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THE CONSTITUTIONAL SIGNIFICANCE OF THE DECLARATIONS OF INCONSISTENCY AMENDMENT ACT

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Abstract

The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act is a significant constitutional change. It requires Parliamentary response to the courts when a declaration is issued, and therefore results in greater involvement of the courts in determining important rights issues. However, Parliament has been very careful to state that it does not see this Act as upsetting parliamentary supremacy. This paper utilises the dichotomy of political and legal constitutionalism to question this contention and consider the implications of the Amendment Act on the respective rules of Parliament and the courts. It explains how this Act has the potential to either result in a shift towards legal constitutionalism, or to reinforce the New Zealand political constitution. It argues that the extent of any impact will be dependent on the responses of constitutional actors, making it necessary to draw on constitutional culture scholarship to consider the likely impact of the Amendment Act. The values of our constitutional culture mean we are most likely to see a reinforcement of our political constitutionalism. Importantly, this Act may change the justifications for our political constitution, and in doing so provide a unique opportunity for the courts to demonstrate the importance of their role within the New Zealand political constitution.

Keywords: *"constitutional culture", "political constitutionalism", "legal constitutionalism", "declarations of inconsistency", "New Zealand Bill of Rights Act"*

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I Introduction

Debate surrounding the proper roles of Parliament and the courts is an ongoing tension in constitutional law. Significant constitutional changes in this area necessarily reignite the debate, creating concerns regarding the impact of change on the constitutional roles of each branch. The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022 is "the most significant change to the New Zealand Bill of Rights Act since the … Act was passed in 1990".[1] I am seeking to examine exactly what the importance of this change might be, in terms of the potential impact on the respective roles of Parliament and the courts in rights determination.

The Amendment Act provides a "statutory mechanism for bringing declarations of inconsistency to the attention of the House".[2] This is an important change. Prior to this, NZBORA explicitly placed the role of rights determination into the realm of Parliament, reinforcing parliamentary supremacy in this area.[3] However, the Amendment Act recognises the power of the courts to make a declaration, and requires Parliamentary engagement with these declarations. I intend to examine Parliament's contention that it does not see the Amendment Act as upsetting the fundamental principle of parliamentary supremacy.[4]

To do this, I will draw on the dichotomy of legal and political constitutionalism to consider whether the Amendment Act may be a shift towards soft legal constitutionalism. This paper contends it can reasonably be argued that this Act might reinforce political constitutionalism, or that it could be a significant shift towards a soft legal constitutionalism. This uncertainty illustrates the importance of institutional actors and

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[1] (23 August 2022) 762 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Third Reading, David Parker).

[2] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-2) (Privileges Committee Report) at 1.

[3] See Section 4 of New Zealand Bill of Rights Act 1990, which makes clear making clear that courts can not hold legislation invalid, or otherwise inapplicable, by reason only of inconsistency with the Act.

[4] See Privileges Committee, above n 2, at 2, and also (11 May 2022) 759 NZPD.

culture in determining whether there is any form of change to our constitutional system. It is difficult to understand the impacts of a change such as this completely without recourse to the constitutional culture. Therefore, I will use constitutional culture scholarship to consider whether a shift is likely. It will be seen that a strong deference to parliamentary sovereignty, coupled with a tendency towards public ambivalence, may limit any movement along this continuum.

However, I conclude by arguing that we may see an important shift within political constitutionalism, in terms of the way it is justified in New Zealand. In particular, I explain the important role courts have to play in our political constitution as a result of the Amendment Act. The significant constitutional change the Amendment Act brings is not likely to be a shift towards legal constitutionalism, but is instead likely to be in providing an opportunity for the courts to present their distinct value to the New Zealand public. The importance of the courts in providing fairness within our constitution is often undervalued in our constitutional culture, and this Act may result in a change within our culture.

This paper firstly outlines the key aspects of political and legal constitutionalism, with a focus on the political constitutionalist school of thought. It then considers how rights are determined in New Zealand at present, explaining how our general approach reinforces a preference for a political constitution. After explaining the changes that the Amendment Act will make to our system, I then outline the potential ways we could see political constitutionalism reinforced, or alternatively how we could see a movement towards a soft legal constitutionalism. This discussion illustrates the importance of Parliament's response in determining the significance of this legislation. Having done this, I then describe the key aspects of our constitutional culture, which suggest that a significant shift across the continuum from political to legal constitutionalism is unlikely. I conclude by suggesting that this Act presents a unique opportunity for the value of the courts to our political constitution to be realised.

II Political and Legal Constitutionalism Theory

Constitutionalism is concerned with the constraint of public power. Tompkins explains the purpose of a constitution as finding ways of holding government to account for its action.[5] Similarly, Willis suggests that the debate around constitutionalism is often related to exactly how this public power is, or should be, controlled.[6] There are two primary schools of thought on this issue. On one perspective, government power should be subject to a fundamental law, with judicial institutions and legal processes constraining power. This is known as legal constitutionalism.[7] A broader interpretation of constitutionalism, as Willis describes it, is political constitutionalism.[8] This sees the government as subject to fundamental laws without the need for direct legal expression of these laws. Democratic accountability and politics form the primary accountability.[9] The latter perspective, political constitutionalism, is often used to describe New Zealand.[10] However, it is important to understand both ideas completely, to consider whether the Amendment Act may alter this description.

This debate begins with JAG Griffith's lecture, "The Political Constitution".[11] Griffith's political constitution was largely descriptive, explaining British constitutional arrangements at the time.[12] This will later be contrasted to the more normative approach that has been taken in recent scholarship. A key aspect of Griffith's explanation of constitutional arrangements was that he did not see there as being any overriding 'rights',

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[5] Adam Tompkins *Our Republican Constitution* (Hart Publishing, Oxford and Portland, 2005) at 2-3.

[6] Edward Willis "Political Constitutionalism: The "critical morality" of constitutional politics" (2018) 28 NZULR 238 at 239.

[7] Richard Bellamy *Political Constitutionalism: a republican defence of the constitutionality of democracy* (Cambridge University Press, Cambridge, 2007) at 3.

[8] Willis, above n 6, at 239.

[9] Willis, above n 6, at 239.

[10] Willis, above n 6, at 264.

[11] JAG Griffith "The Political Constitution" (1979) 42 MLR 1. See also Graham Gee and Grégoire Webber "What is a political constitution" (2010) 30 OJLS 273 at 273, where Gee and Webber contend that the modern political constitution can be traced to Griffith.

[12] Gee and Webber, above n 11, at 276.

and instead suggested that we have conflicts between different groups of people.[13] Consequently, politics was the best placed tool to manage these conflicts, and law could not be a substitute for the importance of politics in this area. From this perspective, it followed that Griffith was highly critical of a Bill of rights, considering that such a Bill purports to resolve conflicts through providing their outcome independent of any political process.[14] This removes the opportunity for conflict away from the political sphere where it should rightfully sit.[15]

It is on this point that political and legal constitutionalism tend to directly conflict. Legal constitutionalism recognises fundamental laws and rights. It does not view rights as areas of conflict, but instead as issues which we can come to a logical agreement on in a democratic society.[16] Moreover, it suggests that courts should hold government power subject to these fundamental laws through judicial institutions and legal processes.[17] Having said this, it is important to note that Griffith did see a place for law, but emphasised the importance of realising the political nature of law. Law has a role in conflict management, but in accepting its political nature we become aware that judges make political decisions.[18] This brief introduction to political and legal constitutionalism illustrates the central tension in this dichotomy: disagreement as to how rights should be determined. This tension is what makes these theories so useful when assessing the impacts of the Amendment Act; the Act alters the way rights are determined in New Zealand.

The ideas presented in Griffith's seminal lecture have been built on in the following years. Whilst Griffith provides a primarily descriptive account, recent scholars have taken a more normative approach when developing the ideas of a political constitution, seeking to find a

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[13] Griffith, above n 11, at 17. This point is explained in Graham Gee "The Political Constitutionalism of JAG Griffith" (2008) 28 LS 20 at 27.

[14] See Griffith, above n 11, at 16-17. For a more detailed discussion of this point see Gee and Webber, above n 11, at 278.

[15] Gee, above n 13, at 28.

[16] Bellamy, above n 7, at 3.

[17] Willis, above n 6, at 239.

[18] Griffith, above n 11, at 19. This is explained in greater detail by Gee, above n 13, at 29.

justification for this theory.[19] There is general agreement within political constitutionalism that politics has a fundamental role in managing conflict, and a corresponding justification for this is the characterisation of politics as a democratic forum.[20]

Political constitutionalists argue that political equality through democratic elections is important in providing legitimacy to the political constitution. The democratic nature of the process justifies parliamentary sovereignty and encourages legal restraint from the executive.[21] As the executive is drawn from the legislature, the public are given a form of control over the executive and the legislature through representative democracy. Through the power to elect the government, the public have the ability to hold that government to account.[22] This is reinforced by the universal right to vote.[23] New Zealand has a very short electoral cycle, which increases the frequency at which government is held to account.[24]

Willis builds on this idea of the importance of parliamentary sovereignty. He notes that in New Zealand, there are no legal limitations on government enacting legislation where it holds the majority in the house.[25] Legal constitutionalists would call this a deficiency due to the lack of legal control. However, Willis suggests that political constitutionalism provides a broader understanding. The nature of democratic accountability provides a constraint on the exercise of this power, meaning government can be held to account without the need for an external legal control.[26] Beyond being held to account at election time, government is also subject to ongoing constitutional responsibility. Government

[19] Gee and Webber, above 11, at 276. See also the discussion of the movement towards normative scholarship in Aileen Kavanagh "Recasting the Political Constitution" (2019) 30 KLJ 43 at 54.

[20] Alexander Latham-Gambi "Political Constitutionalism and Legal Constitutionalism – an Imaginary Opposition?" (2020) 40 OJLS 737 at 742.

[21] Michael Gordon "Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit" (2019) 30 KLJ 125 at 133. This idea was also recognised by Griffith, who acknowledged that politicians are "much more vulnerable than judges and can be dismissed…". See Griffith, above n 11, at 19.

[22] Matthew Palmer and Dean Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Great Britain, 2022) at 120.

[23] Marco Goldoni "Two Internal Critiques of Political Constitutionalism" (2012) 10 ICON 926 at 933.

[24] Willis, above n 6, at 239.

[25] Willis, above n 6, at 238-240.

[26] Willis, above n 6, at 241-242.

needs to hold the favour of the House constantly and is only in government so long as it retains this support.[27] This provides ongoing accountability, which might be compared to legal accountability, where the government would only need to justify its decisions as proceedings arose.[28] An example of this constant responsibility in New Zealand is question time. Willis also suggests the convention that the Governor-General accepts the advice of a Ministry, on the basis that it has the confidence of the legislature, as another example of this ongoing responsibility to the legislature in action.[29]

Therefore, a key justification of political constitutionalism is representative democracy. The legislature is accountable to the people, meaning that if their conflict resolution is unsatisfactory, society can have their say through democratic election processes. This rationale is important to note, as I will later consider how the Amendment Act might have an impact on this justification.

A second key tenet of political constitutionalism relates to the contention that disagreement has a value to political life.[30] Whilst Griffith highlighted the importance of politics for resolving disputes, Gee suggests he did not consider the discussion that comes with these issues being considered in politics, and the potential imaginative solutions that can flow from a robust discussion.[31] However, this is now used as an explanation for more normative arguments, to help justify the preference for politics to resolve conflicts. On this normative approach, political processes have a unique ability to cope with disagreement and discussion. Unlike a legal adversarial system, politics allows for greater plurality of opinion.[32]

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[27] Tompkins, above n 5, at 1. See also Willis, above n 6, at 240. For a further discussion of this in the New Zealand context, see Janet McLean "The Unwritten Political Constitution and its Enemies" (2016) 14 ICON 119 at 122.
[28] Willis, above n 6, at 240
[29] Willis, above n 6, at 242
[30] Goldoni, above n 23, at 930.
[31] Gee, above n 13, at 26. For Griffith's discussion of the importance of politics, see Griffith, above n 11, at 16.
[32] Goldoni, above n 23, at 932.

This perspective, of rights as something for society to disagree on, can be contrasted to the perspective of legal constitutionalists. A legal constitutionalist views rights as being above standard politics.[33] Rights have a special importance, where they exist independently of, and precede, the political process. In this school of thought, rights are something to which a democratic society can come to a logical agreement about. They are not viewed as contestable, in the same way a political constitutionalist would view them.[34] Therefore, they can and should be entrenched, through a constitution or a declaration of rights. Part of the justification for this strong entrenchment or statement of rights, is the view of these rights as fundamental, and therefore requiring direct and strong protection.[35] Political constitutionalists critique this approach, as it means rights are not decided after considering multiple opinions. They contend that determining rights through adjudicative processes, rather than letting the public interest express itself, undermines the important right of equal participation.[36] Therefore, the ability of politics to cope with disagreements makes it uniquely placed to resolve conflict. Given that the Amendment Act has the potential to increase the plurality of opinions considered in legislation that affects rights, understanding this justification for political constitutionalism is important.

A further aspect of the distinction between rights as something for debate, and rights as something that can be agreed on, is the different perspectives on the purpose of rights protection. Goldoni argues this is a key difference between political and legal constitutionalism. Legal constitutionalism considers that rights should be protected on behalf of the individual. This perspective can be linked to the dislike of politics resolving conflict; there is concern that individual rights are not adequately protected in politics, where rights tend to be considered in the context of the common good. They are concerned that fundamental individual rights can be worn away through political decisions based on a utilitarian approach.[37]

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[33] Willis, above n 6, at 243.
[34] Bellamy, above n 7, at 3.
[35] Willis, above n 6, at 247.
[36] Goldoni, above n 23, at 932.
[37] Goldoni, above n 23, at 930.

This discussion has traced political constitutionalism to the descriptive writing of Griffith, discussing the role politics plays in managing conflict of rights. We have seen this develop into a more normative argument, where the role of politics is justified based on democratic grounds, as well as its unique role as a place for discussion. Conversely, legal constitutionalism disagrees that rights are contestable to begin with, and sees an essential role for the courts in holding government subject to fundamental, and objective, laws. This debate is inherently one about the relative roles of government and the courts in determining rights, making it a particularly useful lens through which to view the Amendment Act.

III Rights Determination and Political Constitutionalism in New Zealand

With this understanding of political and legal constitutionalism, it is useful to consider where New Zealand sits in this dichotomy. This is a mostly descriptive analysis, identifying the key aspects of the constitution, which has recently been described as "archetypally political".[38] Examining some key characteristics of the constitution in New Zealand helps us understand the inherently political nature of New Zealand's constitution. It is also necessary to expand on the current approach to rights determination under NZBORA, which can be characterised as mostly in line with political constitutionalism. I then explain the effects of the new sections inserted by the Amendment Act. This is a necessary base to then consider any effect the Amendment Act may have on the characterisation of our constitution.

Knight and Palmer explain how the New Zealand constitution "still looks to the centralised authority that comes with a strong executive, strict legislative supremacy and a unitary state…", characterising it as a pure Westminster system.[39] The concept of representative democracy is very important to it, and might be seen as the underlying principle.[40] Related to the adherence to democratic ideals, the constitution is also strongly premised on the

[38] Willis, above n 6, at 238.
[39] Palmer and Knight, above n 22, at 1.
[40] Palmer and Knight, above n 22, at 5.

concept of parliamentary supremacy. Willis suggests there are no legal limits at all on a New Zealand government enacting legislation, giving the government legal authority to make whatever laws it chooses.[41]

A further key aspect to note is the unwritten nature of the constitution. There is no single document that claims to contain the constitution, and as such it becomes especially important to look to how it operates in practice. An example of this are constitutional conventions, which are a key element in the constitution being described as political. These are crucial rules that are often expressed through politics. For example, Cabinet is a "creature of convention rather than law", and plays a central role in the distribution of political power.[42] Another example is the concept of individual ministerial responsibility, which ensures there is a clear political actor that can be held to account by the House of Representatives.[43] These conventions affirm the role of politics in the constitution in holding public power to account, but this requires a look beyond written legal documents and into the reality of how political power operates in New Zealand.

Generally, we can see the importance of politics to New Zealand's constitution. The rest of this section will explain in more detail how we see this general characterisation remains valid when the focus is narrowed to examine our constitutional approach to rights.

A The New Zealand Bill of Rights Act

In addition to the key principles of our constitution reflecting political ideas, it is also important to consider how this is demonstrated by the way we determine rights. A key aspect of the political and legal constitutionalism dichotomy is the conflict over whether rights are fundamental, and to be protected by law, or whether they are contestable and for determination by politics. Overall, the approach in New Zealand views rights as contestable. Whilst we have entrenched rights, which could indicate they are seen as

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[41] Willis, above n 6, at 241.
[42] Willis, above n 6, at 243.
[43] Palmer and Knight, above n 22, at 7.

fundamental, the lack of judicial override power and the framework of NZBORA instead serves to reinforce rights as an area for Parliament to debate.

The NZBORA was enacted in 1990, with Sir Geoffery Palmer describing its purpose as "to limit the powers of the executive and Parliament and to ensure that human rights were given greater legal weight."[44] A key document in the Act's formation was the White Paper in 1985.[45] This initially proposed that rights would be enforced as supreme law.[46] However, prior to its enactment, NZBORA was 'watered down' due to political necessity, and now functions as an ordinary Act of Parliament.[47] It can be repealed or amended through a standard majority of the House. Despite this ordinary law status, it remains an important part of our constitutional arrangements.

A crucial aspect of the Act is seen in s 4, which makes it clear that the courts do not have the power to strike down legislation which is inconsistent with the Act. It provides that "no court shall… hold any provision… invalid or ineffective, or decline to apply a provision of the enactment, by reason only that it is inconsistent" with NZBORA.[48] This reflects the status of the Act as ordinary legislation, and leaves the final say on rights issues in New Zealand to the elected legislature.[49] Section 5 is another key operative section, and although subject to s 4, it provides that the rights in NZBORA "may be subject only to such reasonable limits prescribed by law as can be demonstratively justified in a free and democratic society." In practice, courts use this section to determine whether the right being infringed through Parliament's legislation is a justified infringement, in terms of s 5.[50] The next relevant section is s 6, which states that where a rights consistent meaning can be found, this should be preferred to a rights inconsistent meaning. This provides an interpretative role for the courts, where if a rights infringement is deemed to be

[44] Geoffery Palmer "What the NZ Bill of Rights Act Aimed to Do, Why It Did Not Succeed and How It Can Be Repaired" (2016) 14 NZJPIL 169 at 171.
[45] Geoffery Palmer "A Bill of Rights for New Zealand: A White Paper" [1984]-[1985] 1 AJHR A6.
[46] Palmer, above n 45, at 22.
[47] Palmer, above n 44, at 174.
[48] New Zealand Bill of Rights Act 1990, s 4.
[49] Andrew Geddis "Rights Scrutiny in New Zealand's Legislative Process" (2016) 4 TPLeg 355 at 356.
[50] *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [92] per Tipping J.

unjustifiable in terms of s 5, then the court will search for an alternative, rights consistent meaning under s 6.[51] However, if no meaning is available, then s 4 makes clear the courts must apply an Act, no matter the potential rights infringement that might result.[52]

The consequence of these sections is that issues of rights determination are ultimately ones for Parliament. Geddis suggests that the primary restraint on the legislature's actions is therefore a moral one: one can only contend that Parliament should not legislate inconsistently with the rights contained in NZBORA, not that the legislature cannot do so.[53] This might be seen as reflecting political constitutionalism; the primary constraint is that Parliament should not be seen as willing to legislate contrary to rights. Where it does so, the predominant repercussions will be political ones, such as questioning by the people or the House, rather than any particular form of legal redress.

In addition to NZBORA placing rights determination in the sphere of Parliament, Parliament itself has also tended to act in ways that reinforce this division. This can be seen in the approach taken to s 7 reports. Section 7 contains the requirement for the Attorney-General to issue a report when a Bill is introduced to the House that appears to interfere with any rights or freedoms contained in the Act. The intention behind this section was for a report issued under it to have a significant impact on the legislative process. It would be rare for a report to be issued, but when they were, it was expected they would be taken seriously.[54]

However, this intention has not been realised in the way s 7 reports have been considered by Parliament. Geddis suggests that government Bills are nearly always enacted, with little

[51] Geddis, above n 49, at 359. See also *R v Hansen,* above n 50, at [92].

[52] See *R v Hansen,* above n 50, at [92]. There are numerous examples of s 4 applying in this way, but for some examples see *R v Phillips* [1991] 3 NZLR 175 (CA); *Police v Smith & Herewini* [1994] 2 NZLR 306 (CA); *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA); and *TV3 Network Services Ltd v R* [1993] 3 NZLR 421 (CA) at 423, where it was explicitly held that the right to freedom of expression is subordinate to the policy indicated by policy.

[53] Geddis, above n 49, at 360.

[54] Geddis, above n 49, at 360.

regard for an accompanying s 7 report.[55] On one perspective, the fact that these Bills which have been subject to s 7 reports are passed is not concerning. The nature of the reports means that what is being considered is whether this is an unjustified limitation on rights. Necessarily, this is a values judgement which can result in a range of reasonable views.[56] On a normative political constitutionalist approach, this position might be acceptable; these are examples of conflicts of rights, which Parliament should have the right to determine. However, despite this room for reasonable disagreement on how rights should be qualified, Ip suggests that the regularity at which Bills are enacted without any amendment as a result of issues raised in a s 7 report is concerning. Moreover, a significant issue arises where reports are not engaged with at the time of enactment.[57] The purpose of a s 7 report is to encourage elected officials to consider rights issues with the legislation being passed.[58] Where they are not engaging with the reports, they are consequently not engaging with rights issues. For a political constitutionalist, the lack of consideration undermines the rationale that politics is best placed to consider a multitude of opinions. So, whilst Parliament is reinforcing political constitutionalism through asserting its right to make ultimate decisions on issues of rights, it is also undermining its position of power through not giving proper consideration to all factors before making its decision. This lack of consideration is an issue I will draw on when discussing the potential outcomes of the Amendment Act in terms of constitutionalism.

B The Declarations of Inconsistency Amendment Act

Overall, it appears that the present constitutional arrangements, especially when it comes to rights determination, are strongly political. Our representative democracy justifies this

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[55] Geddis, above n 49, at 362. Geddis relied on empirical research, stating that at the time of writing (2016) 28 of the 35 government Bills attracting s 7 reports had been enacted without amendment. Only 3 had so far been amended as a result of a report.

[56] Geddis, above n 49, at 371. See also John Ip "Attorney-General v Taylor: A Constitutional Milestone?" (2020) NZ L Rev 35 at 42.

[57] Ip, above n 56, at 6-7.

[58] Geddis, above n 49, at 362. See also Grant Huscroft, 'The Attorney-General, the Bill of Rights, and the Public Interest', in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's, Wellington, 1995) at 137.

in many ways; representative democracy is a key justificatory idea that underlies political constitutionalism, and it is also an important aspect of the New Zealand constitution. However, the Amendment Act brings in some changes that might shift the way our constitution functions. Firstly, we need to understand what the Amendment Act does and how it changes constitutional relationships.

A key aspect of uncertainty with NZBORA since its enactment has been whether the courts can issue a declaration of inconsistency. This power was finally recognised by the courts in *Attorney-General v Taylor,* firstly by the High Court.[59] The decision was appealed, with the majority of the Supreme Court eventually confirming the High Court's power to issue a declaration of inconsistency.[60] However, the minority refused the remedy based on concern that it would not function as an actual remedy. Instead, they thought a declaration might "simply hang in the air."[61] At the same time as the Supreme Court was considering this case, Parliament began considering legislation in relation to this power. The Amendment Act will require a government response to a declaration of inconsistency.[62] This might go some way towards alleviating the concerns of the Supreme Court minority in *Attorney-General v Taylor,* by ensuring that there is a practical consequence when a declaration of inconsistency is made.[63]

The aim of the Amendment Act is to "facilitate consideration of the judiciary declaration of inconsistency".[64] As first introduced, it added s 7A to NZBORA, which required the Attorney-General to report to Parliament following a declaration of inconsistency being made, by the sixth sitting day after the declaration became final.[65] The Amendment Act as

[59] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [66].
[60] *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [65] and [107].
[61] *Attorney-General v Taylor,* above n 60, at [134] per O'Regan J.
[62] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022, cl 4, which inserts s 7B into the New Zealand Bill of Rights Act 1990.
[63] For the concerns referred to see *Attorney-General v Taylor,* above n 60, at [134] per O'Regan J.
[64] (11 May 2022) 759 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Second Reading, Kris Faafoi).
[65] This can be seen in the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1), cl 4, which would have inserted s 7A before the Bill was altered before the second reading. The six sitting days requirement can be found in s 7A(2) of the New Zealand Bill of Rights Act 1990.

initially introduced was described as including only a "mechanical requirement".[66] Whilst the idea of having a formal process through which a declaration required response was generally seen as desirable, some submitters on the Amendment Act were concerned it did not go far enough. Knight described it as "passive, weak and understated", and suggested that both Parliament and the executive should be required to respond to a declaration.[67] Geiringer and Geddis provided a joint submission to the Privileges Committee and raised similar concerns.[68]

The Privileges Committee responded to these submissions, and the Amendment Act as presented at the second reading created a much stronger framework. Section 7A was changed to require the Attorney-General to notify Parliament, rather than provide a report. It inserted a new section, which provides that where a notice is presented under s 7A, the Minister responsible must provide the government response to the House within six months, unless this deadline is extended.[69] Outside of the statute, the committee suggested that the relevant parliamentary processes should be contained in the standing orders. This has now been included in the sessional orders, which set out the relevant changes to the standing orders.[70]

A key aspect of the process is the requirement for a select committee to consider and report on the declaration within four months.[71] This will help inform the government response. The Privileges Committee report suggested that this requirement for the government to present their response ensures that declarations are given proper consideration by

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[66] Privileges Committee, above n 2, at 1.

[67] Dean Knight "Submission to the Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020".

[68] Claudia Geiringer and Andrew Geddis "Submission to the Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020". Geiringer and Geddis drew on precedent from other jurisdictions to support their contention that Government should be required to present their response to the declaration to the House.

[69] Section 7B.

[70] Sessional Orders of the 53rd Parliament, 31 August 2022, "Declarations of Inconsistency".

[71] Explained in Privileges Committee, above n 2, at 6-7. This recommendation was implemented in the3 Sessional Orders, above n 70, r 6.2.

government.[72] In addition, it noted that bringing this report to the House ensures that Parliament fulfils its constitutional role of being informed of the judiciary's view on a particular issue, as well as the government's proposed response to it. When the report is presented, a debate will be triggered in the House to consider the declaration, the select committee report and the proposed government response.[73] The statute provides for the six-month deadline to be shortened or extended, and this is also reflected in the sessional orders.[74] The Privileges Committee explained this provision. Whilst they thought it desirable to have a deadline, they also wanted to allow for flexibility within it. This is due to the potentially high complexity of issues involved, and the desired balancing of the "need for a good and high-quality response with a requirement to respond in the timeframe."[75]

The Amendment Act therefore introduces and formalises some key changes regarding who is involved with determining rights in New Zealand. This is a significant constitutional change. However, the extent to which it might shift our constitution can be debated.

IV The Possible Implications of the Amendment Act

The Amendment Act is important because it provides a formal procedure through which Parliament has to consider a declaration of inconsistency issued by the courts. New Zealand's approach to rights determination was strongly aligned with political constitutionalism prior to this Act, with politics the driving check on the exercise of public power. This is true of the fundamental principles that underpin the constitution, as well as many of the practices that are a key component of it. However, the Amendment Act has the potential to change the way rights are determined in New Zealand. Moreover, it could result in a slight shift away from political constitutionalism. Whether, and to what extent, a shift occurs, will depend largely on Parliament. Parliament can choose the extent to which it engages with what the courts say. This might have important implications for

[72] Privileges Committee, above n 2, at 3.
[73] Proposed in Privileges Committee, above n 2, at 3. See also Sessional Orders, above n 70, at r 10.
[74] Section 7B(2). This recommendation was implemented in Sessional Orders, above n 70, r 8.
[75] Privileges Committee, above n 2, at 4.

constitutionalism; the more the courts influence rights, the greater any shift will be. However, Parliament can also affect the frequency with which courts will have the opportunity to comment on rights issues. The Amendment Act provides the opportunity for Parliament to strengthen the normative justifications for political constitutionalism, in which case there will be less need for court engagement. This discussion seeks to highlight how instrumental Parliament's actions will be in determining the nature of any constitutional shift. Given the dependency of the shift on Parliament's actions, in order to fully understand the impacts of the Amendment Act I will then need to engage with the constitutional culture of New Zealand. This will provide an indication as to how both Parliament and the courts are likely to respond to these changes.

A The Practical Impact of Parliament's Engagement with Declarations

This section seeks to examine the practical implications this Act could have on rights determination. It firstly considers whether the Amendment Act provides courts with a role in rights determination outside that which a political constitutionalist would desire. It concludes that this is unlikely, unless Parliament acts in a way that give courts a significant say in this area. I then explain how, in practice, we are likely to see greater consideration of individual rights reflected in our legislation, although the extent of this will again depend on Parliament's engagement.

1 A movement of the conflict of rights?

The first way Parliament can influence how this change is received is the extent to which it engages with what courts say in their declarations. This will affect whether the Amendment Act can be viewed as moving political conflicts into the realm of the courts. Whilst it should be acknowledged that *Attorney-General v Taylor,* rather than the Amendment Act itself, determined declarations were an available remedy, the Act provides an important legitimacy to declarations.[76] By affirming the court's power to issue a declaration, it could be argued that the Amendment Act plays a role in moving political

[76] *Attorney-General v Taylor,* above n 60, at [65] and [107].

conflicts. It provides a requirement for government consideration of the declaration, which can be seen as endorsing a role for the courts when it comes to rights determination. It will mean there is more engagement by Parliament with the perspectives of courts in the area of rights. This has the potential to be a shift that political constitutionalists would find affronting.

However, this contention needs to be assessed in more detail. On one level of political constitutionalism, this might not be an issue. Much of Griffith's initial reluctance regarding political conflicts being determined by the courts stemmed from a dislike for Bills of rights that purported to resolve conflicts without discussion.[77] However, it seems the conflict would be properly considered under the Amendment Act. It does not provide for a judicial override power, but rather a mechanism through which the court's perspective must be taken into account.[78] Courts are therefore not resolving conflicts directly, which might alleviate some concern. However, they are still engaging with these conflicts, and it is important to consider whether the nature of their involvement mat have the potential to go too far in the eyes of political constitutionalism.

This raises the question of the nature of the rights the courts are determining. Griffith always acknowledged the role that courts had to play in determining these political conflicts; he never contended that there was no role at all for the courts.[79] To determine if conflicts have been moved in an undesirable way, in terms of political constitutionalism, we need to examine the appropriate role for courts as construed by political constitutionalism. Tomkins explains where it might be appropriate within a political constitution for courts to have a role. He suggests that where civil liberties are qualified, then the act of balancing public interest with civil liberties is one that sits in the parliamentary sphere.[80] There are some qualifications that are more prescribed, and where there is less of a proportional balancing test to be applied, it will be more appropriate for

[77] Griffith, above n 11, at 16-17.
[78] Section 7B.
[79] This point is explained by Gee, above n 13, at 29.
[80] Adam Tomkins "What's left of Political Constitution?" 14 German Law Journal 2275 at 2281.

the courts to make this judgment. However, situations such as here, where the court is making a declaration of inconsistency based on the test of what is 'necessary in a democratic society' present a more controversial point.[81] It means courts are weighing values, and coming to a conclusion on the political conflict between values that might be different to that of Parliament. There is an argument to be made that courts declaring legislation to be inconsistent with NZBORA, and therefore determining that they disagree with the way Parliament has chosen to qualify rights, means that courts are determining conflicts of rights outside of what their role in a political constitution should be.

The Amendment Act legitimises the courts' role, and extends the influence they might have over conflicts of rights, through providing for Parliamentary consideration of the declaration. This means there is potential for a greater role for the courts than prior to the Amendment Act. If they are weighing up relative rights, then in a way they may be conclusively resolving conflicts. However, the Amendment Act does not provide that a declaration has to be used to change legislation, it only requires that a response should be made. The ultimate power remains with the legislature. This means that even if courts are becoming involved outside the scope of what political constitutionalists would prefer, it might be seen as an insignificant issue because the final decision remains with Parliament.

With this in mind, whether the conflict of rights will end up being essentially resolved in the courts (and then adopted by Parliament) may come down to the seriousness with which the legislature treats a declaration. If, as is most likely, the legislature takes the declaration and weighs this against other factors, then they will remain as the body that ultimately determines the political conflict. From a more descriptive viewpoint, given that the essence of the conflict seems to remain with Parliament, there may not be a shift towards legal constitutionalism as a result of this Act. For a more significant shift to occur, Parliament would need to display a great deal of deference to the courts' suggestions when it issues a declaration of inconsistency, to the extent that it results in courts effectively becoming the primary determinants of conflict.

[81] Tomkins, above n 80, at 2284.

2 Increased consideration of individual rights

Having considered the potential shift from a political constitutionalist lens, we can also more directly consider how legal constitutionalism might be seen in this shift. Relevantly, a legal constitutionalist sees rights as inherent, existing as fundamental laws to which Parliament should be held subject. This justifies their entrenchment in a constitution or Bill of rights, to protect them from the whims of politics.[82] Through respecting the power of courts to give a declaration of inconsistency, the Amendment Act arguably places more respect on these fundamental rights. It allows for greater protection by the courts of these natural rights.[83] This is because courts have the opportunity to engage in conversations about these rights and restart discussions regarding their protection.

As well as seeming to place greater emphasis on rights more generally, it is also important to note the possible increase in consideration of individual rights, as compared to group rights, in our legislation. Gee discusses how Griffith prioritises the group over the individual, hence the preference for political processes as these are better placed to consider the interests of a group.[84] Goldoni goes further than this, describing legal constitutionalists as seeing rights as serving the individual, whilst political constitutionalists see rights as affecting the common group.[85] The Amendment Act might allow for greater consideration of individual rights when determining political conflicts. It requires both Parliament and government to consider a declaration of inconsistency.[86] A declaration of inconsistency will often be related to a case of individual rights, as that is most likely what the court will be asked to consider in the specific cases that come before it. Political processes will now have to take into account a decision about rights that is based on the individual. As such, we may see greater reflection of individual rights in our legislation. However, this will again be partially dependent on the extent to which Parliament engages with issues raised in declarations.

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[82] Goldoni, above n 23, at 931.
[83] Willis, above n 6, at 247.
[84] Gee, above n 13, at 28.
[85] Goldoni, above n 23, at 931.
[86] Section 7B.

B Impacts on the Normative Justifications for Political Constitutionalism

Parliament may also be able to influence the frequency with which courts can comment on legislation. This is due to its ability to either justify, or undermine the justifications, for our political constitution. The prospective relationship between s 7 reports and declarations of inconsistency is relevant to this. Examining the relationship brings to light some possible consequences of the Amendment Act for political constitutionalists, which will again be dependent on the way the legislature chooses to respond to the Act. As outlined earlier, s 7 reports were intended to be a key aspect of NZBORA, but scholars have commented on the lack of regard that tends to be paid to reports when legislation is enacted.[87] However, it is contended that this Act has the potential to significantly alter the regard that is had to s 7 reports. If it does, then the justifications for our political constitution will be strengthened. Alternatively, if we see disregard for s 7 reports continue, and declarations of inconsistency treated in the same way, then this calls into question some of the normative justifications for a political constitution. The impact on normative justifications may also have a practical effect on declarations of inconsistency, affecting how often they are made.

Issues relating to compliance with NZBORA raised in s 7 reports do not always result in changes to Bills before they are enacted. This means that we might expect to see the same compliance issues raised again by courts in declarations of inconsistency, if the courts also see legislation as having an unjustified impact on rights guaranteed in NZBORA. There are potential political implications for the courts and the Attorney-General taking similar views on the way the legislature has dealt with rights in certain situations. Declarations of inconsistency might bring attention to the lack of consideration given to a s 7 report, through a court drawing on a s 7 report when reaching its decision. Politically, it is undesirable for the legislature to have it made clear that it legislated in a certain way, despite knowledge of the rights implications.

[87] See, for example, Geddis, above n 49, at 357.

This illustrates two potential issues. Firstly, that the legislature is not taking all possible perspectives into account when legislating, which might call into question the rationale of political constitutionalism that Parliament is in a position to consider all relevant views. If Parliament is not realising this unique position through its actions, then the rationale falls away. Further, having two key political actors (the courts and the Attorney-General) reaching the same conclusion on what is admittedly a political balancing test, would seem to call into question the view reached by the legislature. It can be argued it is inherent in the political constitutionalist position that Parliament's appointment through representative democracy and its ability to examine conflicts of rights, means that Parliament will make good decisions. These ideas justify the political constitutionalist approach of having Parliament be the ultimate arbiter of rights. However, if Parliament is reaching a decision which is significantly different to that of the courts and the Attorney-General, we might question whether it is in the best position to be determining rights.

Declarations of inconsistency might bring the lack of engagement with s 7 reports to greater attention, particularly from the public. This potential for increased attention to s 7 reports is important, because a key normative justification for a political constitution is that politics is the best arena through which to determine conflict. Political constitutionalists suggest that unlike legal processes, which often only account for two perspectives, political processes invite a greater plurality of opinions. Goldoni argues that this justifies the authority of law made by Parliament.[88] Similarly, parliamentary supremacy is an important aspect of a political constitution. Geddis contends that if legislative behaviour does not reach a certain standard then it might not deserve this legitimacy.[89] Another way of explaining how crucial good political processes are to political constitutionalism is that there is a moral responsibility on those in politics to listen to other views.[90] Political constitutionalism rests on the idea that politics are uniquely placed to deal with law, and

[88] Goldoni, above n 23 at 931-932. In particular, he comments on the equal participation that politics provides.
[89] Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" (2011) NZ L Rev 443 at 461.
[90] Gee, above n 13, at 27.

this is due to their ability to reflect the views of a population, and take into account different aspects of a conflict.

However, the Amendment Act has the potential to undermine this justification, depending on the actions of Parliament. If s 7 reports continue to be disregarded as they often are now, and declarations of inconsistency overlap with critiques made in these reports, then this calls into question whether politics is the best sphere to be determining these issues. If the ability of politics to engage with multiple opinions is not being realised by our legislature, then the justification for removing them from the realm of the courts falls away. Further, having little regard to the perspectives of other key actors might be viewed as not reaching the standard we would expect from our legislative branch. This could undermine the legitimacy of parliamentary supremacy, which is a crucial aspect of political constitutionalism.

Alternatively, the Amendment Act has the opportunity to strengthen the rationale for a political constitution. Parliamentary concerns regarding potential political implications could result in the legislature taking s 7 reports more seriously. Further, the declaration could also strengthen the conflict resolution process in politics, if it is genuinely engaged with as an input to resolving conflict. If Parliament properly utilises the critiques contained in declarations of inconsistency and s 7 reports, then the arguments of political constitutionalists might be strengthened. Thoroughly engaging with these different perspectives strengthens the ability to resolve political conflicts. In particular, it has the potential to allow for more creative solutions to issues. If it can be shown that the legislature is genuinely engaging with issues, in a way it might not have done before, then the justification for our political constitution increases. Declarations, and the statutory requirement to consider them, can create stronger conflict resolution processes.

If we see the legislature beginning to treat s 7 reports more seriously, then this could affect the frequency with which declarations of inconsistency are made. This is an example of how we might see the effects of Parliament reinforcing the justifications for a political constitution affecting our constitution in a more descriptive sense. McLean suggests that

where Parliament has properly engaged with a s 7 report, courts might be less likely to grant a declaration.[91] This suggestion reinforces the idea that we will have more respect for the processes of Parliament where they are good, and therefore have less need to question them. For example, if a s 7 report has raised a particular issue with a piece of legislation, and Parliament directly considers this issue before legislating, then it might be less likely a court would issue a declaration based on this same point. This idea was acknowledged by Chris Penk MP. He stated he would feel more uncomfortable if the House had "to respond to a declaration of inconsistency by the courts, when this House acknowledged in the first place that the Attorney-General had said there was an inconsistency."[92] This seems to contemplate that where the House has acknowledged an issue, and decide to legislate anyway, it might be outside of the judicial role for courts to comment on this again. For this to apply, Parliament would need to ensure it thoroughly engaged with the issues raised in the report.

Parliament has the opportunity to control how often declarations are made, and therefore might be able to limit the involvement of courts in rights consideration. If it employs good processes, such as thoroughly considering s 7 reports, then this strengthens the rationale for Parliament determining rights issues. This justificatory strengthening can have an impact on political constitutionalism in practice. Courts may be less likely to feel a need to engage with issues where Parliament has fulfilled its role properly. We can therefore see how, through proper engagement with issues before legislation is enacted, Parliament can reinforce the propriety of its role in rights determination. There will be less need for declarations. This means that rights issues will remain with the legislature, because through its actions of properly considering rights issues, it has justified these issues remaining in its sphere.

[91] Janet McLean "The New Zealand Bill of Rights Act 1990 and Constitutional Propriety" (2013) 11 NZJPIL 19 at 35.

[92] (23 August 2022) 762 NZPD (Declarations of Inconsistency Amendment Bill – Third Reading, Chris Penk).

This discussion has made it clear that the extent of any shift in our constitutional arrangements will be extremely dependent on Parliament. There is also some room for the courts to influence this, in terms of their ability to ensure greater consideration is paid to individual rights. The next section will consider in more detail how Parliament is likely to respond to this change, based on evidence of the constitutional culture. It draws on an example of how Canada responded to a legislative change in rights that is formally more powerful than the one the Amendment Act brings, to illustrate how crucial culture can be in determining the shifts effected by a constitutional change. It then considers what the key characteristics of New Zealand constitutional culture are. This is supported by empirical evidence of Parliamentary consideration of s 7 reports, as well as Parliamentary debates over the Amendment Act.

V The Impact of Culture on Constitutional Change

Throughout this discussion of constitutional implications, it is evident that any movement will be dependent on the attitudes and actions of key actors in our constitution. Palmer reinforces this point, considering that the content of our constitution will necessarily be influenced by the beliefs of those involved in its operation, as these beliefs can affect its operation.[93] To what extent will the legislature engage with, and take into account, the court's opinion made through a declaration? Will Parliament thoroughly engage with issues, thereby strengthening its position as ultimate determiners of rights, or will it undermine its own role? In order to answer these questions, and properly consider whether any constitutional change is likely, we need to reflect on our constitutional culture. Firstly, this paper draws on the use of the notwithstanding clause in Canada, to illustrate how fundamental culture can be to determining the way law plays out. Having established the relevance of culture in that context, I then consider what the nature of the constitutional culture is in New Zealand. Drawing on this culture, I then theorise as to the likely impact of the Amendment Act on the constitutional arrangements of New Zealand.

[93] Matthew Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 565.

A The Canadian Experience and the Relevance of Culture

So far, I have considered the potential impacts that the Amendment Act might have and explained the many possible directions our law could take us. Often, it is difficult to predict how law will be received and implemented just by reading it; its practical impact will depend widely on the political context. To illustrate this point, I will draw on an overseas example where culture has impacted rights legislation in practice. Section 33 of the Canadian Charter of Rights and Freedoms contains what is known as the "notwithstanding clause".[94] This clause provides that both federal and provincial legislatures can declare that an Act may operate notwithstanding certain rights protecting provisions in the Charter.[95] Whilst such a declaration ceases after five years, legislatures may re-enact the legislation if they choose.[96] This is a unique provision. The Charter is a constitutional Bill of rights and gives courts the power to legislate inconsistently with the key rights contained in it. However, through s 33, Parliament (either federal or provincial) retains ultimate determination of the law.[97] The clause is similar to one contained in the earlier Bill of Rights.[98]

When this was enacted, it could reasonably have been perceived that s 33 would be used often. Whenever a law was passed that infringed on rights, legislatures could have declared an intention for the law to apply notwithstanding the Charter. In fact, this is exactly how Quebec responded to the passing of the Charter. When the Charter was being considered, Quebec was strongly opposed to its adoption, in part due to its views that such a significant constitutional change should not be made without the consent of Quebec (as one of the

[94] Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK), s 33.
[95] Section 33(1).
[96] Sections 33(2) and (3).
[97] Stephen Gardbaum "Reassessing the new Commonwealth model of constitutionalism" (2010) 8 ICON 167 at 170.
[98] This is explained by Eric Adams and Erin Bower *Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the* Charter (Review of Constitutional Studies) (Forthcoming) at 6. For the earlier Act see Canadian Bill of Rights Act SC 1960 c 44.

founding partners).[99] Once it was adopted, the Quebec National Assembly invoked the clause retrospectively, across all legislation. This response made a "symbolic statement that this legislation would operate notwithstanding the Charter."[100] This action is an example of the strong impact culture can have on the way legislation operates. Quebec constitutional culture can be described as reflecting strong nationalist values.[101] We see this reflected in their response to the passing of the Charter, and their utilisation of it as a political statement. Whilst an extreme example, it illustrates the significant impact that culture and the responses of individual actors can have on the way legislation is received. Here, Quebec used the new provision to restate their parliamentary supremacy, instead of allowing a shift towards giving power to the courts.

A distinction can be made between the use of this clause by the provincial legislatures, and by federal legislatures. Albert notes that the provincial notwithstanding power has been used many times, compared to the federal power which has never been used.[102] This might be an example of culture at play. Newman puts forward the idea that the difference between provincial and federal legislatures reflects that provincial legislatures are more likely to depart from the political median. Each provincial legislature can choose how they wish to use the clause, and this is reflected in the different usage of each clause.[103] Quebec, as discussed above, has a culture of using this clause. This might be compared to Ontario, where until recently, the clause was seen as having little place in politics.[104]

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[99] Janet Hiebert "The Notwithstanding Clause: Why Non-use Does Not Necessarily Equate with Abiding by Judicial Norms" in Peter Oliver (ed) *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, New York, 2017) at 698.

[100] Hiebert, above n 99, at 698.

[101] For a discussion of how "nationalism dominates Quebec politics" see Hudson Meadwell "The Politics of Nationalism in Quebec" (1993) 45 Wld Pol 203.

[102] Richard Albert "The Desuetude of the Notwithstanding Clause – And How to Revive it" (10 December 2016) Social Science Research Network <www.ssrn.com> at 8.

[103] Dwight Newman "Canada's Notwithstanding Clause, Dialogue and Constitutional Identities" in Geoffery Sigalet, Grégoire Webber and Rosalind Dixon (ed) *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press, 2019) at 226.

[104] Jeffery Myers "Doug Ford uses the notwithstanding clause for political benefit" *The Conversation* (online ed, 13 June 2021).

However, the use of s 33 can overall be characterised as limited. Billingsley points out that whilst Quebec is the most common user of the clause, it had only used it 17 times over 20 years (from 1982-2002).[105] It is useful to consider why this might be, and how these reasons can be connected to the constitutional culture of Canada. One reason that is often given is the fear of political implications.[106] Because s 33 requires legislatures to directly invoke it, legislatures must explicitly derogate from rights.[107] This is less politically tenable than in New Zealand; Hiebert suggests that the New Zealand legislature can be passive in their disagreement with courts.[108] Comparatively, the political implications for a Canadian legislature using s 33 are more significant due to the need to be explicit. Hiebert explains how there is public confidence in the courts, coupled with a regard for the Charter. This confidence might viewed as reflecting legal constitutionalist values in the culture of Canada. These two aspects of the constitutional culture mean that where the clause is used, legislatures will be under strong pressure to explain and justify the use of the clause.[109] She also suggests that the justification is made more difficult due to an association of the clause with overriding rights.[110] Again, this public distrust of use of the clause is an important cultural aspect that appears to be influencing the use of the Charter in practice.

Albert offers another explanation for the lack of use, and this can also be connected to the culture. He characterises the power in s 33 as "politically toxic", due to the high political risk that comes with this use.[111] He is concerned that political actors are conforming to the standard practice of not using this section.[112] Albert proposes that resolving the lack of use of s 33, which he characterises as a problem, would require us to "redirect the culture

[105] Barbara Billingsley "Section 33: The Charter's Sleeping Giant" (2002) 21 Windsor YB Access Just 331 at 341.
[106] Albert, above n 102, at 4; Billingsley, above n 105, at 343; Hiebert, above n 99, at 706.
[107] Adams and Bower, above n 98, at 8.
[108] Hiebert, above n 99, at 703-704. Hiebert explains how New Zealand Parliament can simply ignore judicial statements at present, whereas the Canadian section requires legislatures to be assertive in their dismissal of rights.
[109] Hiebert, above n 99, at 706.
[110] Hiebert, above n 99, at 706.
[111] Albert, above n 106, at 4.
[112] Albert above n 106, at 6.

towards one where political actors interpret the Constitution on their own."[113] This is a direct reference to the importance of culture on the way laws are used.

Culture has been crucial in informing how the Canadian notwithstanding clause has applied in practice. This clause could have been utilised in a way which reinforced parliamentary supremacy. However, for the most part, there has been a strong reluctance to use this clause, that can be traced to the constitutional culture. In particular, the dominance of legal constitutionalist norms in Canadian culture has meant there is greater trust in the courts, which in turn creates significant political costs for Canadian legislatures, both provincial and federal, seeking to use this clause. This is an interesting comparison to New Zealand. Canada could have used this clause in a way to assert a political constitutionalism, but the presence of legal constitutionalism in their culture resulted in a largely legal constitutionalist approach being taken to this clause. In the next sections, I will explain how New Zealand has a comparatively political constitutionalist culture, and suggest that this culture means that while the Act could be used in a way to shift towards legal constitutionalism, this is unlikely due to the preference for political norms. In the same way that constitutional norms of Canada can be seen in their response to a significant constitutional change, the constitutional culture of New Zealand will be crucial in determining how the Amendment Act is utilised in practice.

B What is the New Zealand Constitutional Culture?

Examining the New Zealand constitutional culture will draw on two key sources of information. Firstly, Palmer's analysis of the key values of our constitution will be explained. Palmer defines constitutional culture as "New Zealander's collective mindset or set of attitudes that relate to the exercise of public power."[114] He has written extensively on what he views as the key aspects of our constitutional culture, and this paper seeks to adopt his analysis to help consider the likely response to the Amendment Act. Building on

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[113] Albert, above n 106, at 9.

[114] Matthew Palmer "The Place of the Judiciary in the Constitutional Culture of New Zealand" (paper presented to the Symposium of Australasian Constitution, Centre for Comparative Constitutional Studies, University of Melbourne Law School, 13-14 December 2013) at 4.

this analysis, we can also consider evidence of how this culture operates in the NZBORA context. The way Parliament has engaged with rights issues raised by the courts in recent times can be used to illustrate how it might be likely to engage with rights issues raised by declarations of inconsistency. Similarly, drawing on statements made by the legislature when the Amendment Act passed its third reading can bring to light what Parliament sees the purpose of this Act as being. The purpose, as will be discussed, can be very important in understanding how key actors will view the practical operation of the Amendment Act. It is also evidence of our culture in the context of rights determination.

Egalitarianism, authoritarianism and pragmatism have been outlined as the key norms of our constitution. The possibility of fairness being a fourth norm has also been considered in detail.[115] Palmer describes egalitarianism as the strongest constitutionalism norm, and something we see reflected in our representative democracy.[116] It is characterised by a belief in equality and the collective.[117] We select those who "wield the coercive power of government", and on this basis, the government cannot and should not see themselves as superior.[118] The second key norm is authoritarianism, and this can be linked to the strength of parliamentary supremacy in New Zealand, as well as the executive dominance of the legislature.[119] There is a strong expectation and reliance on government to solve our problems. Palmer suggests that we have never really seriously questioned the primacy of parliamentary sovereignty in our constitutional arrangements.[120] Pragmatism is identified as the third norm, and Palmer draws on our assertion of an unwritten constitution as an example of this. We are reluctant to tie our hands in the future, and an unwritten constitution allows for flexibility. He also suggests it explains the incrementalist approach we have taken to constitutional change.[121]

[115] See Palmer, above n 93.
[116] Palmer, above n 93.
[117] Palmer and Knight, above n 22, at 17.
[118] Palmer, above n 93 at 576 and 580.
[119] Palmer, above n 114, at 4.
[120] Palmer, above n 114, at 7.
[121] Palmer and Knight, above n 22, at 21.

The final norm that he raises is fairness, linked to the rule of law. However, he has been less certain of the place of this within our culture. In his earlier piece, he linked the value we place on the rule of law to our separation of powers.[122] He questioned the extent it might be relevant in New Zealand when it comes to the comparative value we tend to place on politicians as opposed to judges. In doing so, concern was raised that there is a lack of understanding of the importance of the judiciary and the rule of law in our culture.[123] In a 2013 piece, he developed this point by bringing up examples of where we have chosen to use administrative law, rather than the courts, to provide a check on public power. For example, he discusses the use of the Ombudsman, the creation of the Waitangi Tribunal and the introduction of our accident compensation system. Palmer suggests these tend to show that New Zealand does not stand by the importance of judicial power in our constitution.[124] Most recently, in a 2022 book, he reiterated this point, suggesting that we do not see courts as the best means of providing fairness, and that we do not understand the importance of the rule of law.[125] It seems that fairness and the rule of law have the potential to be a key part of our constitutional culture, but it is not something that New Zealanders have yet been willing to recognise.[126] It is possible to link this lack of recognition to the strong political constitutionalist nature of New Zealand; there is trust in Parliament, and a corresponding lack of trust in the courts. This again illustrates the prevalence of political constitutionalism in New Zealand.

So far, constitutional culture has been set out in a relatively theoretical way. However, to gain a complete understanding of the culture it is also useful to reflect on some recent examples of this culture in action, particularly in the context of rights. Section 7 reports can provide a useful indicator of Parliament's culture in practice when faced with suggestions that legislation is breaching fundamental rights. As discussed above, in the past Geddis has suggested that little attention is paid to s 7 reports.[127] The recent parliamentary

[122] Palmer, above n 93, at 587
[123] Palmer, above n 93, at 589.
[124] Palmer, above n 114, at 10-11.
[125] Palmer and Knight, above n 22, at 19.
[126] Palmer, above n 114, at 21.
[127] Geddis, above 49, at 362.

debate surrounding the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act provides an interesting look at a more recent example of how the House considers s 7 reports.[128]

The Child Protection Amendment Act was a response to the decision in *D v NZ Police,* which raised the issue of whether the main Act, which provides that a court may make registration orders for a person convicted of a qualifying offence, applied to someone who committed the offence before the Act came into force.[129] The Supreme Court determined the Act was not clear enough to displace a presumption against retrospective penalties.[130] The Amendment Act was a response to that case, and sought to clarify that the primary Act applies to all offenders, whether or not the offending occurred prior to the Act coming into force.[131] The Attorney-General submitted a s 7 report, highlighting an unjustified inconsistency with the right to benefit from a lesser penalty and freedom from double jeopardy.[132] The s 7 report received a reasonable number of references throughout the readings of the Amendment Act. However, many of these references did not fully engage with the meaning of the report. Instead, the inherent role of Parliament to make a trade-off between rights was often recited.[133] The importance of the s 7 report as balancing rights and determining that a limit on the rights in question was mostly diminished. Golriz Gharaman MP raised serious concerns at every reading surrounding the fact that both the Supreme Court and the Attorney-General had concluded this legislation would be an

[128] Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021.

[129] D (SC 31/2019) v New Zealand Police [2021] NZSC 2, [2021] 1 NZLR 213, considering the application of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016. Section 9 of the Act provides the power for the court to make a registration order, and ss 7-8 deal with who is a registrable offender.

[130] At [81]-[84], explained in Attorney-General "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the (Child Sex Offender Government Agency Registration) Amendment Bill (2021).

[131] Attorney-General, above n 130, at [11].

[132] Attorney-General, above n 130, at [2]. These rights are protected in the New Zealand Bill of Rights Act 1990, ss 25(g) and 26.

[133] For example, see (17 March 2021) 750 NZPD (Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021 – Third Reading, Arena Williams).

unjustified limit on rights.[134] However, other members were "horrified" at this position.[135] The diminishment of the importance of both the Attorney-General report, and the Supreme Court decision, by the majority of the House reinforces that authoritarianism remains a key part of the culture. It also indicates a lack of willingness to seriously consider the weighting of rights done by key actors outside of the House. It is worth noting this legislation was passed under urgency, which again brings about concerns with the willingness of the House to evaluate issues raised around rights inconsistency. This can also be seen to reflect authoritarianism; it illustrates the ability of the legislature, dominated by the executive, to pass significant legislation with speed.

Finally, the way key actors view the purpose of this Amendment Act is crucial to understanding the culture around this specific piece of legislation. A similar idea was put forward by Adams and Bower in the Canadian context. They focused on how understanding the history of a piece of legislation can be crucial to understanding the culture around it in the present day.[136] For example, they suggest the purpose of the notwithstanding clause was always to "enhance deliberate deliberation around rights."[137] It ensures that each of the legislature, the courts and the public had a prescribed role to play in determining rights.[138] If you understand the purpose as being to enhance rights discussion, then this necessarily prescribes the way you use the Charter. The example given is that even where the clause has been invoked in legislation, courts should still comment on whether they would have found this invalid if it were not for the clause. If the purpose of the clause indicates their role is to engage with rights discussion, then they should ensure they carry out their function of doing so.[139]

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[134] (17 March 2021) 750 NZPD (Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021– First Reading, Golriz Gharaman); (17 March 2021) 750 NZPD (Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021 – Second Reading, Golriz Gharaman); (17 March 2021) 750 NZPD (Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021 – Third Reading, Golriz Gharaman).

[135] (17 March 2021) 750 NZPD (Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021– First Reading, Simeon Brown).

[136] Adams and Bower, above n 98, at 3.

[137] Adams and Bower, above n 98, at 18

[138] Adams and Bower, above n 98, at 18.

[139] Adams and Bower, above n 98, at 18.

It is useful then to examine what Parliament views the purpose of this amendment as being. That will likely play some role in indicating how it might use the Amendment Act. It can be seen as reflecting part of the constitutional culture; the way in which these key actors currently view the comparative functions of the courts and Parliament. When introducing the Amendment Act to the House for the third reading, David Parker MP acknowledged the importance of NZBORA, and how this amendment will provide a mechanism for Parliament to reconsider issues when courts determine Parliament has gone too far. He also reminded the House that the fundamental power remained with Parliament.[140] This sentiment was echoed by many of the other speakers. Paul Goldsmith MP explained the fundamental point of this legislation as being about parliamentary supremacy, and Michael Woodhouse MP also reiterated that while the role of the court is important, Parliament remains sovereign.[141]

However, many of the speakers also acknowledged the importance of this amendment for enhancing the role of the courts in issues of rights. Duncan Webb MP characterised this legislation as meaning that instead of absolute sovereignty of either Parliament or the courts, the amendment ensures there is conversation between the branches. It balances parliamentary sovereignty and judicial integrity.[142] Chris Penk MP reiterated this point, commenting on the importance of this providing opportunity for dialogue.[143] Similar ideas are reflected in the final report from the Privileges Committee. It described the recommendations as seeking to provide "a clear framework for dialogue between the branches of government."[144] This debate shows an openness from the House to the role of the courts in this area. Whilst the politicians are very clear to affirm parliamentary

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[140] (23 August 2022) 762 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Third Reading, David Parker)

[141] (23 August 2022) 762 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Third Reading, Paul Goldsmith) and (23 August 2022) 762 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Third Reading, Michael Woodhouse).

[142] (23 August 2022) 762 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Third Reading, Duncan Webb). See also (23 August 2022) 762 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Third Reading, Golriz Ghahraman).

[143] (23 August 2022) 762 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Third Reading, Chris Penk).

[144] Privileges Committee, above n 66, at 3.

sovereignty, thereby affirming the value of authoritarianism, their openness to the role of the courts might represent fairness and egalitarianism as well. Pragmatism can also be seen through the strong characterisation of this as not fundamentally changing our constitutional arrangements.

C Applying Constitutional Culture

Overall, these norms seem at first glance to indicate that the Amendment Act will not result in a shift towards legal constitutionalism, and instead favour political constitutionalism. Egalitarianism and the strength of representative democracy underlies political constitutionalism. Further, authoritarianism and the corresponding parliamentary supremacy are another key aspect of a political constitution. Pragmatism might suggest we are unlikely to advance significant constitutional change. Finally, the uncertainty over the importance of rule of law and the judicial role would also suggest that placing much power in the hands of the judiciary is unlikely.

These principles can be examined in more detail to question whether there might be more room for a change than first appears. In order to explain how these norms might apply in practice here, it is useful to categorise the potential outcomes of the Amendment Act that we discussed above. I considered the way Parliament could affect outcomes through the extent to which it engaged with the court's declarations. It was also noted that they could impact the frequency with which courts had the opportunity to issue a declaration. From the courts' perspective, any change might also be affected by whether they issue a declaration where Parliament has already considered the issue in detail. Finally, the strength of any potential political implications, which were discussed as potentially having an impact on parliamentary actions, will depend on the media and the general public.

The seriousness with which Parliament treats declarations will be relevant to several potential outcomes. Whether the conflict of rights will be moved in practice, whether we will see greater consideration of individual rights by Parliament, and whether it will pay the necessary attention to declarations so as not to undermine the rationale for being the

body to determine conflicts. The norms of authoritarianism and egalitarianism will be in conflict when it comes to the seriousness with which Parliament treats declarations. On one hand, the belief in equality and the importance of Parliament not viewing itself as superior might indicate a willingness to take into account other viewpoints, such as a declaration of inconsistency. This willingness was seen in some of the speeches made by parliamentarians when the Amendment Act was passed.[145] If we see egalitarianism more present than perhaps we have before, then this is something we would associate more with a legal constitutionalism. However, Palmer did question whether we might be becoming slightly more individualistic, meaning this principle might not hold as strongly as expected.[146]

Applying authoritarianism, and the strong adherence to parliamentary supremacy, we can expect to see the legislature asserting their role in resolving issues for society. This contention is furthered by Palmer's suggestion of the general lack of understanding of the judicial role in our constitution.[147] Parliament's continued reiteration of the Amendment Act as not undermining parliamentary sovereignty means we would be unlikely to expect significant change, as authoritarianism seems a strong value.

Considering these two norms together, the most likely outcome appears to be an application of parliamentary sovereignty. Whilst egalitarianism might influence this to some extent, encouraging the legislature to take into account different views, it is unlikely to mean Parliament would defer to court decisions. The third reading of this legislation affirmed that Parliament intends to engage with issues raised by the courts, but Parliament was also careful to reinforce that parliamentary sovereignty remains.[148] Additionally, as discussed above, the approach of Parliament in a recent key s 7 case undermines an expectation of deep engagement. In practice, this means we are unlikely to see a significant shift away

[145] Discussed above. See, for example, (23 August 2022) 762 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Third Reading, Chris Penk).
[146] Palmer, above n 114, at 5.
[147] Palmer, above n 93, at 589.
[148] (23 August 2022) 762 NZPD (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill – Third Reading). See, for example, the speeches of Paul Goldsmith, Duncan Webb, Michael Woodhouse, Helen White and Chris Penk.

from political constitutionalism. Finally, the pragmatic nature of our culture should also be noted. We are unwilling to embark on significant constitutional change.[149] However at the same time, it can also be suggested that as a result of this, we can see significant constitutional changes occur with little awareness or discussion.[150] Overall, it seems likely that the strong commitment to parliamentary sovereignty coupled with uncertainty around the role of the judiciary in our constitution will result in little change in where we sit on the continuum of political to legal constitutionalism as a result of Parliament's actions.

As discussed above, there is a chance Parliament might take s 7 reports more seriously. This could occur due to the potential for increased public scrutiny as a result of declarations of inconsistency. Whether these political implications eventuate will depend on public perception about whether, and to what extent, Parliament is having regard to s 7 reports or declarations of inconsistency made by the courts. In turn, this point will depend on the role of the media and the public as to whether they care enough to enforce these potential implications. The problem with this may be highlighted by Palmer's discussion of the lack of concern for rule of law. Our culture tends to be unconcerned with the important role of the rule of law, and so may not feel the need to hold government accountable. Palmer suggests that generally we have struggled to gather interest in the exercise of public power.[151] However, this has often been linked to judicial upholding of the rule of law; we may be more interested in engaging with government directly. Importantly, Joseph discusses the results of a constitutional advisory panel in 2013, which suggested that citizens are uneasy that Parliament can legislate notwithstanding NZBORA.[152] This could manifest itself in citizens paying more attention than we expect to the way Parliament creates legislation, particularly legislation that is inconsistent with NZBORA. With the requirement of both a government and legislature response to a declaration, it might become more obvious to the public where Parliament has legislated regardless of the

[149] Palmer and Knight, above n 22, at 21.
[150] Palmer, above n 93, at 593.
[151] Palmer, above n 114, at 22.
[152] Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 133. For the report itself, see Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation | He Kōuinga Kōrero mō Te Kaupapa Ture o Aotearoa* (November 2013).

NZBORA, and in particular where they have done this in dismissal of important issues raised by other branches of government.

Even if this change is not characterised as significant in terms of where New Zealand sits on a continuum from legal constitutionalism to political constitutionalism, it could have an important impact on the way our political constitutionalism functions. As explained, a key component of a political constitution is the ability for the public to hold the legislature to account through representative democracy. In order for the public to do this effectively, it is useful for them to have maximum information around the decisions the legislature is making. At a minimum, the Amendment Act will increase the information available to voters. This is because it requires Parliament to be more explicit when it is breaching rights. Currently, if a court thinks that a piece of legislation breaches rights, Parliament is under no obligation to acknowledge this. Given the uncertainty over the role of the courts in our wider culture, this might go unnoticed by much of the voting population. However, under the Amendment Act, Parliament must respond. This means acknowledging that a court has found their legislation to be an unjustified breach of rights. If Parliament's response is for the legislation to remain the same, this means it is more explicitly breaching rights. It also means that itwill need to provide valid justifications for the decision to retain the legislation as is. Otherwise, the public may lose faith. Therefore, this could strengthen the political constitution through increasing the efficacy of the public check.

Finally, the willingness of, and the circumstances in which, courts will issue declarations might also have an effect on the constitutional arrangements. If they are willing to issue declarations where Parliament has already directly considered this issue and decided to legislate anyway, then this might be seen as courts going some way to enter discussions on political conflicts. Priestly has suggested that institutionally, courts may be unlikely to act in a way to advance their own constitutional role.[153] Judicial respect for the important norm of parliamentary supremacy may contribute to this as well. If the cultural values that Palmer identifies apply equally to the judicial branch itself, then we can expect that the courts

[153] John Priestly "The Harkness Henry Lecture: Chipping Away at the Judicial Arm?" (2009) 17 Wai L Rev 1 at 14.

might decide it inappropriate to issue a declaration if Parliament has considered the issue already. However, if fairness is a norm, at least in culture of the judiciary, then this might be changed. We might expect to see courts step in regardless of whether the issue has been considered in detail already, if they see the final determination as unfair or contrary to the rule of law. Courts might see it as important to uphold the rule of law and provide a check on the exercise of power.

It appears that overall, the constitutional culture of New Zealand will tend towards preserving a political constitution. Our strong support for representative democracy and parliamentary sovereignty in particular will work against the significant change that the Amendment Act has the potential to invoke in terms of a shift towards legal constitutionalism. However, this discussion has shown that even if this new provision may not move us towards a soft legal constitution, it may serve to strengthen the political constitutionalism. As explained above, through requiring Parliament to respond to a declaration from the courts, Parliament is forced to be more explicit when they breach rights. This explicitness provides greater public awareness of legislation that is inconsistent with rights, which creates a stronger representative democracy as more information is available to the public. Representative democracy is an important aspect of a political constitution, and through strengthening it, the justifications for political constitutionalism are also strengthened.

VI Conclusion

Culture is a key part of New Zealand constitutionalism. The Declarations of Inconsistency Amendment Act signifies a constitutional change in the approach to rights determination. This paper has explained how this Act has the potential to advance either political or legal constitutional theory in New Zealand, whilst also illustrating how the nature of this shift will depend significantly on our culture. Through examination of the key aspects of constitutional culture as it stands in New Zealand, I have shown that the Amendment Act will most likely reinforce political constitutionalism. We are more likely to see a shift in the way political constitutionalism is justified in New Zealand, than a shift towards legal

constitutionalism. In concluding, I wish to also note how this shift may be significant in terms of how we view courts. In particular, it provides a unique opportunity for courts to demonstrate the importance of fairness as a norm within our political constitution, and therefore to change our constitutional culture.

As discussed above, declarations force Parliament to make an active decision to disregard rights, and in doing so this can become more explicit to the public. This strengthens representative democracy. Courts therefore have an important role to play in providing the public with information, so they can then make informed decisions regarding their elected representatives. Operating as an integral part of our political constitution, instead of seeking to cement a role outside of it, may be more palatable to our constitution. Hesitancy around the role of courts often stems from a preference for elected representatives to be deciding issues of rights. However, if the role of the courts is as ensuring elective representatives can be fully held to account, then this will be considered more acceptable. Through this, the courts can strengthen our constitutional norm of fairness, and ensure that the judiciary is seen as a valuable part of our constitution.

Further, the specific nature of this area, as being about rights, also provides an opportunity for courts to increase the perception of their value. Palmer has noted that there may be opportunity for courts to prove their value to New Zealand society where there are difficult constitutional issues and Parliament's view is inconsistent with the rule of law.[154] The Amendment Act provides an opportunity for courts to show their value when it comes to difficult constitutional issues, in particular determination of individual rights. A declaration is a more accessible ruling for the public, allowing them to see how courts engage with Parliament's law-making. This provides a forum for the courts to illustrate their use to the public, thereby increasing public understanding of the norm of fairness and rule of law.

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[154] Palmer, above n 114, at 24. Rishworth has taken a similar viewpoint, suggesting that the fact New Zealand judges have chosen not to resolve controversial cases has contributed to their low profile. See Paul Rishworth "Judicial Activism and Restraint, New Zealand Style" in Sam Bookman and others (ed) *Pragmatism, Principle, and Power in Common Law Constitutional Systems: essays in Honour of Bruce Harris* (Intersentia, Cambridge, 2022) at 166.

It can be argued that the area of rights is uniquely placed for courts to realise this opportunity. In particular, this is because the rights of minorities might not be adequately protected through political processes. Where unpopular, or less common, groups have rights at issue, there will be no negative public reaction to legislation, and therefore the political controls on such legislation are limited.[155] Courts, and their ability to issue a declaration, may therefore be the best means for minority groups to have these issues raised to Parliament. They can provide a voice for minority groups, and an opportunity to question legislation.[156] Although Parliament is under no obligation to alter the law as a result of a declaration, it could serve to require justification of its perspective, or to provide a contextualisation of how the law is operating in practice.[157] If courts can demonstrate their ability to uphold fairness, then this will provide an opportunity to strengthen this norm in our culture.

It is evident that the Amendment Act provides a good opportunity for the courts to emphasise the importance of the fairness norm to New Zealand. This is because it provides the opportunity for courts to make a formal statement of law on contentious social issues, and the Act means that Parliament must engage with these statements.[158] However, the question still remains as to whether they will seize this opportunity. Rishworth discusses three examples – abortion, euthanasia and same-sex marriage – where courts have actively left space for these issues to be resolved by Parliament. He suggests that to some extent, the courts have had to be creative in order to display this deference.[159] However, there are also recent examples where courts have been less willing to show deference. In the recent case of *Fitzgerald v R,* the Supreme Court took a "muscular" approach to read into the section that the three strikes legislation should not operate inconsistently with

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[155] Geddis, above n 49, at 373.

[156] Jason Varuhas "Courts in the Service of Democracy: Why Courts Should Have a Constitutional (But Not Supreme) Role in Westminster Legal Systems" (2009) 2009 NZ L Rev 481 at 504.

[157] Varuhas, above n 156, at 508.

[158] Rishworth, above n 154, at 165.

[159] Rishworth, above n 154, at 165.

NZBORA.[160] Further, the statutory recognition of the court's role in this Amendment Act might also encourage the courts to take a less deferential approach.

The nature of our constitutional culture means that we are unlikely to see a movement towards legal constitutionalism. However, courts have the potential to further their role in a different way. Within political constitutionalism, they can make a change to the way our culture views the value of the courts. The nature of rights issues as an area, coupled with the mechanisms for court involvement within our political constitution that the Amendment Act provides, gives the courts a clear opportunity to illustrate their value to society. Whilst their role might not be as significantly changed as it would be in a shift towards legal constitutionalism, the increase in value of the courts within the political constitution is a crucial impact of the Amendment Act.

Therefore, the constitutional significance of the Amendment Act is twofold. Firstly, it will likely alter the justifications for political constitutionalism by forcing Parliament to be more explicit when breaching fundamental rights, thereby strengthening the power of representative democracy. Secondly, and relatedly, it presents a crucial opportunity for the courts to transform our constitutional culture and gain greater recognition for the value of fairness in our constitution. What the courts will make of this opportunity remains to be seen.

[160] *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551, discussing the Sentencing Act 2002. The muscular approach taken is explained in Dean Knight "New Zealand: Three strikes, disproportionately severe punishment and the Bill of Rights Act: a new dawn for rights interpretation?" (Forthcoming) (24 June 2022) Social Sciences Research Network <www.ssrn.com>.

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