Interpretive Theories in New Zealand Bill Of Rights Jurisprudence

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I: Introduction

The New Zealand Bill of Rights Act 1990 ("NZBORA") is a unique instrument. It was originally drafted as a supreme 'constitutional' bill of rights.[1] However, significant opposition to this proposal meant that the entrenched Bill of Rights was converted into an ordinary statute.[2] This watered-down, "parliamentary Bill of Rights" has become a "constitutional enigma".[3] In manner and form, the NZBORA is a normal – even inferior – enactment. Yet it aspires to something greater. It is lofty in tone, and reads like a constitutional document.[4]

The NZBORA's odd dichotomy has attracted significant academic and judicial comment. The New Zealand Court of Appeal has stated both that "[t]he New Zealand Bill of Rights Act is not a constitution",[5] and also that it "is nonetheless an affirmation and a means of promoting principles which are fundamental to every constitutional instrument".[6] Despite this acknowledgement, very little has been said about how the substance of the NZBORA should be construed. This raises a fundamental question: should the NZBORA be interpreted according to its ordinary form, or its constitutional content?

This article contends that the NZBORA requires a constitutional approach to purposive interpretation. The NZBORA is an affirmation of "hallowed constitutional rights",[7] and the interpretive method employed by the courts should take this into account. The theories of constitutional interpretation are many and varied. These theories are distinguished by their approach to constitutional language, underlying intent and the nature of the rights themselves. Although some of these theories are implicit in NZBORA jurisprudence, not all are appropriate. As a result, this article seeks to:

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1 See *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR A6 ["*The White Paper*"].

2 Adams, "Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal" [1996] 3 NZ L Rev 368.

3 Ibid. See also Rishworth, "Affirming the Fundamental Values of the Nation" in Huscroft and Rishworth (eds), *Rights and Freedoms* (1995) 73 ["Fundamentals"].

4 Rishworth, Fundamentals, supra note 3, 73.

5 *Simpson v Attorney-General* [1994] 3 NZLR 667, 705 (CA) per Gault J ["*Baigent's Case*"].

6 *Ministry of Transport v Noort* [1992] 3 NZLR 260, 286 (CA) per Hardie Boys J ["*Noort*"].

7 Adams, supra note 2.

1. outline the theories of statutory and constitutional interpretation;
2. examine the constitutional nature of the NZBORA;
3. identify examples of constitutional interpretation within NZBORA jurisprudence; and
4. evaluate the strengths and weaknesses of these constitutional approaches.

II: Interpretive Theory

1. Statutory Interpretation

In New Zealand, a statute is the formal expression of the will of the sovereign and supreme Parliament.[8] The object of statutory interpretation is to give effect to that will. Section 5(1) of the Interpretation Act 1999 directs the judiciary to adopt a purposive approach to statutory interpretation. Notably, this contrasts with many jurisdictions where interpretation is a matter of judicial practice and convention.

Purposive interpretation seeks to give effect to the purpose of an enactment, and thus, the intention of Parliament. Consequently, the text of a provision "should be given a liberal interpretation to ensure that the purpose of the legislation is achieved".[9] If a purely grammatical construction does not give effect to the clear purpose of a provision, then the court should search for a construction that does give effect to that purpose.

The purposive approach also requires that a provision be read in its full context. The internal context – the place of an individual section within the framework of the Act as a whole – "may evince a clear theme or enacted purpose which clarifies the meaning of the section in question".[10] In addition, extrinsic material may help an interpreter understand the background to an enactment, and so establish what the framers had in mind.[11] Donaldson LJ explained the court's role in this process in *Corocraft Ltd v Pan American Airways Inc*:[12]

> The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the judges do not act as computers into which are fed the statute and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade.

8 Dicey, *An Introduction to the Study of the Law of the Constitution* (8 ed, 1915). See also *Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323, 330 ["*Pall Mall*"].

9 Burrows, *Statute Law in New Zealand* (2 ed, 1999) 118.

10 Ibid 149.

11 Ibid 119.

12 [1969] 1 QB 616, 638; revd on other grounds [1969] 1 QB 616, 640 ["*Corocraft*"].

2. Constitutional Interpretation

A written constitution is not an ordinary statute, but rather a political document designed to embody broad principles by which to conduct government.[13] The Supreme Court of Canada in *Hunter v Southam Inc*[14] has explained this difference succinctly:[15]

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must ... be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

The Privy Council has affirmed this theme, declaring that a constitution requires its own unique principles of interpretation.[16] However, there remains widespread disagreement as to what these interpretive principles should be. The most prominent theories in this debate are discussed below.

(a) Literal Construction

The first school of constitutional interpretation is literalism.[17] The approach is based on the belief that the literal meaning of a sentence is a context-free notion.[18] Literalism holds that "reference to legislative intent is inappropriate because interpretation should be governed solely by the meaning of the [text] and not by the intention of the legislator".[19] A literalist approach thus assumes that the meaning of a constitutional provision can be divined from the words alone. The perceived advantage of the literal approach is that decisions are made by reference to objective legal rules, rather than by the application of those subjective values held by the judges presiding in any given case.[20]

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13 Friedman, "Judges, Politics and the Law" (1951) 29 Can Bar Rev 811, 827.

14 [1984] 2 SCR 145.

15 Ibid 155 per Dickson J.

16 *Minister of Home Affairs v Fisher* [1980] AC 319, 329 (PC) per Lord Wilberforce. See also *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 669-670 (PC) per Lord Diplock.

17 See Bassham, *Original Intent and the Constitution: A Philosophical Study* (1992) 26.

18 Hodge, "Statutory Interpretation and Section 6 of the New Zealand Bill of Rights Act: A Blank Cheque or a Return to the Prevailing Doctrine?" [2000] Auckland UL Rev 1, 3. For a summary of 'traditional semantic theory' see Searle, "The Background of Meaning" in Searle, Kiefer and Bierwisch (eds), *Speech Act Theory and Pragmatics* (1980) 223.

19 Hodge, supra note 18, 6.

20 Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience" (1986) 16 F L Rev 1, 5.

The High Court of Australia has, until recently, been an enthusiastic proponent of literal constitutional construction. In the watershed case *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* the Court accepted that the Australian Constitution was a "political compact [with] the whole of the people of Australia",[21] yet refused to adopt a sui generis mode of interpretation. This can be observed in the opinion of Isaacs J, who delivered the majority opinion:[22]

> I propose ... to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole ... I think that the only safe course is to read the language of the statute in what seems to be its natural sense.

In contrast, the United States Supreme Court has consistently rejected the literal approach, stating that "[t]he direct operation or literal meaning of the words used do not measure the purpose or scope of [the Constitution's] provisions."[23] In the US it is now generally acknowledged that a constitution cannot be interpreted in isolation and detached from values.[24] Outside of Australia, then, literalism has been soundly rejected as a tool of constitutional adjudication.

(b) American Constitutional Construction

The next theories of constitutional interpretation discussed in this article are found in the American tradition. This tradition recognizes two opposing schools, originally described as 'interpretive' and 'non-interpretive' review.[25] Interpretivism embodied the view that judges deciding constitutional issues should do so by reference to the norms and values clearly stated, or implied, in the written constitution. In contrast, non-interpretivism reflected the view that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document".[26] Modern constitutional scholars now see these labels as defunct:[27]

> [T]he concept of interpretation is broad enough to encompass any plausible mode of constitutional adjudication. We are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt.

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21 (1920) 28 CLR 129, 142.
22 Ibid 149.
23 *United States v Lefkowitz* 285 US 452; 76 L Ed 877, 883 (1932). See also Antieau, *Adjudicating Constitutional Issues* (1985) 49.
24 Mason, supra note 20.
25 See Grey, "Do We Have an Unwritten Constitution" [1975] 27 Stan L Rev 703 ["Unwritten Constitution"].
26 Ely, Democracy and Distrust: A Theory of Judicial Review (1980) 1.
27 Grey, "The Constitution as Scripture" [1984] 37 Stan L Rev 1 ["Constitution"].

In recent times the "real point of disagreement is whether the intent of the framers is binding and, if so, how that intent should be understood".[28] As a result, the two schools are now defined by their approach to original intent. These are known as originalism and non-originalism.

(i) Originalism

Originalist constitutional interpretation consists of the quest for original intent. According to this theory, the aim of construction of a constitutional provision is to give effect to the intent of its framers.[29] Original intent can take two forms, interpretive intent and substantive intent.[30] Interpretive originalism focuses on the interpretive intent of the founders and seeks to determine how the framers intended the constitution to be interpreted. In contrast, substantive originalism is concerned with the substance of the constitution, focusing on what the founders intended the provision to mean.[31]

Within substantive originalism there is a further important division, between strict and moderate originalism.[32] The strict and moderate approaches are distinguished by the degree of 'generality' that is afforded to original intent. This notion is illustrated by Dworkin's distinction between a concept and a conception:[33]

> When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it.

Strict originalism adopts a narrow level of generality and seeks to uphold specific original intent.[34] It requires interpreters "to determine how the [framers] would have applied a provision to a given situation, and to apply it accordingly".[35] The theory is 'strict' because it limits the nature and scope of constitutional rights to those rights "recognized by a limited group of people at a fixed date in history".[36] It freezes the constitution within a narrow historical framework. Any situation outside the minds of the framers cannot be 'reached' by the

28 Stone et al, *Constitutional Law* (1986) 692.
29 *Home Building and Loan Association v Blaisdell* 290 US 398, 453 (1934) (US SC) per Sutherland J dissenting.
30 Bassham, supra note 17, 25.
31 When used in an academic setting, the term 'originalism' usually refers to substantive originalism.
32 The terms were originally coined by Paul Brest. See Brest, "The Misconceived Quest for Original Understanding" (1980) 60 BUL Rev 204.
33 Dworkin, *Taking Rights Seriously* (1978) 135.
34 Brest, supra note 32, 223; Bassham, supra note 17, 23.
35 Brest, supra note 32, 222; See also Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977).
36 Dworkin, supra note 33, 134.

constitutional provisions. As a result, a constitution can offer no answer to a question unforeseen by its framers.[37]

Moderate originalism adopts a far greater level of generality than strict originalism.[38] It directs interpreters to apply the framers' intent "at a relatively high level of generality, consistent with ... the 'purpose of the provision'".[39] Moderate originalists assert that the broad, abstract language often employed in constitutional provisions shows that the framers intend to enact broad concepts, not particular conceptions".[40] As such, the provisions of a constitution are considered to advance general principles and not technical rules.

The crucial distinction between strict and moderate originalism is illustrated by *Brown v Board of Education* ("*Brown*").[41] *Brown* was a challenge to the constitutionality of a state law requiring racial segregation of public schools. Racial segregation had been deemed constitutional by the 1896 decision *Plessy v Ferguson* ("*Plessy*").[42] In that case, the Supreme Court declared that "the equal protection clause of the fourteenth amendment [was] satisfied by a Louisiana law that required 'equal' but separate accommodations for black and white railroad passengers".[43] However, the Supreme Court in *Brown* unanimously overturned *Plessy*, declaring racial segregation of public schools unconstitutional.

Bork describes *Brown* as "the greatest case of the twentieth century ... the defining event of modern American constitutional law".[44] But, that said, the interpretive method adopted by the court in the case remains controversial. "The inescapable fact is that those who ratified the [fourteenth] amendment did not think it outlawed segregated education or segregation in any aspect of life";[45] it was assumed that segregation would continue.[46] In this light, it is clear that the Court in *Brown* departed from the specific original intent of the founders. Yet, moderate originalists contend that the original understanding did not envisage a technical rule, but rather a concept – the principle that "no state may discriminate against a group on the ground that the members of the group are inferior, as human beings, to persons not members of the group".[47] Accordingly, the finding in *Brown* is consistent with, and compelled by, the original understanding of the Fourteenth Amendment's equal protection requirement.[48] This decision is consistent with moderate originalism.

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37 Mason, "Theoretical Approaches to Constitutional Interpretation" in Sampford (ed), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 16.

38 Brest, supra note 32, 223; Bassham, supra note 17, 28.

39 Brest, supra note 32, 223.

40 Bassham, supra note 17, 31.

41 347 US 483 (1954) (US SC).

42 163 US 537 (1896) (US SC).

43 Bork, *The Tempting of America: The Political Seduction of the Law* (1990) 74.

44 Ibid 74.

45 Ibid 75-76. For a comprehensive discussion of the specific original intent of the founders in regard to the Fourteenth Amendment see Berger, supra note 35.

46 Berger, supra note 35, 125.

47 Perry, *The Constitution in the Courts: Law or Politics?* (1994) 144 ["*The Constitution*"].

48 Bork, supra note 43, 76.

(ii) Non-originalism

Non-originalism casts a constitution as a document "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs".[49] Non-originalism embraces the assertion that the original substantive intent of the founders is not the sole authoritative source of constitutional meaning.[50] A court partakes in non-original review when it makes a determination of constitutionality by reference to values other than those constitutionalized by the framers.[51] Non-originalism extends and broadens the principles extant in a constitution "beyond the normative content intended for them by the framers".[52]

Non-originalism views a constitution as a 'living document', free from the permafrost of history. The non-originalist constitution is dynamic, not static. "It is continuously evolving, sometimes slower, sometimes faster, but nonetheless perpetually in a state of flux".[53] As a consequence, the meaning of a constitution is not what the founders' believed it was, but rather what the courts say it is.[54]

In the United States most of the twentieth century constitutional jurisprudence concerning human rights which has been developed by the Supreme Court is the result of non-original review.[55] *Roe v Wade* ("*Roe*")[56] provides an infamous illustration. *Roe* was a challenge to the constitutionality of state abortion laws. Until this decision the moral question as to which abortions should be legal had been left at the discretion of state legislatures.[57] However, in 1973 the majority of the Supreme Court, using the right of privacy, struck down the abortion laws of most states and placed severe limitations upon the ability of states to regulate abortion.[58]

Prior to *Roe*, the right of privacy had only been applied in Supreme Court cases involving contraception.[59] The majority in *Roe* changed this, deciding the case with a simple assertion:[60]

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

49 *M'Culloch v Maryland* 4 Wheaton 17 US 316, 413 (1819) (US SC) per Marshal CJ.
50 Perry, *The Constitution*, supra note 47, 33.
51 Perry, *The Constitution, the Courts, and Human Rights* (1982) 11 ["*Human Rights* "].
52 Grey, Unwritten Constitution?, supra note 25, 713 n 46.
53 Shaman, *Constitutional Interpretation: Illusion and Reality* (2001) 6. Citations omitted.
54 Danelski and Tulchin (eds), *The Autobiographical Notes of Charles Evans Hughes* (1973) 139.
55 Perry, *Human Rights*, supra note 51, 91.
56 410 US 113 (1973) (US SC).
57 Bork, supra note 43, 112.
58 Ibid 111-112.
59 Ibid 114.
60 *Roe*, supra note 56, 153.

Bork suggests that to search for the source of the right identified in *Roe* would be futile because the right was forced into, rather than stemmed from, the Constitution.[61] The minority opinion of White J, who was joined by Rehnquist J, reinforces this view:[62]

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.

According to White J, the right to privacy – and the subsidiary right to an abortion – is not explicitly embodied by a provision of the Constitution nor drawn from any original understanding. It is a creation of the Supreme Court. *Roe*, accordingly, is a non-originalist decision.

(iii) Reconciling Moderate Originalism and Non-originalism

At first glance, it can be difficult to distinguish between moderate originalism and non-originalism. Both schools of constitutional interpretation accept that the provisions of a constitution embody general principles and Dworkin-like concepts. This shared belief leads to a definitional problem. At high levels of abstraction, "general purposes can be invoked to support almost any position an interpreter chooses to defend".[63] It has thus been suggested that when originalism adopts a wide degree of generality, the line between original review and non-original review becomes blurred or disappears.[64]

Proponents of moderate originalism reject this assertion. Non-originalism, they state, is the claim that courts are free to create new principles and adopt new values. In contrast, moderate originalism, although not bound by specific intent, is still bound by the original principles enacted by the founders:[65]

> No originalist ... can assert that judges are free to disregard the clear original intent of constitutional language in favor of some highly generalized purpose the framers may have shared .... [Highly generalized purposes] impose too little constraint, too little that is genuinely original, on judges to be regarded by originalists as a surrogate for clear original intent.

Moderate originalism dictates that a constitutional directive should be articulated at the level of generality demanded by the relevant materials.[66] In

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61 Bork, supra note 43, 114.

62 *Roe*, supra note 56, 221-222 per White J (dissenting).

63 Bassham, supra note 17, 23.

64 Perry describes this as "the most fundamental interpretive problem". Perry, *The Constitution*, supra note 47, 40.

65 Bassham, supra note 17, 23.

66 Perry, *The Constitution*, supra note 47, 41; Bork, supra note 43, 149-150.

other words, if a posited construction "can no longer be supported by the weight of historical evidence [and] judicial interpretation ... application of that principle must stop, leaving any further protection to political construction".[67]

The dichotomy between moderate originalist and non-originalist review can be illustrated by reference to *Brown* and *Roe*. As noted above, moderate originalism casts constitutional directives as broad principles. The substantive meaning of these directives can only be determined by reference to the original understanding of the founders. Therefore, although the scope of a constitutional principle has broad latitude to evolve, the nature of the principle (the principle or directive itself) is firmly anchored to the founders' original understanding. In *Brown* the directive at issue was the Fourteenth Amendment. That directive was held to embody a principle prohibiting racial discrimination. The principle was drawn at a relatively wide level of generality, yet most academics accept that this interpretation is historically justified. Indeed, in 1967, the Supreme Court stated: "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[68] It follows that the decision in *Brown* is consistent with moderate originalism; it rejects specific intent but remains bound by the principle originally constitutionalized by the founders.

In contrast, non-originalism adopts the view that the original intent is only one of many sources that may be relevant in regard to substantive meaning. The scope and the nature of the principles embodied by a constitution are virtually boundless. The court may evolve a constitutional directive far beyond its original understanding, or even create new principles. In effect, a constitution is a 'clothes rack' upon which the court may hang any meaning it sees fit.[69] In *Roe* the Court recognized and enforced a constitutional right to privacy, yet, the "Court did not ... feel obliged to settle the question of where the right of privacy or the subsidiary right to abort [was] to be attached to the Constitution's text".[70] The right to privacy was not a directive constitutionalized by the founders, but rather one read into the Constitution by the Court.

(c) The Nature of Rights

The third broad approach to constitutional interpretation focuses on the nature of the rights set out in a constitution. Scalia J (of the United States Supreme Court) asserts that the American Bill of Rights "was meant to preserve a state of liberty that was believed already to exist – to confirm the rights of Englishmen that the former colonists believed they already possessed".[71] He believes that

67 Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review* (1999) 37.
68 *Loving v Virginia* 388 US 1, 10 (1967).
69 Shaman, supra note 53, xv. See also Grey, Unwritten Constitution?, supra note 25.
70 Bork, supra note 43, 114.
71 Scalia, "The Bill of Rights: Confirmation of Extant Freedom of Invitation to Judicial Creation?" in Huscroft and Rishworth (eds), Litigating Rights: Perspectives from International and Domestic Law (2002) 20.

the American Bill of Rights is affirmatory and confirmatory in nature.[72] It was intended to provide constitutional protection for freedoms thought to exist at the time of its founding. It did not create new rights, nor did it license judicial creativity, it simply affirmed the state of the law.

The American approach is not of universal application. Many countries have a totalitarian past with a legacy of oppression, rather than freedom. The modern constitutions of these countries are amendatory. They are designed not "to confirm and preserve the past, but to repudiate it".[73] An amendatory bill of rights does not restate existing rights, it creates them. The Constitutional Court of post-apartheid South Africa has commented on this matter:[74]

> [T]he Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is acceptable and represents a radical and decisive break from that part of the past which is unacceptable .... The relevant provisions of the Constitution must therefore be interpreted to give effect to the purposes sought to be advanced by their enactment.

The nature of a bill of rights will influence the process of constitutional interpretation. Because an affirmatory bill of rights affirms rights thought to already exist, the substantive meaning of its rights and freedoms should be informed by reference to the past. Conversely, because an amendatory bill of rights amends the existing law, the meaning of its provisions cannot be drawn from the past and must be created with an eye to the future.

(d) Process-Based Interpretation

The final mode of constitutional interpretation is process based. This approach is distinct from the theories outlined above. Literalism, originalism, non-originalism, and the nature of rights approach presuppose that a constitution is designed to protect fundamental substantive values. The process-based approach, on the other hand, is founded on the belief that the United States Constitution was created in order to protect the American view of democracy.

Put simply, democracy is "rule by the people".[75] Rule by the people, or popular sovereignty, occurs when "public policies are determined either directly by vote of the electorate or indirectly by officials freely elected at reasonably frequent intervals and by a process in which each voter who chooses to vote counts equally".[76] Proponents of process-based interpretation assert that the United States Constitution was designed to leave the selection of substantive

72 Ibid 22.
73 Ibid 20.
74 *Shabalala v Attorney-General*, Transvaal 1996 (1) SA 725 [26] (SA CC); See also *S v Makwanyane* 1995 (3) SA 391 [333] (SA CC) per O'Regan J.
75 Pennock, *Democratic Political Theory* (1979) 7.
76 Ibid.

values to the people, not the unaccountable judiciary. The open-ended provisions of the Constitution merely empower the Court to protect the procedural elements of the democratic system. They do not justify the judicial selection of substantive values.

John Hart Ely, the chief advocate of process-based interpretation, has stated that a functioning democratic system should be representative of all, including minority groups. Consequently, the function of constitutional interpretation is 'representation reinforcement': the protection of democratic systems and minority participation. Under this approach, the Supreme Court should be driven by a desire to "ensure that the political process [is] open to those of all viewpoints on something approaching an equal basis".[77]

The process-based theory is attractive because it provides a democratic justification for constitutional review. However, as a theory of constitutional interpretation it suffers significant flaws. Ely's approach rests on the assertion that the United States Constitution is concerned with the protection of process and not the protection of substantive values in and of themselves. Yet, as Laurence Tribe has stated, this creates a curious irony: "If process is constitutionally valued ... it must be valued not only as a means to some independent end, but for its intrinsic characteristics .... Process ... therefore, becomes substantive."[78] Accordingly, despite its democratic nature, the process-based theory does not provide a satisfactory basis for judicial review.[79]

III: The New Zealand Bill of Rights Act

1. Interpretation – the Search for Purpose

The White Paper that preceded the NZBORA called for a supreme 'constitutional' bill of rights. It proclaimed that the New Zealand Courts should, and would, adopt a constitutional mode of interpretation.[80] However, the supreme Bill of Rights envisaged by the White Paper did not eventuate. In its place, the legislature adopted an ordinary Act of Parliament.

In manner and form, the NZBORA is indistinguishable from any other piece of legislation on the New Zealand statute books. As a result, it is subject to the normal rules of statutory interpretation. In order to give effect to the intent of Parliament, the courts must find the purpose of the Act.[81] This search should take three crucial factors into account.

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77 Ely, supra note 26, 74.

78 Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 Yale LJ 1063, 1070.

79 Rishworth et al, *The New Zealand Bill of Rights* (2003) 51 ["*Bill of Rights*"].

80 *The White Paper*, supra note 1, 44.

81 Interpretation Act 1999, s 5(1). See also *Palmer v Superintendent of Auckland Maximum Security Prison* [1991] 3 NZLR 315. In that case, Wylie J ruled that s 5(j) of the Acts Interpretation Act 1924 (the predecessor to the Interpretation Act 1999) applied to the NZBORA.

The first factor is the language of the Act. As a general rule, New Zealand legislation aspires "to be [a] detailed [prescription] of conduct and responsibility".[82] However, the NZBORA is different, "it is deliberately general – and hence unavoidably vague – in its scope".[83] Although some of the rights and freedoms are set out in reasonable detail, the majority are expressed in terms of "general principle".[84] Thus, it is apparent that the provisions of the NZBORA are intended to embody broad principles and not narrow rules.

The second factor is the Long Title to the NZBORA. The Long Title sets out the intention of the Act:

> (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
> (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

This brief statement provides two essential clues to aid interpretation of the Act. The first concerns the nature of the Act. It should be remembered that the NZBORA was not the product of a cataclysmic constitutional event.[85] The majority of the rights that the NZBORA embraces, such as the rights to life, liberty, religion and speech, "have informed judicial decisions for centuries".[86] In addition, the Long Title states that the NZBORA was intended to 'affirm' human rights and fundamental freedoms. Consequently, the Act is affirmatory in nature, collating but not creating new human rights.[87]

Yet reference to this common law history is not intended to block further development. The affirmatory label merely means that the NZBORA's approach is evolutionary rather than revolutionary.[88] It does not fossilize human rights. Instead, it encourages their evolutionary advancement.[89]

The second clue concerns the character of the rights. The Long Title declares that the NZBORA was intended to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights ("ICCPR").[90] The scope of that commitment can be demonstrated by reference to the ICCPR's preamble:[91]

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82 Rishworth, Fundamentals, supra note 3, 73.
83 Ibid.
84 Burrows, supra note 9, 407.
85 Rishworth, Fundamentals, supra note 3, 73.
86 Ibid 76.
87 *R v Jeffries* [1994] 1 NZLR 290, 299 (CA) per Richardson J.
88 Ibid.
89 In *Noort*, supra note 6, 270, Cooke P (as he then was) emphasized that the NZBORA was not to be approached as if it did "no more than preserve the status quo". See also *R v Goodwin* [1993] 2 NZLR 153, 199 per Hardie Boys J and *Baigent's case*, supra note 5, 690 per Casey J.
90 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
91 Emphasis added.

> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the *inherent dignity and of the equal inalienable rights* of all members of the human family is the foundation of freedom, justice and peace in the world ... *these rights derive from the inherent dignity of the human person.*

This assertion is striking. The rights are not described as mere social constructs,[92] but as universal entitlements, inalienable rights that derive from the inherent dignity of the human person. The NZBORA adopts similar language, enacting "human rights and fundamental freedoms".[93] The Court of Appeal has stated that all citizens are entitled to basic human rights. The protection of such rights is "the obligation of every civilized state. They are inherent in and essential to the structure of society."[94] As such, it is clear that the NZBORA is an expression of fundamental and universal values.

The final factor relevant to the NZBORA's purpose is the justified limitations clause. There are three accepted ways of drafting limitations to rights and freedoms.[95] The first model, embraced by the framers of the ICCPR, attaches a separate limitation clause to each right or freedom enacted by the instrument. The second model, adopted by the framers of the United States Constitution, states no express limits at all. The limitation process is left at the discretion of the judiciary, who determine the scope of a right by "reading in balancing and limiting factors".[96] The third approach, drawn from the Canadian Charter, adopts a single limitations provision that is applied as appropriate to all the rights affirmed by the document. The New Zealand Parliament followed the third approach, enacting a generally applicable limitations provision:[97]

> **5. Justified limitations –**
> Subject to section 4 of the Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The choice of this approach is highly significant. Under the first (ICCPR) limitation method the drafter expressly limits the scope of specific rights. Consequently, there is little role for judicial creativity. In contrast, section 5 of the NZBORA operates as a general limitation, providing no specific parliamentary guidance as to the scope of any individual right. Thus, in the absence of parliamentary limitation, the role of definition and limitation is left to the judiciary. The very existence of section 5 places the court in a supervisory role.[98]

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92 See Adams, supra note 2, 381.
93 Long Title.
94 *Baigent's case*, supra note 5, 702 per Hardie Boys J.
95 *The White Paper*, supra note 1, 71.
96 Ibid.
97 Section 5.
98 The "Bill of Rights ... casts the Courts in a supervisory role. Parliament has accepted that, subject to s 4, this supervision should occur." *R v Poumako* [2000] 2 NZLR 695, 717 (CA) per Thomas J.

Taking into account the language, Long Title, and justified limitation provision, it seems clear that the NZBORA is not a stone tablet upon which Parliament carved the 'rules' regarding human rights. Rather, it is a 'living document'. The provisions of the NZBORA embody broad principles that are intended to be evolutionary in scope, fundamental in nature, and subject to judicial supervision.

Therefore, despite its humble form and structural limitations,[99] the NZBORA is not a normal statute. In language and purpose it is the equivalent of a higher law 'constitutional' bill of rights. Hardie Boys J made this point in *Simpson v Attorney-General* ("*Baigent's case*"):[100]

> I see no reason to think that [the status of the rights] should depend on the terms of a written constitution. Enjoyment of the basic human rights [is] the entitlement of every citizen .... They do not depend on the legal or constitutional form in which they are declared.

It is apparent that Parliament intended to enact a Bill of Rights that was constitutional in substance despite its inferior form. As such, in order to give effect to the purpose of the NZBORA, the process of statutory interpretation should take principles of constitutional interpretation into account.

2. A Constitutional Approach to Interpretation?

The NZBORA mandates constitutional interpretation.[101] The most influential theories of constitutional interpretation are Ely's process-based approach and the broad substantive models of originalism and non-originalism. The application of these theories to the NZBORA is considered below.

(a) Process-Based Interpretation

(i) A Process-Based Bill of Rights?

This approach is concerned with the democratic systems by which substantive values are selected, rather than with substantive values in and of themselves. Under this approach, the function of constitutional interpretation is to protect representative democracy. This 'representation reinforcement' safeguards both democratic systems, and participation in those systems by minority groups.[102]

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99 Rishworth, Fundamentals, supra note 3, 75.

100 *Baigent's case*, supra note 5, 702 per Hardie Boys J. "Though the Bill of Rights has structural limitations arising from its status as an ordinary statute and the humble circumstances of its enactment, the similarities to its entrenched cousins overseas remain more important than the differences. After all, the rights and freedoms it contains are essentially identical to those in other countries' bills of rights." Rishworth, Fundamentals, supra note 3, 75-76.

101 Joseph, "Constitutional Review Now" [1998] NZ L Rev 85.

102 *United States v Carolene Products Ltd* 304 US 144, 152-153 (1938).

The process-based theory was influential amongst the drafters of the NZBORA. The extent of this influence is evident in the White Paper that preceded the NZBORA:[103]

> [T]he Bill would in large measure promote the accountability of government and the quality of democracy. For the most part it would not control the substance of the law and of the policy which would continue to be elaborated in, and administered by, present and future parliaments and governments. Thus the Bill would reaffirm and strengthen the fundamental procedural rights in the political and social spheres .... These rights in a substantive sense can ... be seen as value free.

(ii) Application and Evaluation

The New Zealand courts have given a degree of support to the process-based theory. In particular, they have highlighted the importance of freedom of expression in a functioning democracy:[104]

> The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.

Yet, although the process-based theory has received this judicial support, it suffers a significant flaw. As noted above, the theory rests on the assertion that a bill of rights or constitution protects the process by which substantive values are determined but not the values themselves. Consequently, where the line between procedure and substance is blurred or indistinct, the process-based theory is undermined and offers no clear guidance.

Quilter v Attorney-General ("*Quilter*")[105] serves as an example of this difficulty. *Quilter* involved an appeal by three lesbian couples claiming that the refusal of the Registrar of Marriages to grant them marriage licences contravened section 19 of the NZBORA. Section 19(1) provides that: "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993." While the appeal was denied, each judge in *Quilter* adopted a different approach to the relationship between section 19 and the Marriage Act 1955.[106] Keith J stated that section 19 did not 'reach' the area of marriage. Accordingly, he determined that the nature of marriage was a matter best left to the democratic system. Gault J was prepared to accept that section 19

103 *The White Paper*, supra note 1, 28.

104 *R v Secretary of State for the Home Department, ex parte Simms* [1999] 3 All ER 400, 408 cited in *Living Word Distributors Ltd v Human Rights Action Group* [2000] 3 NZLR 570, 584-585 (CA) per Richardson P.

105 [1998] 1 NZLR 523 (CA).

106 See Rishworth, "Reflections on the Bill of Rights after Quilter v Attorney-General" [1998] NZ L Rev ["Reflections"].

could encompass marriage. However, he concluded that discrimination should be determined by reference to "social values".[107] As a result, both judges were prepared to leave the determination of a substantive value (that is, the question of who may marry) to Parliament. These approaches seem to support the process-based theory of interpretation.

However, Thomas J, in a dissenting judgment, stated that the denial of marriage to same-sex couples stigmatized the gay and lesbian community. He asserted that the claim of the appellants demanded recognition from the Court because it was made by a minority group that did not have "ready access to the ordinary political process".[108] Their claim thus triggered the second element of representation reinforcement – the protection of minority groups, and their right to participate in government. This second element highlights the paradox inherent in the process-based theory. Substantive questions concerning participation in the democratic system must pre-empt any questions as to the fairness of the system itself. With this in mind, it seems clear that the process-based theory does not offer a comprehensive framework for the interpretation of the NZBORA.

(b) A Substantive Approach

The alternative to the process-based theory is the traditional American approach to constitutional interpretation. As noted earlier, this approach encompasses two schools, originalism and non-originalism. In addition, originalism can be divided into strict originalism and moderate originalism. The application of these theories to the NZBORA reveals three possible modes of interpretation.

(i) Closed Interpretation

Closed interpretation is similar to strict originalism. It assumes that the principles of the NZBORA are 'closed'. That is, they have defined limits that can be drawn by reference to specific parliamentary intent. The scope of these rights is determined by a one-step of process of internal definition. Thus, in certain situations the 'right' in question may not 'reach' the issue before the court, because the issue lies outside the intended scope of the right.

(ii) Moderate Interpretation

Moderate interpretation is analogous to moderate originalism. It casts the principles embodied by the NZBORA as concepts, not conceptions. Under this approach, the original intent of Parliament determines the nature of a right or freedom, but the specific intent of Parliament does not define the limits of that right or freedom. Whilst the scope of a principle remains open to judicial

107 *Quilter*, supra note 105, 526.
108 Rishworth, *Bill of Rights*, supra note 79, 51.

development, the principle itself (the original directive issued by Parliament) is not evolutionary and may only be altered by legislative amendment. Hence, a right or freedom should initially be defined as broadly as the original directive will allow and then be limited in an appropriate manner.[109] There are two possible approaches to limitation.

Using the first method, termed definitional balancing, interests competing with a right are balanced against the right in the course of its definition without reference to section 5. A process of internal definition determines the scope of the right. Such an approach is not ideal. The definitional method "balances values at an abstract level, producing general rules of law which define the scope of the rights concerned".[110] These general rules of law would bind lower courts and hinder further development of the enacted principles. Consequently, definitional balancing would undermine the evolutionary purpose of the moderate approach.

Under the second method, any limitations on the definition are considered separately by reference to section 5. In this manner, termed 'ad hoc balancing', the principles of the NZBORA may be limited in a democratic fashion, yet they will remain free from the stricture of specific intent.[111] Judges may legitimately evolve the NZBORA in a creative fashion, as long as they hold true to the original directive.

(iii) Open Interpretation

Open interpretation is the New Zealand equivalent to non-originalism. It views the rights and freedoms embodied by the NZBORA as 'open' principles. These principles are not bound by the original intent of Parliament at any level of generality. Accordingly, the scope and nature of the principles embodied by the NZBORA are virtually boundless. The court may evolve directives far beyond their original understanding, or even create new principles. The consequences of utilizing open interpretation are the same as those of using non-originalism, the meaning of the NZBORA is not what Parliament believed it was, but rather what the judges say it is.

3. The Theory in Practice

The NZBORA has not yet "generated much in the way of controversy about originalism and its nuances".[112] Yet, despite the lack of overt discussion, the three

109 Adams, supra note 2, 389. It has been suggested that even broad 'moderate' principles have inherent limits. For example, in *Irwing Toy Ltd v Quebec (Attorney-General)* (1989) 58 DLR (4th) 577, 607 the majority of the Supreme Court of Canada stated: "a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen".

110 Adams, supra note 2, 389.

111 Given the preference of the author for ad hoc balancing, any unqualified reference to moderate interpretation in this article refers to ad hoc moderate interpretation.

112 Rishworth, *Bill of Rights*, supra note 79, 46.

approaches to original intent (closed, open, and moderate interpretation) can be discerned in some NZBORA jurisprudence. Cases illustrating this point are set out below.

(a) Solicitor General v Radio New Zealand[113]

Radio New Zealand involved a prosecution for contempt of court. In deciding the case, the Court was forced to consider the relationship between the long-standing law of contempt and the relatively new NZBORA. At issue was the scope of section 14: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." The Court was presented with a crucial issue:[114]

> [W]hether freedom of expression encompasses the committing of the contempt alleged in this case. In other words whether the defendant's right to freedom of expression is wide enough to include and to protect its conduct in this case. If it is wide enough the finding that there has been contempt will restrict or limit the defendant's right.

The Court addressed this issue in short order, deciding that: "Freedom of expression does not authorise or permit the conduct of the defendant in this case. The right does not encompass the contempt alleged and found."[115] By definition, section 14 did not reach or protect the conduct before the Court. This internal limitation was made by reference to the law of contempt, with the Court finding that "freedom of expression is qualified by the necessity to preserve and protect those fundamental elements in the jury system".[116] The Court seems to have adopted an interpretive approach based on an underlying assumption that Parliament could not have intended the right to freedom of expression to reach or protect contempt of court.

Notably, the Court's interpretive approach contains two key elements. First, section 14 is cast as a conception, a right with clearly defined and closed parameters of influence. Secondly, this conception is based on the specific intent of Parliament. Therefore, section 14 did not – and presumably could never – encompass or provide prima facie protection for contempt of court because Parliament had not intended it to do so.

The decision is a clear example of closed interpretation. Any situation not contemplated by Parliament is not 'reached' by section 14 because the provision offers no protection in circumstances that Parliament did not specifically foresee. It freezes section 14 within a narrow historical framework.

113 [1994] 1 NZLR 48 per Eichelbaum CJ and Greig J.
114 Ibid 58.
115 Ibid 60.
116 Ibid.

(b) Duff v Communicado Ltd[117]

Duff also involved an action for contempt of court. This case is noteworthy because the Court chose to re-examine the relationship between the NZBORA and the law of contempt.

In *Radio New Zealand* the Court 'tested' the common law doctrine of contempt against the NZBORA's right to freedom of expression.[118] The Court in Duff however took a different approach. This can be seen in the decision of Blanchard J:[119]

> [T]he Court could determine what effect to give to the Bill of Rights guarantee on a case-by-case basis, balancing the right to freedom of expression against the interference with the administration of justice in the particular case.

It is evident that Blanchard J prefers the ad hoc approach. He states: "balancing is best done on the facts of each case, rather than in the abstract".[120]

In the result, the Court determined that freedom of expression should be widely defined and that the question of limitation should be resolved in accordance with section 5 of the NZBORA:[121]

> Mr Duff's statements were a form of expression ... protected by the Bill of Rights. The particular form of expression was the public airing of his opinion regarding his dispute with Communicado. In my view that must fall within 'information and opinions of any kind in any form'. These last words of s 14 indicate ... that Parliament intended the method I have adopted, namely to define the rights broadly and consider the question of limits under s 5.

Duff represents a clear departure from the closed approach adopted in *Radio New Zealand.* The Court in *Duff* applied parliamentary intent with a greater level of generality. The right to freedom of expression was defined as a broad principle: the right to impart "information and opinions of any kind in any form".[122] In addition, the issue of limitation was not treated as a matter of internal definition, but as a separate question to be dealt with under section 5.[123] Thus, while *Radio New Zealand* found that freedom of expression did not protect contempt of court (for that was not Parliament's intent) *Duff*, adopted a moderate mode of interpretation holding that section 14 encompassed and protected conduct before the court. In *Duff* the Court viewed freedom of expression as a concept or general

117 [1996] 2 NZLR 89.
118 Ibid 99.
119 Ibid.
120 Ibid.
121 Ibid.
122 Section 14.
123 Although Blanchard J advocated ad hoc balancing, he also accepted that "there must be some limits inherent in s 14". *Duff*, supra note 117, 99. See also supra note 109.

principle, not a conception or technical rule. The original intent of Parliament determined the nature of the right to freedom of expression but not the scope of the principle. The decision is consistent with the underlying directive, or the 'purpose of the provision'.

(c) Quilter

As mentioned, *Quilter* concerned the issue of same-sex marriage. The five-judge bench unanimously decided that the Marriage Act 1955 did not permit same-sex marriage. However, for the purposes of this article it is the interpretative method, not the outcome that is of note. Three distinct modes of interpretation can be identified in four relevant judgments.

(i) Keith J

Keith J asserted that section 19 of the NZBORA cannot be used to redefine the concept of marriage.[124] As such, his Honour concluded that section 19 "does not reach the question of the right to marry".[125] This approach is very similar to the method adopted by the Court in Radio New Zealand. It casts section 19 as a conception, a specified rule with a closed, defined 'reach' (or scope). Situations outside this 'reach' are not encompassed or protected by the right. In addition, the internal scope of the right is defined by reference to the specific intent of Parliament:[126]

> When Parliament in 1990 affirmed in the general language of s 19 the right to be free from discrimination on the stated grounds, it cannot be seen as overthrowing that particularistic approach which it had followed for so long ... Parliament would not have chosen such an indirect route to introduce such a major change not simply in the status of marriage but also in all its incidents. The matter would have been introduced in a much more direct way, by specifically altering an element of the accepted definition of marriage ...

The scope of section 19 was seen as frozen. It did not 'reach' the area of marriage because that was not Parliament's intent. The approach is a clear example of closed interpretation. It freezes the right within the narrow framework of specific intent, preventing future evolution.

(ii) Gault and Thomas JJ

The approach of Gault and Thomas JJ has two key characteristics – its approach to original intent, and its approach to limitation. Gault and Thomas

124 Rishworth, Reflections, supra note 106, 685.
125 *Quilter*, supra note 105, 567.
126 Ibid 570-571.

JJ applied parliamentary intent with a greater level of generality than Keith J. Gault J asserted that differential treatment is not, prima facie, discriminatory. In addition, he noted that the line between mere differential treatment and unlawful discrimination is a matter of definition. He defined discrimination as an unjustified difference in treatment. Thomas J adopts a similar approach. His Honour noted that "not all distinctions between individuals and groups of individuals will be discriminatory for the purposes of the guarantee in the Bill of Rights".[127]

Accordingly, he concluded that a finding of discrimination turns on a key question:[128]

> [The key question] is not whether there is a distinction but whether the distinction which exists is based on the personal characteristics of the individual or group and has the effect of imposing burdens, obligations, or disadvantages on that individual or group which are not imposed on others.

Gault and Thomas JJ define the right to freedom from discrimination as a general principle: the right to be free from unjustified difference. This principle embraces the original intent of Parliament at a high level of abstraction. It holds true to the underlying parliamentary directive while remaining free from the constraints imposed by specific intent. Using this approach, the possible scope of freedom from discrimination extends to marriage and beyond.

With regard to limitation, Gault and Thomas JJ set out definitional tests. Gault J stressed that the definition of the right to freedom from discrimination should "be considered before any issue of the possible application of s 5 of the Bill of Rights Act arises".[129] In a similar vein, Thomas J held that discrimination is a matter of internal definition. Once a distinction has been classified prima facie as discriminatory, it cannot be saved by reference to section 5. A disadvantageous difference that is unjustified, or demeaning to dignity is, by definition, discrimination. The balancing process that occurs is internal and takes place without reference to the statutory balancing mechanism set out in section 5. The relevant balancing factor is not the specific intent of Parliament, but the social policy (or community values) existing at the time of balancing.

In summary, the approach of Gault and Thomas JJ remains true to the concept of freedom from discrimination, yet free from the specific intent of Parliament. It also limits the scope of freedom from discrimination by a process of internal definition. The interpretive approach of Gault and Thomas JJ is thus an example of definitional moderate interpretation.

127 Ibid 532.
128 Ibid.
129 Ibid 527.

(iii) Tipping J

Regarding the issue of interpretation, Tipping J stated that "in this kind of case it is better conceptually to start with a more widely-defined right and legitimise or justify a restriction if appropriate, than to start with a more restricted right".[130] As such, Tipping J adopts a very wide definition of discrimination, holding that "difference in impact amounts prima facie to a difference in treatment and thus to discrimination".[131] The limitations on the wide scope of this right are then considered separately by reference to section 4 and section 5:[132]

> [I]f prima facie discrimination on a prohibited ground is found to exist at step one and it is neither legitimate under s 4 of the Bill of Rights nor justifiable under s 5, nor otherwise lawful, it will be unlawful and thus in breach of s 19.

This approach is very similar to the method adopted by the Court in *Duff*. Parliamentary intent is applied at a relatively high level of generality, consistent with the underlying directive, or the 'purpose of the provision'. Thus, the right to freedom from discrimination is defined as a broad principle or concept. In addition, the issue of limitation is not treated as a matter of internal definition, but as a separate question to be dealt with under section 5. Utilizing this approach section 19 may be limited in a democratic fashion, but it will not be restricted by specific intent. This approach is an example of ad hoc moderate interpretation.

(d) Lumber Specialties Ltd v Hodgson[133]

Lumber Specialties concerned the termination of beech harvesting on the West Coast forestry estate. In 1999 the plaintiffs, a group of logging companies, entered contracts with Timberlands (the State-Owned Enterprise tasked with forest management) for the supply of beech. However, before the resource consent process was complete, the shareholding Ministers issued a directive under section 13 of the State Owned Enterprises Act 1986, requiring Timberlands to abandon the beech harvest. Consequently, Timberlands suspended the supply contracts, declaring that the government directive constituted a force majeure. Unable to claim for breach of contract, the sawmillers sought judicial review of the section 13 directive pursuing four causes of action, including an alleged breach of section 27(1) of the NZBORA, which affirms the right of every person "to the observance of the principles of natural justice by any tribunal or other public authority".

At common law the term 'natural justice' embodies the rules of procedural fairness, principally the hearing rule and the rule against bias. In *Lumber*

130 Ibid 576.
131 Ibid 575.
132 Ibid 576.
133 [2000] 2 NZLR 347.

Specialties the plaintiffs restricted their section 27(1) argument to these traditional procedural grounds. However, unprompted by counsel, Hammond J indicated that section 27(1) could extend beyond the procedural sphere and provide a substantive right to property (a so-called 'right against takings'):[134]

> I note however that, in many ways, these plaintiffs' arguments were really ... a 'takings' argument. They say that a 'market' for beech was created, which was then taken out from under their noses, by an executive direction, after they had committed ... to the advancement of the beech scheme.

A constitutional right "not to be deprived of property by the State (except for a public purpose, upon payment of compensation and according to law)"[135] exists in many jurisdictions. Hammond J suggested that section 27(1) might become a 'surrogate' for this type of constitutional provision, protecting against the uncompensated 'taking' of private property.[136] However, despite this observation, the issue was not raised in argument before the Court.[137]

Although the proposed right was not adopted, the interpretive approach that spawned it is highly significant. On its face, it appears as if Hammond J created (or at least mooted) new meaning for section 27(1) of the NZBORA in a non-originalist fashion. In order to confirm this contention, it is necessary to investigate the pre-NZBORA 'right to property' and the legislative history of section 27(1). This is examined briefly below.

(i) The Right to Property

In New Zealand, the traditional 'right to property' is very limited. In *Cooper v Attorney-General*, the Court confirmed: "We have no protection of property rights equivalent to the ... US Fifth Amendment .... Our constitutional safeguard for property rights is that of Ch 29 of Magna Carta."[138] However, the constitutional safeguard provided by the Magna Carta is very narrow in its scope. The 'right' simply states that private property can only be 'taken' by the law of the land (an Act of Parliament). A "statute need not provide for compensation and there is no right to compensation unless a statute provides for it".[139] Any law of the land that purports to take property can do so without triggering any constitutional obligation to compensate the original owner.[140]

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134 Ibid 374.

135 Allen, "Commonwealth Constitutions and the Right not to be Deprived of Property" [1993] 42 ICLQ 523.

136 *Lumber Specialties*, supra note 133, 374.

137 Ibid.

138 [1996] 3 NZLR 480, 483 (HC). See also (1297) 25 Edw 1 (Magna Carta) c 29 (which remains in force in New Zealand under s 3(1) of the Imperial Laws Application Act 1988).

139 Allen, supra note 135, 524.

140 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL). This case provides a presumption in favour of compensation, however this presumption remains a rule of construction and can be extinguished by clear parliamentary intent.

The White Paper that preceded the NZBORA makes it clear that article 21 (now section 27) was intended to be procedural in nature:[141]

> The rules of natural justice, which in essence require fairness in decision-making by public bodies, have been developed and applied by the courts over many years. Indeed Article 21 of the Bill of Rights recognises this, and enhances the constitutional status of the rules of natural justice.

In addition, the White Paper specifically rejected the adoption of substantive economic rights (such as a right to property):[142]

> [The Bill] should not however attempt to capture (or more accurately to impose) a temporarily popular view of policy. For the most part the Bill would leave to the unfolding operation of [the] constitutional and political system the selection and resolution of the debates in society about substantive values, especially in the economic area. Accordingly, the Bill does not include major economic, social and cultural rights.

The decision to exclude an explicit right to property from the Bill of Rights is a conclusive interpretive factor. In the absence of a traditional substantive right to property, it is unrealistic to infer that Parliament intended to embed such a right in the section 27(1) natural justice provision.[143]

Consequently, the parliamentary directive embodied by section 27(1) must be procedural in nature. This conclusion confirms that the approach advocated by Hammond J in *Lumber Specialties* is an exercise in creation not extension. The proposed substantive right – protection against the uncompensated taking of private property – is conceptually distinct from the directive issued by Parliament, which was aimed solely at procedural fairness. The right against takings is a new principle; it is not supported or derived from the original intent of Parliament. Accordingly, the judicial creativity advocated in *Lumber Specialties* provides a clear example of the open mode of interpretation.

(e) Westco Lagan v Attorney-General[144]

Lumber Specialties was not the end of the issue. The speculative right suggested by Hammond J in *Lumber Specialties* was adopted as a cause of action in *Westco Lagan*. This case was an attack by the plaintiff on the Forests (West Coast Accord) Bill 2000. The Bill was intended to cancel the West Coast Accord and any Crown obligations (including contractual obligations to the plaintiff) arising under the Accord. Clause 7 of the Bill provided that "no compensation

141 *The White Paper*, supra note 1, 47.
142 Ibid 23. See also *Lumber Specialties*, supra note 133, 374.
143 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40, 54.
144 Ibid.

is payable by the Crown to any person for any loss or damage arising from the enactment or operation of this Part".[145] The plaintiff claimed that the Bill amounted to an uncompensated taking and thus breached the substantive right to property protected by section 27(1) of the NZBORA. The plaintiff argued that section 27(1) "require[d] an expansion of the usual concept of 'natural justice' so as to cover expropriation of property without compensation".[146]

In the High Court, McGechan J accepted that section 27(1) extends the traditional notion of natural justice, stating that "the boundaries of the concept are not set in stone".[147] However, he refused to accept that the approach mooted in *Lumber Specialties* was merely an extension of the concept of natural justice, citing the "absence of any clear provision as to seizure of property without compensation"[148] as evidence of parliamentary intent to "omit such rights altogether".[149] The Court concluded that section 27(1) was clearly a procedural provision and was not intended to create other substantive rights.[150] The Court was prepared to allow the scope of the right to expand, but was not prepared to move beyond the original parliamentary directive.

Accordingly, *Westco Lagan* is an example of the moderate mode of NZBORA interpretation. Although the scope of the principle remains open to judicial development, the principle itself (here, the right to procedural fairness) remains anchored to the original directive issued by Parliament. This principle is not evolutionary and may only be altered by legislative amendment. As a result, the will of Parliament continues to bind the court (albeit at a relatively high level of abstraction).

4. Evaluation of Interpretative Methods

The cases outlined above highlight instances in which the closed, moderate, and open approaches to NZBORA interpretation have been applied. Yet the adoption of an interpretive method does not in itself justify or validate that approach. Ultimately the validity of an approach will depend upon its legitimacy and appropriateness. This is examined below.

(a) Closed Interpretation

Under the closed approach the scope of the NZBORA's provisions is determined by reference to the specific intent of Parliament. This intent is applied at a very narrow level of generality. Consequently, the provisions of the Act may

145 Ibid 44.
146 Ibid 54.
147 Ibid. Emphasis added.
148 Ibid.
149 Ibid.
150 Ibid 55.

not 'reach' a given situation, because the issue lies outside the intended scope of the right.

Strict adherence to specific intent gives this approach legitimacy. In New Zealand, parliamentary supremacy dictates that the Courts are to interpret the law as ordained by Parliament.[151] The judiciary cannot rule on the validity of laws or engage in blatant creativity: rather, they must give effect to the intent of Parliament. Accordingly, the closed mode of interpretation is constitutionally legitimate.

However, closed interpretation suffers a significant flaw. Specific intent limits the scope of the NZBORA to a set of situations recognized by a limited group of people at a fixed date in history. As a result, the rights and freedoms embodied by the NZBORA are stagnant. They cannot adapt to meet new challenges, situations, social conditions or community values.

There seems to be little point in interpreting the NZBORA so narrowly and inflexibly as to force constant legislative amendment.[152] The Supreme Court of Canada has articulated a similar view:[153]

> [A constitution] must ... be capable of growth and development over time to meet new social, political, and historical realities often unimagined by its framers ... Professor Paul Freund expressed this idea aptly when he admonished the American Courts 'not to read the provisions of the Constitution like a last will and testament lest it become one!'

The New Zealand Court of Appeal has endorsed this declaration, announcing that the NZBORA "is not to be construed narrowly or technically".[154] Thus, although the closed approach may be constitutionally legitimate, its inflexibility makes it an inappropriate mechanism for the interpretation of a document that embraces fundamental human rights.

(b) Open Interpretation

Under the open approach the original intent of Parliament is not binding. The scope and the nature of the principles embodied by the NZBORA are therefore virtually boundless. The court may extend or broaden the NZBORA's principles beyond the original understanding, or even create new principles.

The key strength of this approach is its flexibility. It casts the NZBORA as a dynamic document, free from the frozen hand of the past and capable of evolving to meet the challenges of the future. Utilizing this approach New Zealand courts may make decisions based on the values, principles, and policies of the day.

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151 *Pall Mall*, supra note 8, 330 per Robertson J.

152 See Burrows, supra note 9, 415.

153 *Hunter v Southam Inc* (1984) 11 DLR (4th) 641, 649 per Dickson J.

154 *R v Butcher* [1992] 2 NZLR 257, 264 (CA) per Cooke P.

As such, the open approach seems a far more appropriate mode of NZBORA interpretation than the inflexible closed approach.

However, the open approach also suffers a crucial flaw. In New Zealand, Parliament is sovereign and supreme. "The duty of the courts is to ascertain and give effect to the will of Parliament."[155] New Zealand courts cannot simply ignore this will and create a new meaning for a statute, as this approach would advocate. Hence, because of its flexibility, the open approach is constitutionally illegitimate and unacceptable.

(c) Moderate Interpretation

The moderate approach to NZBORA interpretation lies between the closed and open extremes. Under this approach the courts must identify the original directive issued by Parliament. This 'core' directive is binding. However, the application (or scope) of this directive is not governed by original intent. Therefore, as long as a provision remains anchored to the original directive, the scope of that provision may extend to issues and situations never considered by Parliament. This approach has two key strengths.

The first strength is its flexibility. Under the moderate interpretation, the scope of the NZBORA is not restrained by specific intent. The provisions of the Act can respond to meet challenges and problems that were not conceived of by Parliament. As a result, the inherent flexibility of the moderate approach makes it an appropriate mode of interpretation for the NZBORA.

The second strength relates to the Diceyan orthodoxy. This orthodoxy states that the object of statutory interpretation is to give effect to the intention of Parliament. Moderate interpretation affords the judiciary a very wide scope to extend the bounds of a right or freedom. However, although the scope of a NZBORA provision remains open to judicial development, the underlying directive is not evolutionary and may only be altered by legislative amendment. The courts are bound to find and apply the intent of Parliament at the appropriate level of generality.

The moderate approach is able to encompass both the notion of parliamentary supremacy and the need to treat the NZBORA as a living, flexible document. Accordingly, the moderate mode of interpretation is both appropriate and constitutionally legitimate.

155 *Corocraft*, supra note 12, 638 per Donaldson J.

IV: Conclusion

The NZBORA would seem to mandate constitutional interpretation.[156] However, issues relating to its interpretation are complex. There are a variety of approaches to constitutional interpretation, and, to an extent, all of these approaches can be observed in NZBORA jurisprudence. On its face, the process-based theory advocated by Ely and the drafters of the NZBORA seems to provide an attractive framework for interpretation. However, the theory is flawed. It cannot adequately resolve issues where the line between substance and procedure becomes blurred. Also flawed are the closed and open interpretation approaches, which stem from traditional schools of American constitutional interpretation. The closed approach is constitutionally legitimate, yet it is not suited to the interpretation of fundamental human rights due to its rigidity and adherence to specific intent. The open interpretation approach suffers the opposite flaw. It facilitates flexibility and growth, yet is constitutionally illegitimate. As a result, neither the open nor the closed approach provides an acceptable framework for the interpretation of the NZBORA. It is the moderate interpretation approach that is most suitable. This approach binds the courts to the original core directive, yet it allows them to remain free from the limitations of specific intent. The approach is able to give effect to both the normal form, and the constitutional purpose of the NZBORA. The author submits that it is this, more principled, approach that should be adopted (consistently) by the courts.

156 Joseph, supra note 101.