated.

First, the makeup of the most important house, and the identity of the government would still be determined by PR. Further, it is not suggested that PR should be abandoned. The diversity of MMP parliaments is a welcome change and should be kept in the House.[415] While it has been suggested that the upper house should be elected by PR,[416] it is submitted that under the proposed system PR is important enough that it should determine the makeup of the more powerful House, and therefore also the identity of the government. Second, it is submitted that the loss of PR is outweighed by the need to balance the constitution. FPP elections for the Senate would be a positive step in constitutional law rather than a retrograde step in electoral law.

Finally, constitutional innovation should not be feared. As N W Barber has argued:[417]

> Sometimes it is not possible, or not sensible, to allocate a new task to pre-existing institutions' a new structure must be created to accommodate the task. Separation of powers is not therefore just a theory about the division of powers, it is also concerned with the creation of institutions.

Thus consideration should not be confined to rearranging existing government bodies so as to separate them and make them check each other better.[418] In summary, these arrangements would provide for an efficient, yet balanced constitution that meets muster under analysis against the separation of powers, which would also retain the most important aspects of Parliamentary government.

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[415] See J Karp "Members of Parliament and Representation" in J Vowles, P Aimer, J Karp, S Banducci R Miller, A Sullivan *Proportional Representation on Trial: The 1999 New Zealand General Election and the Fate of MMP* (Auckland University Press, Auckland, 2002) 130, 135 – 136. The arguments for MMP are beyond the scope of this essay. However, the essay proceeds on the premise that PR should be kept.
[416] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 124.
[417] N W Barber "Prelude to the Separation of Powers" (2001) 60(1) CLJ 59, 73.
[418] R M Unger *Knowledge and Politics* (The Free Press, New York, 1975) 1; R M Unger *Law In Modern Society* (The Free Press, New York, 1976) 1-3.

B. Expanding The Power of the Judiciary.

1. Judicial Independence.

Because enforcing the rights of minorities is necessarily counter-majoritarian, the judiciary's independence from the political process makes them the best-placed body for ensuring the effective enjoyment of basic human rights. No other branch shares the judiciary's independence necessary to ensure the liberty of minorities is respected. Legislatures by their political and popular nature, are ill placed to protect rights in a way that will be unpopular.[419] They are by their nature "the rule of law's public enemy number one."[420]

In contrast the judiciary are protected from influence by other branches of government.[421] Furthermore, in New Zealand the judiciary has had a proud tradition of being politically neutral.[422]

As Lord Steyn said in *Brown v Stott*[423] "only an entirely neutral, impartial, and independent judiciary can carry out the primary task of securing and enforcing Convention rights."[424] Similarly the European Court of Human Rights has noted the impartiality of the Courts is a "fundamental principle."[425]

With respect the how a lack of judicial independence affects the right to a fair trial[426] Lord Bingham commented in *Millar v Dickson* that:[427]

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[419] Lord Cooke of Thorndon "The Role of Judges" in C James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 371.
[420] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 715.
[421] Constitution Act 1986, ss 23 and 24.
[422] G Palmer & M Palmer *Bridled Power – New Zealand Government Under MMP* (3 ed, Oxford University Press, Auckland, 1997) 243.
[423] *Brown v Stott* [2001] 2 WLR 817 (PC).
[424] *Brown v Stott,* above, 840 Lord Steyn.
[425] *De Cubber v Belgium* (1984) 7 EHRR 236, 246 (ECHR). See the similar approach of the ECHR in *Bulut v Austria* (1996) 24 EHRR 84 (ECHR).
[426] International Covenant on Civil and Political Rights Art 6(1).

> The conduct of trials at all stages by an independent and impartial tribunal is in my view recognised by the Convention and the authorities.... It is a safeguard which should not... be weakened or diluted whatever the political consequences.

Similarly the Bill of Rights guarantees everyone charged with an offence "the right to a fair and public hearing by an independent and impartial court."[428] Therefore, judicial independence is a fundamental prerequisite of the preservation of liberty.

While the Judiciary's motivations may have elements of politics, they are the most detached from the political process. As the development of Cabinet government has shown, the interests of the legislature and the executive are too closely aligned for them to be trusted to check the excesses of each other.[429] Rather the tendency of party politics is to consolidate power, not limit it. The judiciary alone stand sufficiently disinterested to check whether other branches of government have exceeded their mandate.

Judicial independence becomes a particularly important consideration if the courts are to have increased power. Although popular conceptions are that judges should not be given more power because they are detached from public/political control, it is precisely because judges are independent that they should be entrusted with more power than they currently have.

The tradition non-partisan political appointments in New Zealand[430] is to be encouraged as it supports a judiciary who are free of political influence, which is of increased importance should their constitutional function be enhanced. It is most unfortunate that there have been moves by the ACT party, and in particular Stephen

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[427] *Millar v Dickson* 2002] 1 WLR 1615, 1638 (PC) Lord Bingham.
[428] New Zealand Bill of Rights Act s 25(a).
[429] See part III A 1 Cabinet Government above.
[430] G Palmer *Unbridled Power: An Introduction to New Zealand's Constitution and Government* (2 ed, Oxford University Press, Auckland, 1987) 182.

Franks, to make judges subject to a recall.[431] The inevitable effect will be to compromise the integrity of judges. They will no longer be able to give judgment without fear or favour because they risk recall for unpopular decisions. If the current appointments process in New Zealand cannot protect the independence then we should not opt for a politicised appointments process or electoral system.[432]

2. *Judicial Enforcement of the Constitution.*

A Constitution cannot be balanced if the judiciary are unable to enforce it. At present judicial review of executive action places limits on the executive. In a balanced Constitution similar limits must be placed on the legislature.[433] This would also require the adoption of a written Constitution, so that the Courts had a concrete document to enforce.[434]

The following argument for expanding the Courts power of judicial review to include legislation proceeds in two parts. First, it is submitted that the constitutional functions of each branch and the corresponding limitations of those functions must be capable of judicial enforcement, Acts of the legislature notwithstanding. Second, it is submitted that there is also a clear and convincing case for making the Bill of Rights supreme law. In the alternative if the Bill of Rights is not extended to permit judicial

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[431] S Franks, comments made at public lecture; J Waldron " Retroactive Law: How Dodgy was Duynhoven?" (Public Lecture Victoria University of Wellington Law School, Wellington, 21 August 2003).

[432] D Gambrill "Chief justice says no to electing judges: Politicizing courts would undermine independence and impartiality" *Law Times* http://www.canadalawbook.ca/headlines/headline276_arc.html (last accessed 4 October 2003).

[433] This paper does not propose to make a complete case for judicial review of legislation. Rather the focus of this section is that if the Constitution is to be balanced there must be judicial review of legislation. Hence the wider arguments for and against judicial review of legislation will not be fully canvassed.

[434] Adopting a written constitution on its own remains a topic of debate in New Zealand. For a recent rejection of the idea see J Allen "No to a Written Constitution" in C James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 391. Consequentially the full debate will not be entered into here. It is noted in passing that a written constitution is not as bad a thing as its detractors would suggest. It is of note that New Zealand is only one of three western countries that do not have a written constitution (the others being the United Kingdom and Israel); M Russell "Responsibilities of Second Chambers" in N D J Baldwin and D Shell (eds) *Second Chambers* (Frank Cass, London, 2001) 61, 63

review of inconsistent legislation, then the Courts should be more aggressive in their use of the Bill of Rights, and should recognise judicial indications of inconsistency.[435]

Despite the problems with Parliamentary supremacy,[436] there still remain those who contend that there is no need for the Courts to be able to judicially review legislation. For example in N Barber has argued that:[437]

> There is... no obvious reason why the courts should assume a general jurisdiction to police divisions of power within the constitution. The power of the courts over other institutions is a crucial question of institutional competence: the court process is not necessarily the best forum for the crafting of our constitution.

Janet McLean has also made similar comments in a New Zealand context.[438]

So far as this suggests that the Courts should not enforce the limits of government powers under the Constitution, this approach is misguided.[439] There must be checks on the functions of the different branches of government, otherwise there can be no balance in the system.[440] The inevitable tendency will be for people to accumulate power, which if unchecked will result in one group accumulating too much. There must be an independent body that will prevent government bodies from exceeding the proper limits of their powers.

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[435] Judicial indications of consistency have been recognised to a limited extent in *R v Poumako* [2000] 2 NZLR 695 (CA) and *Moonan v Film and Literature Board of Review* [2000] 2NZLR 9 (CA). However there is still some debate, or at least denial, from the Crown that declarations of inconsistency are an established part of the law.

[436] See Part III A 2 Uncontrolled Law Making above.

[437] N W Barber "Prelude to the Separation of Powers" [2001] CLJ, 59, 88

[438] J McLean "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] *New Zealand Law Review* 421, 448.

[439] It is accepted that the Courts may have limitations with respect to deciding budgetary allocations. However, even this is subject to argument. For example the Constitution of South Africa recognises cultural and economic rights which historically were regarded as non-justiciable, although how justiciable such rights are under the South African Constitution is open to some debate.

[440] See Part II B Pure Separation of Powers and Checks and Balances and Part II E 2 Balanced Government above.

Essentially a lack of judicial review means that the constitution is ultimately at the whim of the legislative branch, subject to the Courts' powers of interpretation. Even the strongest critics of the American separation of powers reject the notion that the legislature can alter the constitution at it sees fit. Rather, judicial review of legislation is seen as an essential element of a constrained parliamentarianism.[441]

The concept of the legislature being above the law is a dated one,[442] and strikes at the heart of government by and under law. In contrast to Hobbes conceptions of parliamentary sovereignty Marshal CJ' comments in *Marbury v Madison* remain apposite:[443]

> The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it.

The dangers of the constitution being at the whim of the legislature are well demonstrated by the abolition of the legislative council in New Zealand. Despite the Legislative Council's inactivity, its abolition was New Zealand's most significant constitutional change in the first half of the twentieth century.[444] This change was made on the strength of a 51.4% National majority at the preceding general election.[445] Given that a victory at a general election is only a broad assessment of a party's performance, lacking the specificity of a referendum or strong threshold of a super-majority in Parliament, this is inadequate legitimisation for such significant constitutional change.

In the first instance such changes should require more than a majority vote in Parliament to prevent easy alteration. Furthermore, it is necessary that there must be a

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[441] B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633, 641.
[442] See the discussion of Hobbes in Part III A 2 Uncontrolled Lawmaking above.
[443] *Marbury v Madison* (1803) 1 Cranch 137, 145.
[444] W K Jackson *The New Zealand Legislative Council, A Study of the Establishment, Failure and Abolition of the New Zealand Legislative Council* (University of Otago Press, Dunedin, 1972) 198.
[445] W K Jackson, above, 196.

body to ensure compliance with the rules. Therefore the Constitution should be supreme law. Otherwise the constitution will be mere window dressing.

The judiciary are the best placed body to exercise this function. First, they are the most politically neutral branch of government.[446] Second, they are necessarily the weakest branch.[447] Third, such questions of constitutional interpretation are best dealt with as questions of law. As such the judiciary is the only body suited to interpreting and policing the boundaries of the Constitution.

3. *A Supreme Bill of Rights.*

Although for slightly different reasons, the Bill of Rights should also become supreme law. This move would be in accordance with the comments of New Zealand's international obligations under the International Covenant on Civil and Political Rights,[448] and has been urged on New Zealand by the United Nations Human Rights Committee.[449] It is submitted that this is a necessary check on the power of the legislature to protect liberty.

However, it has recently argued that the current system, particularly with the interrelationship and dialogue between the Courts and Parliament, is sufficient to protect individual liberty.[450] This defence of the current Bill of Rights is based on the argument

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[446] See Part IV B 1 Judicial Independence above.
[447] Hamilton *Federalist 78*in S F Mittell (ed) *The Federalist* (National Home Library Foundation, Washinton DC, 1961) 502 – 511.
[448] International Covenant on Civil and Political Rights, Art 2(3)(b).
[449] Concluding Comments of the Human Rights Committee: New Zealand 30 October 1995 CC{R/C/79/Add 47; A/50/40 para 185 in Ministry of Foreign Affairs and Trade "Human Rights in New Zealand" (1995) 56 *MFAT Information Bulletin.*
[450] See J McLean "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] *New Zealand Law Review* 421. It is noted that McLean focuses on the actual record of human rights enforcement not theoretical possibilities, see McLean, above, 444. Thus the criticisms of this paper are directed at a slightly different purpose, to show the problems that can arise under our present constitutional arrangements, and how these should be remedied.

that interpretation is a sufficiently powerful tool.[451] With respect this type of argument is superficial.

In arguing this position Janet McLean uses *Pora* to show that in the face of a clear legislative breach of human rights the Court managed to vindicate rights,[452] making a supreme bill of rights is unnecessary. This analysis misses the reality of what *Pora* did. Essentially the *Pora* decision read down offensive provisions in quasi-supreme law fashion. It is circular to suggest that this Westminster jurisprudential equivalent to a supreme bill of rights means that we do not need a supreme bill of rights. Furthermore, the strong reaction of the Court in *Pora* was necessary to ensure a change in the law after earlier criticism of the legislation in *Poumako* was not sufficient to persuade Parliament to repeal the act.[453] This illustrates that mere judicial/legislative correspondence and in particular judicial subservience are insufficient to protect liberty. Rather, the courts must take decisive action to ensure the effective enjoyment of rights.

The argument that judicial review of legislation is unnecessary ultimately comes to rest on the argument that (as proposed by Barber) "legislatures are at least as good as other institutions in reaching necessary decision that do not admit of a technical solution."[454] Barber reaches this conclusion after highlighting the problems judges can have in creating law that has implications beyond the specific case at hand.[455] In defence of this position Barber cites *Brown v The Board of Education of Topeka*[456], to illustrate the problems courts encounter in trying to formulate and implement law that has wide implications.[457]

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[451] See in particular J McLean "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] *New Zealand Law Review* 421, 435 – 436.
[452] J McLean, above, 443.
[453] J McLean, above, 443 notes that the lack of reaction in *Poumoko* provoked the *Pora* response.
[454] N W Barber "Prelude to the Separation of Powers" [2001] CLJ, 59, 87. McLean advances a similar argument, although based more on a judiciary/legislature interaction J McLean, above, 448.
[455] N W Barber "Prelude to the Separation of Powers" [2001] CLJ, 59, 74 – 84.
[456] *Brown v The Board of Education for Topeka* (1954) 347 US 483 (USSC).
[457] N W Barber, above, 79.

There are three principle objections to the argument Barber advances. First, it miss-appreciates the independence of the judiciary, which make the Courts the appropriate body to enforce often counter-majoritarian limitations on the legislature by enforcing human rights.[458]

Second, the reliance on the example of *Brown,* is misplaced. Rather than supporting judicial review of legislation, *Brown* is a paradigm example of circumstances where it is essential for the judiciary, rightly removed from democratic control, to protect minority interests imperilled by the actions of the majority that would otherwise go uncorrected. In the 1950s legislative change could not be made to racially discriminatory laws.[459] Because of white control in the south[460] it would have been unthinkable to attempt to persuade state legislatures to pass anti-segregation legislation. Similarly southern Democratic domination of Congress made the Federal situation not much better.[461] Legislative change to segregation was simply not an option until 10 years after *Brown,* by which time the courts had already made many major initial changes.[462] Hence, litigation was the only option for ending a fundamentally unjust system.[463]

Third, asking judges to judicially review legislation does not ask them to make policy decisions, but to apply the law.[464] The limits of the incremental approach of the common law, and appropriate deference[465] will mean that the common law is carefully developed. While there are limitations to the courts abilities,[466] it would be wise not to underestimate

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[458] See Part IV B 1 Judicial Independence above.
[459] See D Bell *And We Are Not Saved* (Basic Books, New York, 1979).
[460] J Greenberg *Crusaders in the Courts* (Basic Books, New York, 1994) 108 – 109.
[461] For an example of the lengths that white southern Congressmen would go to to prevent any progressive race relations laws see J Greenberg, above, 16 – 17.
[462] J Greenberg, above, 116, 260 and 267.
[463] For an example of the lengths that white southern Congressmen would go to prevent any progressive race relations laws see J Greenberg, above, 16 – 17. Furthermore, the violent background to *Brown* and the violence following *Brown's* implementation suggest that there would have been resistance however desegregation had been implemented, at least during the 1950's. To attribute the problems of judge made law is misleading. For a well researched account of southern racial violence around the *Brown* period see M Belknap *Federal Law and Southern Order* (University of Georgia Press, Athens, 1987).
[464] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 70.
[465] See the discussion of due deference in Part IV B 4 Judicial Review of Executive Action below.
[466] N W Barber "Prelude to the Separation of Powers" [2001] CLJ, 59, 74 – 84.

the potential of judges to understand society. If they lack knowledge of social issues than Brandeis briefs can help fill that gap.[467]

Therefore arguments against the transfer of power to an unelected judiciary are misconceived. The judiciary are the only branch that can effectively serve this purpose, it is necessary that they serve it, and they are competent to do so.

4. Judicial Review of Executive Action.

The position of *R v Gardiner* with respect to the non-requirement of positive legal authority for the executive invasions of privacy should be overruled.[468] If carried to its logical conclusion it would mean that the executive did not require positive authority for its acts. In addition to dispensing with internationally recognised standards,[469] and established common law in celebrated cases such as *The Case of the Proclamations,*[470] *Entick v Carrington,*[471] *Fitzgerald v Muldoon* and *Transport Ministry v Payn,*[472] this would end judicial review of executive acts;[473] a necessary check on the power of the executive. Furthermore, if the executive can act on its own volition in this manner one questions what role the legislature has.

Rather than let judicial scrutiny ebb it should be re-invigorated. Expansions of administrative law through cases such as *CREEDNZ v Governor General,*[474] *Anning v Minister of Education,*[475] *Drew v Attorney General* and *Taito v R*[476] which have shown an

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[467] These have already had some use in New Zealand, for example in *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).
[468] *R v Gardiner* (1997) 4 HRNZ 7, 11 (CA) Blanchard J.
[469] See *Malone v United Kingdom* (1984) 7 EHRR 14 (ECHR); *Halford v United Kingdom* (1997) 24 EHRR 523 (ECHR); *Kopp v Switzerland* (1998) 27 EHRR 91 (ECHR); *Valenzuela Contreras v Spain* (1998) 28 EHRR 483 (ECHR); *Amann v Switzerland* (2000) 30 EHRR 843 (ECHR); *Funke v France* (1993) 16 EHRR 297 (ECHR).
[470] *The Case of the Proclamations* (1611) 12 Co Rep 74
[471] *Entick v Carrington* (1765) 19 St Tr 1030.
[472] *Transport Ministry v Payn* [1977] 2 NZLR 50 (CA).
[473] H Schwartz "The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act" [1998] NZ Law Rev 259, 302.
[474] *CREEDNZ v Governor-General* [1981] 1 NZLR 172.
[475] *Anning v Minister of Education* CP (26 April 2002) High Court Wellington CP 122/00 Goddard J.
[476] *Taito v R* (2002) 6 HRNZ 539.

increased willingness for on the part of the judiciary to genuinely look at the legality of executive and indeed *judicial* actions[477] are positive moves. In a balanced constitution the courts should not ensure that all branches of the government stay within their limits.[478]

The principle of legality is also a positive move in this regard. Under this doctrine unless there are clear words to the contrary then the courts will not infer on Parliament an intent to legislate against the rule of law.[479] This is endorsed as a necessary check particularly in the absence of an entrenched bill of rights. This has already received endorsement in *Drew,*[480] and it is submitted that this is good law, which should be utilised to check the executive branch, and read down offensive legislation.

As Vile has noted, historically it is not necessarily proper to refer to English courts as the defenders of the people against the other branches of the state.[481] If Vile is correct the extending of judicial review by way of concepts such as the principle of legality is a healthy progression. The New Zealand courts should not go down the restrictive interpretations and willingness to protect human rights that can be seen in the dissenting judgment of Scalia J in *Lawrence v Texas.*[482]

Indeed, in our present constitutional arrangements, precisely because of parliamentary supremacy, the judiciary should be all the more active in checking the executive and protecting the individual by giving restrictive interpretations to oppressive statutes. Otherwise Parliament and the executive will overbalance the already delicate relationship.

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[477] *Taito v R* (2002) 6 HRNZ 539, this overruled the finding of non-justiciability by Tipping J at an earlier stage in the *Taito* proceedings; *Nichols v Registrar of the Court of Appeal* [1998] 2 NZLR 385, 430 (CA) Tipping J.
[478] Note that s 27(2) of the Bill of Rights contains the right to judicial review indicating its importance. For the importance of access to the courts see also R B Cooke "Fundamentals" [1988] NZLJ 158.
[479] This was first developed in the case of *R v Secretary of the State for the Home Department ex p Pierson* [1998] 2 AC 539 (HL); affirmed in *R v Secretary of the State for the Home Department ex p Simms* [2000] 2 AC 115 (HL); *R (Daly) v Secretary of the State for the Home Department* [2001] 2 WLR 1622 (HL),
[480] *Drew v Attorney-General* [2002] 1 NZLR 58, 70 (CA) Blanchard J
[481] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 321.
[482] *Lawrence v Texas* (2003) US Lexis 50013 (USSC).

Use of indications of inconsistency under the Bill of Rights would be a positive step within our current constitutional arrangement. Andrew Butler has suggested that this would have to change separation of powers as it currently stands in New Zealand.[483] It is submitted that if this does involve a change,[484] it would be a positive one. Notions of Parliamentary sovereignty are outdated.[485] To suggest that Parliamentary sovereignty should still extend to stopping the Courts from questioning Parliament neglects to balance government bodies. If the Courts do not to check the formally unrestrained power of Parliament, the least that they can do is formally inform Parliament when it has legislated contrary to fundamental human rights.[486]

However, in exercising judicial review of legislation and of executive acts the courts should follow doctrine of due deference which is currently developing in the English courts. Under the doctrine of due deference the courts should pay appropriate, but not blind, respect to the proper functions of other branches of government.[487]

This still allows democratic institutions to make decisions,[488] provided that they are within the appropriate matters. While the courts' expertise in areas outside the law can

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[483] A S Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ Law Review 43, 55.

[484] Given the stern criticism of Thomas J that the retrospective legislation was close to an act of attainder; *R v Poumako* [2000] 2 NZLR 695, 712 – 713, also 710 (CA) Thomas J, it seems that Mr Butler is exaggerating the current situation in saying that courts have not previously passed judgment on the legal quality of legislation; A S Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ Law Review 43, 55.

[485] See International Covenant on the Protection of Civil and Political Rights Art 1 and Concluding Comments of the Human Rights Committee: New Zealand 30 October 1995 CC{R/C/79/Add 47; A/50/40 para 185 in Ministry of Foreign Affairs and Trade "Human Rights in New Zealand" (1995) 56 *MFAT Information Bulletin.*

[486] Note that this is provided for under the Human Rights Act 1998 (UK), s 4. This is does not seem to have caused any undue problems; see Lord Irvine, The Lord Chancellor "The Human Rights Act Two Years On: An Analysis" (1 November 2002) *Durham University Inaugural Human Rights Lecture* http://www.lcd.gov.uk/speeches/2002/lc011102.htm (last accessed 7 May 2003).

[487] D Dyzenhaus "Judicial Review and Democracy" in M Taggart *The Province of Administrative Law* (Oxford: Heart, 1997) 302–308; R A Edwards "Judicial Deference Under the Human Rights Act" (2002) MLR 65:6 November 859, 879; *R v British BroaDC, 1961asting Corporation ex p Prolife Alliance* [2003] UKHL 23, [75] (HL) Lord Hoffman.

[488] See for example *R v British BroaDC, 1961asting Corporation ex p Prolife Alliance* [2003] UKHL 23, [132] per Lord Walker and the authorities cited therein.

be assisted by Brandeis briefs courts do lack the expertise of specialised institutions.[489] Hence there are valid constitutional limitations as to areas that courts should become involved in. Thus due deference will mitigate against the undemocratic nature of judicial review,[490] and provides a means by which the legislature can make necessary policy decisions.[491]

However, the amount of judicial deference which is appropriate should not be overstated. As Lord Hoffman stated in his speech in *Prolife Alliance:*[492]

> Although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are... The principles upon which decision-making powers are allocated are principles of law...The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle... On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle.

Essentially the courts should respect the legislative and executive branches of government, but should not submit to them.[493] Similarly, the attitudes of the members of all the branches are important. When exercising power all bodies of government should be mindful of their constitutional function.[494] While some tension between the branches is an essential element of the separation of powers,[495] this should not deteriorate to

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[489] R A Edwards "Judicial Deference Under the Human Rights Act" (2002) MLR 65:6 November 859, 859.
[490] R A Edwards, above, 859.
[491] For example due deference would let the legislature set maximum working hours for children, compare to *Wilson v Receivers of the Missouri, Oklahoma & Gulf Railway Company* (1918) 234 US 332 (USSC).
[492] *R v British Broad Casting Corporation ex p Prolife Alliance* [2003] UKHL 23, [75] – [76] (HL) Lord Hoffman.
[493] D Dyzenhaus "Judicial Review and Democracy" in M Taggart *The Province of Administrative Law* (Oxford: Heart, 1997) 302–308; R A Edwards "Judicial Deference Under the Human Rights Act" (2002) MLR 65:6 November 859, 879.
[494] M J C Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) 296 and 312.
[495] *Myers v US* (1926) 52 US 272, 293 (USSC) Brandeis J (dissenting).

constitutional crisis that will destroy the balance that the separation of powers seeks to provide.

Thus the courts should be aggressive in checking the actions of the legislature and the executive, while under exercise due deference to mitigate against the undemocratic nature of judicial review,[496] and with courts' lack of expertise vis-à-vis specialised institutions,[497] so as to strike a balance between democracy and constitutionality.

V. CONCLUSIONS.

In summary it is suggested that New Zealand's Constitution, particularly following the introduction of MMP, is moving towards conformity with the doctrine of the separation of powers. However, improvement can still be made. It is hoped that the reforms proposed in this paper may help further improvement.

The points that the author is most attached to are one; that New Zealand's Constitution at present is incapable of securing liberty, and two; that this must be changed. The reforms proposed are suggested as beneficial ideas, but the options for reform are infinite. Any changes that will remedy this situation, without going too far in the other direction, are welcomed.

Constitutional reform relates to liberty, not politics. If we are genuinely committed to liberal ideals then we must be prepared for change to protect these them. New Zealand cannot remain in the constitutional wilderness forever – ultimately change must come.[498] It is hoped that the analysis and suggestions offered in this paper will help further New Zealand's constitutional maturation.

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[496] R A Edwards, above, 859.
[497] *Handyside v United Kingdom* (1976) 1 EHRR 737 (ECHR) [48] – [50]; R A Edwards, above, 859, while not yet widespread Brandeis briefs have been used in New Zealand already, for example in *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).
[498] G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 174.

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