INTERPRETIVISM AND SECTIONS 7 & 15 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

*Robert E. Hawkins**

In a recent book, Robert Bork, former nominee to the United States Supreme Court, argued that the provisions of the American Constitution should be given the meaning that they were commonly understood to have had at the time the Constitution was ratified. He suggested that any other approach would enable judges to amend the Constitution in an undemocratic fashion. Bork's restatement of the doctrine of interpretivism is at odds with the Canadian Supreme Court's notions of "progressive" Charter *interpretation. It also conflicts with recent statements from the court indicating a reluctance to consider evidence given at the Joint Committee of the Senate and House of Commons which studied the* Charter *prior to its adoption. This article sets out Bork's theory. It then applies it in the Canadian context by examining whether decisions of the Supreme Court of Canada dealing with sections 7 and 15 of the* Charter *reflect the common understanding of those sections held at the time of their adoption. Finally, the article asks what role, if any, the doctrine of interpretivism should play as a tool in* Charter *jurisprudence and as a justification for judicial review of the constitutionality of laws in Canada.*

Dans un livre paru récemment, Robert Bork, ex-candidat à la Cour suprême des États-Unis, soutient que l'on devrait attribuer aux dispositions de la Constitution américaine le sens courant qu'on leur donnait au moment de la ratification de la Constitution. Il affirme que toute autre approche permettrait aux juges de modifier la Constitution de façon non démocratique. Son nouvel exposé de la doctrine de l'"interpretivism" (interprétation étroite et formaliste) s'oppose au concept d'interprétation «évolutive» de la Charte *énoncé par la Cour suprême du Canada. Il est en contradiction également avec des déclarations récentes de la Cour démontrant une réticence à examiner la preuve présentée au Comité mixte du Sénat et de la Chambre des communes qui a étudié la* Charte *avant son adoption. Dans cet article, l'auteur expose la théorie de Bork. Il l'applique ensuite au contexte canadien en examinant si les décisions de la Cour suprême du Canada ayant trait aux articles 7 et 15 de la* Charte *reflètent le sens courant qu'on donnait à ces articles au moment de leur adoption. Enfin, l'auteur se demande quel rôle, s'il en est un, la doctrine de l'"interpretivism" devrait jouer comme instrument d'interprétation de la* Charte *par les tribunaux et comme fondement du contrôle de la constitutionnalité des lois au Canada.*

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* Assistant Professor, Faculty of Law, Queen's University. I was aided in the preparation of this article by Janice Page who provided research assistance and by the law firm of Fraser & Beatty, Toronto, who provided office facilities. I would like to thank them both.

I. INTRODUCTION

Robert Bork's nomination to the United States Supreme Court was recently rejected by the American Senate. Despite a distinguished career as a lawyer, scholar and judge, his opponents charged that he was too conservative to be entrusted with a number of politically contentious questions such as the abortion issue. Bork has written an important answer to his critics.[1] He argues that his theory of constitutional interpretation is neither conservative nor liberal, but rather is neutral, because it is based on the common understanding of the Constitution held by the informed public at the time when it was adopted. Part II of this article will set out Bork's theory. Parts III and IV will apply that theory in order to determine the extent to which the Supreme Court of Canada has felt bound by the original understanding of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.[2] Part V will consider the limits of the interpretivist approach in the Canadian context.

II. BORK'S THEORY OF INTERPRETIVISM

Bork begins where constitutional theory should begin, with a definition of the problem: "Constitutional philosophy is a theory of what renders a judge's power to override democratic choice legitimate."[3] It is a theory about how courts are to reason in resolving the constitutional disputes brought before them.[4]

Bork then sets out his fundamental premise: "The orthodoxy of our civil religion, which the Constitution has aptly been called, holds that we govern ourselves democratically, except on those occasions, few in number though crucially important, when the Constitution places a topic beyond the reach of majorities."[5] The basic American constitutional plan is representative democracy, qualified in a few important instances.[6]

The qualifications are all instances in which the Constitution assigns topics for decision to the courts rather than to the legislatures. The constitutional problem is to prevent these instances from consuming the basic principle. A judicial exercise of power which takes a topic properly decided in the democratic sphere and transfers it to the judicial sphere cannot be legitimate. Such an exercise of power would

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[1] R.H. Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (New York: The Free Press, 1990).

[2] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

[3] *Supra*, note 1 at 78.

[4] *Ibid.* at 140.

[5] *Ibid.* at 153.

[6] *Ibid.* at 49.

transform the system from a democratic one into an authoritarian one. What is needed is a criterion to define which topics properly belong in the legislative sphere and which topics properly fall within the judicial domain.

The challenge of protecting individual rights in a democracy has been called the Madisonian dilemma.[7] It is a dilemma created by the need to reconcile two conflicting principles. On the one hand there is the right of the majority to govern over a wide range of topics, "simply because they are majorities".[8] That is the principle of self-government. On the other hand, in limited areas, there is the right of the individual not to be interfered with by the majority will. That is the principle of liberty. A conflict arises between the citizen's freedom to govern as part of the majority and the citizen's freedom as an individual not to be governed. The Madison reconciliation consists in drawing a line between those topics left to the majority and those topics reserved to the individual.

Simply drawing a line is not enough. Without someone to police that line, one side or the other will try and sneak across. The policing role is usually assigned to judges.[9] In order to enforce that line, judges are going to have to say, on occasion, that the actions of the majority are invalid because they trespass into the area of freedom reserved to the individual. In other words, a single judge, or several judges, will frustrate the will of the majority. This "counter-majoritarian difficulty" is the outward reflection of the internal tension between the premise of self-government and individual liberty. The issue of the legitimacy of judicial power depends for its resolution on a reconciliation of that tension.

Success in resolving the tension will depend on the method used to interpret the bill or charter in question. One way would be for each judge to define the line in the way in which he or she wants. They might draw the line in accordance with their own personal preference, the preference of the last philosopher which they read, or the preference of the noisiest interest group which they encountered. At least to some — the judge him or herself, the philosopher, the interest group — the judge's method of reasoning would be praiseworthy as being right, or just, or good.

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[7] *Ibid.* at 139. *See also* A.M. Bickel, THE LEAST DANGEROUS BRANCH; THE SUPREME COURT AT THE BAR OF POLITICS (Indianapolis: The Bobbs-Merrill Company, Inc., 1962) at 16-23.

[8] Bork, *ibid.*

[9] The policing role need not necessarily be assigned to the courts. It could be assigned to the legislature, to the executive, or even to the citizenry by way of referenda. In the United States, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) assigned this role to the courts. In Canada, sections 24 and 52 of the *Charter* expressly assign it to the judiciary.

For Bork, this type of "result oriented" judging[10] is incompatible with democratic self-government: "It is no answer to say that we like the results, no matter how divorced from the intentions of the lawgivers, for that is to say that we prefer an authoritarian regime with which we agree to a democracy with which we do not."[11] It is also to permit, by osmosis, the incorporation of non-constitutional theories into the Constitution.[12]

Bork argues that there is only one neutral method of constitutional interpretation. He calls it "original understanding". Others have called it "interpretivism". According to this doctrine, the words of the Constitution must be given the meaning which they had at the time they were adopted.[13] This meaning is not the subjective meaning which a particular draftsman, legislator or assembly might have subscribed to them. Bork describes such a subjective approach as one which, "no one holds, one that is not only indefensible but undefended".[14] Instead, what is sought is the objective meaning of the words, the way in which they would have been understood at the time of their adoption. This meaning is to be found in the original dictionary definitions of the words contained in the text as well as in secondary materials such as debate at the conventions, public discussion at the time, newspaper articles, etcetera.[15] Also of interest are precedents from the time of ratification since presumably judges of the time were aware of the ordinary meaning which the words then carried.[16]

Bork acknowledges that interpretivists often speak of the intention of the ratifiers of the Constitution. This is not to be confused with a subjective approach. Bork states: "Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean."[17]

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[10] *Supra*, note 1 at 203.

[11] *Ibid.* at 78.

[12] *Ibid.* at 250.

[13] *Ibid.* at 143-44 and 300.

[14] *Ibid.* at 162. On the claim that original understanding is unknowable, *see generally* pages 161-64.

[15] *Ibid.* at 144.

[16] *Ibid.* at 157. The criticisms of the theory of original understanding are discussed below in Part V.

[17] *Ibid.* at 144. *But see ibid.* at 5, where Bork admits the following exception to the obligation of judges to apply the Constitution in a neutral way:

> They must not make or apply any policy not fairly to be found in the Constitution or a statute. It is of course true that judges to some extent must make law every time they decide a case, but it is a minor, interstitial lawmaking. The ratifiers of the Constitution put in place the walls, roofs and beams; judges preserve the major architectural features, adding only filigree.

Bork makes no distinction between constitutional interpretation and statutory interpretation: "When law makers use words, the law that results is what those words ordinarily mean".[18] The notion that judges are bound by the original meaning of a legislated text does, in Professor Ely's words, "seem to retain the substantial virtue of fitting better our ordinary notion of how law works...".[19]

Where the Constitution says nothing about the existence of a particular right, it means that no right was created. Such a right might be subsequently created by a constitutional amendment, or an ordinary law, but not by judicial fiat.[20] Central to the doctrine of original understanding is the principle that legislators make laws and courts implement them.[21] The judge is bound by the original meaning of the text; he or she must apply the law as those who made the law understood it would be applied.[22] In Bork's words, '[w]here the law stops, the legislator may move on to create more; but where the law stops, the judge must stop."[23]

Bork argues that constitutional interpretation based on original understanding is a "necessary inference" from the structure of government apparent on the face of the American Constitution.[24] Once a court abandons the intention of those who made the law, the court is necessarily thrust into a legislative posture.[25] Such a non-neutral posture would violate the division of powers which the American Constitution establishes, in part, to insure the maintenance of republican self-government. The debates surrounding the establishment of the American Constitution show that the ratifiers did not intend the courts to have a political role, but only a role in "expounding" the law made by others.[26]

Interpretivism is not a notion which is foreign in the Canadian constitutional context. In seeking the original understanding of words, courts have looked to the purpose which the provision was intended to serve. What good was sought by the enactment of the provision; what ill was it to cure? Chief Justice Dickson set out an interpretivist standard for dealing with the *Charter* in *R.* v. *Big M Drug Mart Ltd*:

> The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

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[18] *Ibid.* at 144.
[19] *Ibid.* at 161 n. 1.
[20] *Ibid.* at 118-19, 256, 259 and 345.
[21] *Ibid.* at 177.
[22] *Ibid.* at 5.
[23] *Ibid.* at 151.
[24] *Ibid.* at 155.
[25] *Ibid.* at 81.
[26] *Ibid.* at 154 and *see infra*, note 144 and accompanying text. As is discussed in Part V, the situation with respect to the role of judges envisaged by the ratifiers of the *Charter* is not so clear cut.

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.[27]

Professor Hogg's views on interpretivism are ambivalent. He begins with an interpretivist premise: "Whether judicial review takes place on distribution-of-powers (or federalism) grounds or on *Charter* grounds, it appears to be a normal judicial task, since it involves the interpretation of an authoritative text, the Constitution of Canada. This task is similar to the interpretation of a statute, a will or a contract, for example".[28] Hogg argues that judges strive to exclude their personal policy preferences from the process of constitutional adjudication. It is this attempt to achieve professional neutrality which justifies, in a democratic society, the conferral of powers of judicial review on non-elected judges.[29] There is a presumption of constitutionality. A legislative decision should be given the benefit of a reasonable doubt and allowed to stand unless its unconstitutionality is clear. This will reduce the danger of the imposition of judicial policy preference.[30]

On the other hand, this interpretivist premise remains, for Hogg, a largely unrealizable ideal. The broad and vague language of the Constitution, together with the existence of new problems not envisaged by the framers of the text, means that courts will plainly be called upon to make discretionary choices. Judicial review of the

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[27] [1985] 1 S.C.R. 295 at 344, 18 D.L.R. (4th) 321 at 359-60 [emphasis in original]. *See also* the decision of Mr Justice McIntyre in *Reference re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 394, 78 A.R. 1 at 9:

> It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the *Charter*, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society.

[28] P.W. Hogg, CONSTITUTIONAL LAW OF CANADA, 2d ed. (Toronto: The Carswell Company Limited, 1985) at 97.

[29] *Ibid.* at 261.

[30] *Ibid.* at 99-100.

Constitution inevitably involves policy-making.[31] Bork and Hogg do not appear to disagree on the idea that interpretivism justifies judicial review or on the idea that political judging poses a threat to democratic principles. Where they part company is over the extent to which technical problems will prevent application of the Constitution in accordance with the original understanding of its framers thus justifying judicial policy-making, on a restrained basis, as a second best reality.[32]

Bork concludes, after developing his theory of interpretivism, that this idea is now "outside the mainstream" of American constitutional law.[33] He continues:

> What is worrisome is that so many of the Court's increased number of declarations of unconstitutionality are not even plausibly related to the actual Constitution. This means that we are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own.[34]

Bork argues that this marks the culmination of a trend. At various times within the last 50 years different elite groups, unable to win popular legislative support for their reform agenda, had, nonetheless, captured the attention of the American Supreme Court and persuaded it to elevate their ideas to the level of constitutional doctrine.[35] Judges, instead of interpreting the Constitution on the basis of the original understanding of its words, wrote into the Constitution items from the ideology of the elite to which they felt closest.[36] In the 1930's, the Court, allied with business interests and an ideology of free enterprise, wrote the laissez-faire principles of Adam Smith into the Constitution by striking down New Deal legislation in decisions which relied on *Lochner* v. *New York*.[37] At the time, liberal academics urged interpretation of the Constitution according to original understanding and pressed for a policy of judicial restraint.[38] Bork argues that recently the values of the intellectual class, from which judges are drawn, have become more egalitarian and socially permissive than those of the public at large.[39] The result has been the inclusion of a new set of values in the Constitution through decisions such as *Griswold* v. *Connecticut*[40] (a right to contraception and to privacy), and *Roe* v. *Wade*[41] (a right to an abortion), values which are clearly not there.

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[31] *Ibid.* at 97 and 261.

[32] Part V *infra*, considers, and to some extent answers, the limitations in making interpretivism operate identified by Hogg.

[33] *Supra*, note 1 at 143.

[34] *Ibid.* at 130.

[35] *Ibid.* at 250 and 337.

[36] *Ibid.* at 16-17 and 130.

[37] 198 U.S. 45 (1905) [hereinafter *Lochner*].

[38] Bork, *supra*, note 1 at 177.

[39] *Ibid.* at 8 and 242.

[40] 381 U.S. 479 (1965) [hereinafter *Griswold*].

[41] 410 U.S. 113 (1973) [hereinafter *Roe*].

Bork describes the techniques which judges have used to constitutionalize values originating outside of the Constitution. The first technique is substantive due process. It was first used in 1857 in the case of *Dred Scott* v. *Sandford*,[42] where Chief Justice Taney used the due process clause in holding that slave ownership was a constitutionally guaranteed right. He stated: "And an act of Congress which deprives a citizen of the United States of his liberty or property ... could hardly be dignified with the name of due process of law."[43]

Through this act of legerdemain, Taney transformed a clause mandating process into one mandating substance. The two are not the same. The oxymoron "substantive due process" was invented. Bork, following Ely, compares the contradiction in that phrase to that contained in the phrase, "green pastel redness".[44] The due process clause does not give any textual support for reviewing the substance of a law. Moreover, because there is no guide in constitutional text, structure or history as to what substance might be due, the meaning of the provision is unlimited. As Bork observes, "The clause now 'means' anything that can attract five votes on the Court."[45]

Dred Scott became the "very ugly common ancestor"[46] of *Lochner*, which used the notion of substantive due process to constitutionalize the "right to work" unlimited hours, and of *Roe*, which used the same argument to constitutionalize the right to an abortion. The text of the Constitution, as interpreted in light of the original understanding of the framers, nowhere creates such rights. That does not preclude the possibility of the introduction of such rights through legislation or constitutional amendment. It might be politically and morally proper to take such a step. There can be no legitimacy, however, in the creation of such rights through judicial fiat.

The second technique is substantive equal protection. The Fourteenth Amendment of the United States Constitution guarantees all persons born or naturalized in the United States, "the equal protection of the laws". It was adopted after the American Civil war. According to Bork, it was originally understood as making constitutionally inadmissible any law which allocated burdens or benefits on the basis of skin colour.[47] The original intention in adopting the provision was not to prohibit legislatures from favouring or disfavouring individuals or groups on any non-racial basis. Nonetheless, the American judiciary has used the clause to prevent legislatures from making non-racial distinctions. Laws have been struck down which placed burdens on

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[42] 60 U.S. (19 How.) 393 (1856) [hereinafter *Dred Scott*].
[43] Bork, *supra*, note 1 at 31, citing Chief Justice Taney.
[44] *Ibid.* at 32 n. 24.
[45] *Ibid.* at 238.
[46] *Ibid.* at 32.
[47] *Ibid.* at 39 and 63.

"discrete and insular minorities" who could not easily participate in the political process.[48]

In striking down such laws, courts are substituting their judgment on how these groups are to be treated for that of the legislature. Because the "discrete and insular" principle finds no support in the original understanding of the text of the Constitution, its adoption represents pure judicial policy-making. Bork summarizes his opposition to substantive equal protection in the following words:

> When a judge assumes the power to decide which distinctions made in a statute are legitimate and which are not, he assumes the power to disapprove of any and all legislation, because all legislation makes distinctions. ... The men who ratified the fourteenth amendment had made the decision that statutory inequality between blacks and white was immoral and was to be disallowed.
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> Once the Court begins to employ its own notions of reasonableness in order to decide which classifications should be treated like race, it *cannot* avoid legislating the Justices' personal views. The most honest and intelligent judge the nation has ever known could not avoid it if the clause is so read.[49]

The third technique was developed in *Griswold*, the decision which declared a law criminalizing the use of contraceptives unconstitutional. The law was held to violate the individual's right to privacy. The difficulty was that the Constitution nowhere contains such a right. In his decision, Justice Douglas began with the following premise: "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them [i.e. those guarantees] life and substance."[50] He then cited the first amendment (freedom of speech), the third (soldiers not to be quartered in private homes), the fourth (ban on unreasonable search and seizure) and the fifth (freedom from self-incrimination), as having penumbras which create a right to privacy.

There are problems with this. The supporting guarantees in no way cover the facts of the *Griswold* case. Freedom of speech has nothing to do with the right to use contraception either directly, or indirectly. The right to use contraception is not necessary to protect free speech. Moreover, while specific constitutional provisions may

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[48] *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938) at 152-53 n. 4 [hereinafter *Carolene Products*]. The footnote sets out various distinctions which Justice Stone suggests should be subject to "strict judicial review"; in other words, which should constitutionally invalidate legislation. Distinctions affecting "discrete and insular minorities" fall within this category.

[49] *Supra*, note 1 at 65 and 64 [emphasis in original].

[50] *Supra*, note 40 at 484.

protect privacy in specific situations, there is no general right to privacy guaranteed by the Constitution. There is no guide in constitutional text, structure or history as to what activities a right to privacy might cover. As a result, Bork concluded that "privacy" would turn out to protect those activities which a majority of Justices think ought to be protected but not those activities for which they had little sympathy.[51]

Prior to Justice Douglas constitutionalizing his own personal predilections by weaving a new constitutional right out of several inapplicable constitutional provisions, he rejected any judicial assumption of political power through the process of "Lochnerization". He claimed to take the high road:

> Overtones of some arguments suggest that [*Lochner*] should be our guide. But we decline that invitation. ... We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.[52]

Justice Douglas purported to apply the text of the Constitution as understood in light of the words, structure and history supplied by its authors. Instead, he gave effect to his own policy preferences. It is worth considering, given the interpretivist approach articulated by Chief Justice Dickson, cited earlier, whether the Supreme Court of Canada's early decisions on sections 7 and 15 of the *Charter* exhibit any of this "watch what I do, not what I say" quality.

III. INTERPRETIVISM AND SECTION 7 OF THE *CHARTER*

Section 7 of the *Charter* provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Subsection 94(2) of the British Columbia *Motor Vehicle Act*[53] made it an offence to drive while prohibited from doing so. In order to obtain a conviction, the Crown was required to show only that the accused was driving. It was not necessary for the Crown to prove that the accused knew that he or she was prohibited from driving. The statute created an absolute liability offence. Upon conviction, the accused could be imprisoned. In *Reference re section 94(2) of the Motor Vehicle Act (B.C.)*,[54] Mr Justice Lamer held that a statute which

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[51] *Supra*, note 1 at 99-100.

[52] *Griswold*, *supra*, note 40 at 481-82.

[53] R.S.B.C. 1979, *as am.* S.B.C. 1982, c. 36.

[54] [1985] 2 S.C.R. 486, 69 B.C.L.R. 145 [hereinafter *Reference Motor Vehicle Act* cited to S.C.R.].

created an absolute liability offence, punishable by imprisonment, was a deprivation of liberty not in accordance with the principles of fundamental justice.

In effect, Mr Justice Lamer held that certain kinds of crimes, in this case absolute liability offences carrying a possible penalty of imprisonment, violated the principles of fundamental justice. The notion of fundamental justice was not limited to an inquiry into procedure. Instead, it was extended to an inquiry into the type of offence which the law created; an inquiry into substance. Mr Justice McIntyre, writing in support of the majority, expressly agreed that fundamental justice included a substantive element.[55] In inventing "substantive fundamental justice", Mr Justice Lamer did for the *Charter* what, in inventing substantive due process, Justice Taney did for the American *Bill of Rights*.[56]

Mr Justice Lamer gave three reasons for his conclusion. One was textual. He argued that if the framers of the Constitution had intended section 7 to be simply a procedural guarantee they would not have used a term like "fundamental justice", which is "shrouded in ambiguity".[57] Instead, the framers would have used a term like "natural justice" which has a well known and precise meaning in administrative law. He stated:

> Thus, it seems to me that to replace "fundamental justice" with the term "natural justice" misses the mark entirely. It was, after all, clearly open to the legislator to use the term natural justice, a known term of art, but such was not done. We must, as a general rule, be loath to exchange the terms actually used with terms so obviously avoided.[58]

There is no doubt why the term "fundamental justice", rather than the term "natural justice", was used in the *Charter*. There is also no doubt about how the term was understood when it was originally used. Mr Justice Lamer cites the evidence in his judgement. It is drawn from testimony given before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada ("Joint Committee").[59] The Committee met prior to the passage of the *Charter* in order to consider the proposed *Charter* provisions. The senior civil servants and politicians who wrote the *Charter* gave

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[55] *Ibid.* at 521-22.

[56] *Dred Scott*, *supra*, note 42.

[57] *Reference Motor Vehicle Act*, *supra*, note 54 at 512.

[58] *Ibid.* at 503.

[59] *See* Canada, Parliament, MINUTES OF PROCEEDINGS AND EVIDENCE OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND OF THE HOUSE OF COMMONS ON THE CONSTITUTION OF CANADA (Ottawa: Queen's Printer for Canada, 1980-81) [hereinafter COMMITTEE PROCEEDINGS]. This is a useful research tool. The last number in the series contains a good index.

evidence. The Assistant Deputy Minister of Justice, Public Law, Dr B. L. Strayer, testified that fundamental justice covered the same thing as procedural due process but did not include substantive due process. He added: "Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness".[60] The reference here is to the administrative law concept of fairness; a concept which expands to procedural protection available to individuals who are affected by governmental decisions taken in non-judicial contexts. Fairness provides procedural safeguards in situations where the right to natural justice would not be available. This explains why the authors of the *Charter* could not use the term natural justice as a synonym for procedural due process.

The testimony of Assistant Deputy Minister Strayer was supported by two other witnesses. The Deputy Minister of Justice, Roger Tassé, stated: "We would think that the Court would find in that phraseology principles of fundamental justice a meaning somewhat like natural justice or inherent fairness."[61] Finally, the Minister of Justice, the Honourable Jean Chrétien, testified that, while the term fundamental justice was perhaps marginally more appropriate than natural justice, either term was acceptable to the Government.[62]

Mr Justice Lamer clearly had to find some way to deal with this evidence of original understanding. He did so as follows:

> Moreover, the simple fact remains that the *Charter* is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the *Charter*. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?
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> Were this Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, *i.e.*, the intention of the legislative bodies which adopted the *Charter*.[63]

Mr Justice Lamer is saying that we cannot interpret the Constitution in accordance with the intention of those who adopted it because such intentions are unknowable; impossible of proof. The *Charter*'s ratification was the work of many legislative bodies, presumably all of disparate intention. Indeed, it is ephemeral to talk of the intention of even one legislature given that it is made up of many multi-motivated actors. If Mr Justice Lamer is right, and if interpretivism is

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[60] *Ibid.* No. 46 at 32 (27 January 1981).
[61] *Ibid.* No. 3 at 79 (12 November 1980).
[62] *Ibid.* No. 46 at 38 (27 January 1981).
[63] *Reference Motor Vehicle Act*, *supra*, note 54 at 508-09.

unworkable for these reasons, no statute could ever be applied, except in accordance with the personal whims of the judge. And yet, statutes are applied, and the will of the lawmakers is done.

Mr Justice Lamer refutes a theory of constitutional interpretation which, in Bork's words cited earlier, "no one holds". Original understanding is not concerned with the subjective understanding of the ratifiers except to the extent that the understanding can be taken to be the understanding of the meaning of the words held by the informed public at the time of their adoption. The testimony of the authors of the *Charter* is important historical evidence of what was commonly understood by the words of the *Charter* at the time of its passage. This is particularly true given that the testimony was before a legislative body with the power to question, was publicly broadcast, and was delivered prior to ratification of the *Charter* by any assembly; federal, provincial, or mixed. It is significant that the testimony was uncontradicted.[64] It is also significant that the opinion voiced in the testimony was consistent with well documented provincial concerns to the effect that a substantive due process doctrine would unacceptably weaken the criminal law.[65]

Mr Justice Lamer would have been correct in not limiting himself to the evidence of a "few individual public servants, however distinguished"[66] in the search for the original understanding of the term "fundamental justice". The term was known in Canada at the time it was written into the *Charter*. It had been used as a procedural guarantee in subsection 2(e) of the *Canadian Bill of Rights*.[67] In *Duke* v. *The Queen*,[68] fundamental justice was interpreted as meaning "that the tribunal which adjudicates upon his [the applicant's] rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case".[69] Without evidence to the contrary, and there is none, one would expect the term to have the same meaning when adopted for use in the *Charter*. As will be seen below, when the authors of the *Charter* wished to depart from the meaning given to the term "equality" in subsection 1(b) of the *Canadian Bill of Rights*, they made their intentions clear in their debates on the issue and in the text which they actually chose for the *Charter*.

The second reason Mr Justice Lamer gave was structural. He held that section 7 of the *Charter* provided a general right to fundamental

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[64] The Members of the Joint Committee asked no questions at the time the testimony was given and made no proposals for change in the final report which would have indicated support for substantive review. *See* Professor Hogg's comments on this point, *supra*, note 28 at 74.

[65] Ontario was strongly of this view.

[66] *Reference Motor Vehicle Act*, *supra*, note 54 at 508.

[67] S.C. 1960, c. 44, *reprinted in* R.S.C. 1985, App. III.

[68] [1972] S.C.R. 917, 28 D.L.R. (3d) 129 [hereinafter *Duke* cited to S.C.R.].

[69] *Ibid.* at 923.

justice in the areas of life, liberty and security of the person and that sections 8 through 14 were illustrative examples of that general right. It followed from this, since sections 8 to 14 contained both procedural and substantive rights, that section 7 must have been wide enough to contain both of these elements as well. Mr Justice Lamer reasoned:

> [Sections] 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilized provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section".[70]

However, section 7 was not written in that way. Mr Justice Lamer's argument is inconclusive. One could as easily argue that the separate treatment of sections 8 to 14 indicates that those sections are different from section 7 rather than illustrative of it. Section 12 guarantees to everyone the right not to be subjected to cruel and unusual punishment. This is a substantive and not a procedural guarantee. Was this section meant as an example of fundamental justice, or was it listed separately precisely because it was meant as an additional and different kind of guarantee than that accorded by procedural fundamental justice?

Mr. Justice Lamer gives no reason for preferring the illustrative approach.[71] It is significant that elsewhere in the *Charter*, where the framers wished to list a series of examples following a general provision, they adopted formulae similar to the hypothetical formulae which was suggested by Mr Justice Lamer and which was not used in the redaction of section 7.[72]

Mr Justice Lamer's third reason is historical, or perhaps anti-historical. He rejects the background of American constitutional jurisprudence as a worthwhile guide in interpreting section 7 of the *Charter*. He reasoned:

> It [the substantive/procedural dichotomy] is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and

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[70] *Reference Motor Vehicle Act*, *supra*, note 54 at 502-03.

[71] Mr Justice Lamer's interpretation is supported by only one statement in the debates before the Joint Committee. *See* COMMITTEE PROCEEDINGS, *supra*, note 59 No. 41 at 15-16 (20 January 1981), where Acting Minister of Justice Robert Kaplan stated: "Well, I think generally, the generally recognized rights affecting life, liberty and security are specifically referred to in the provisions that follow, and the reason for a general introductory statement like that is to permit the evolution and expansion of rights of life, liberty and security over time."

[72] *See* subsection 15(1), the equality rights subsection, which uses the phrase "and, in particular"; subsection 15(2), the affirmative action subsection, which uses the phrase "including"; and section 25, the section preserving aboriginal rights, which uses the joining word, "including".

> jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution. ... We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions.[73]

The difficulty is that the American example was the driving force behind the choice of the words "fundamental justice" for the *Charter*. The authors of the *Charter* were aware of the way the American courts had turned the due process clause from a clause mandating review on procedural grounds into one permitting review on substantive grounds. A review of the historical record leaves no doubt that the phrase "fundamental justice" was chosen instead of the more widely recognized phrase "due process" in an effort to avoid the substantive review baggage which this latter phrase had acquired in its journey through the American courts. Indeed, an amendment in Committee was proposed which would have added to the words "fundamental justice" the phrase "including the principles of due process of law". The amendment was rejected. During the course of the debate on the amendment, Assistant Deputy Minister of Justice Strayer testified:

> [T]here is a good deal of jurisprudence on the term "due process", both in Canada and the United States, and some of the jurisprudence in the United States gave rise to the problem that we were trying to avoid with the term, "fundamental justice".
>
> . . .
>
> Due process would certainly include the concept of procedural fairness that we think is covered by Fundamental justice, but we think that "due process" would have the danger of going well beyond procedural fairness and to deal with substantive fairness which raises the possibility of the courts second guessing Parliaments or legislatures on the policy of the law as opposed to the procedure by which rights are to be dealt with. That has been the experience at times in the United States in the interpretation of the term "due process".[74]

By failing to give credence to the historical background against which the *Charter* was written, and by importing a substantive element into the notion of fundamental justice, Mr Justice Lamer in effect reversed the vote of the Parliamentary Committee rejecting the inclusion of the words "due process" in the constitutional provision.[75]

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[73] *Reference Motor Vehicle Act*, *supra*, note 54 at 498.

[74] COMMITTEE PROCEEDINGS, *supra*, note 59 No. 46 at 33 and 36 (27 January 1981).

[75] *See generally ibid.* No. 46 at 30-45 (27 January 1981).

By incorporating a substantive element into the term "fundamental justice", Mr Justice Lamer is, in fact, "Lochnerizing".[76] The objection to this is the same as the objection which Bork made to the transformation of a clause about due process into one about due substance. Not only does it represent an invasion of the democratic sphere by the judiciary; it is an invasion which knows no bounds.[77] There is little in the *Charter*'s text, history or structure which would suggest what substantive fundamental justice means.

Mr Justice Lamer himself offers the following suggestion: "[T]he principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system."[78] Support for this limitation might be found in the fact that sections 7 to 14 are entitled "Legal Rights" and in the fact, if one accepts it, that sections 8 to 14 illustrate section 7. As discussed, however, this support is tenuous. It is difficult to see anything in the original understanding of the *Charter* which suggests that the basic tenets of our legal system, apart from those expressly mentioned, were not meant to be determined democratically rather than judicially. What are the basic tenets of our legal system? Why do absolute liability offences, punishable by imprisonment, violate the basic tenets of our legal system? Even if absolute liability offences do alter the basic tenets of our legal system, why is it not open to the democratic process to make such an alteration?

The *Reference Motor Vehicle Act* decision, with its doctrine of substantive fundamental justice, may itself become a "very ugly common ancestor".[79] In *R.* v. *Morgentaler*[80], a majority of the Supreme Court of Canada held unconstitutional certain sections of the *Criminal Code*[81] prohibiting abortion except in certain limited circumstances. The sections were held to violate a woman's right not to be deprived of security of the person except in accordance with the principles of fundamental justice. Chief Justice Dickson, ruling for the majority, held:

> I conclude that the procedures created in s. 251 of the *Criminal Code* for obtaining a therapeutic abortion do not comport with the principles of fundamental justice. It is not necessary to determine whether s. 7 also contains a substantive content leading to the conclusion that, in some

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[76] *See* Bork, *supra*, note 1 at 44.

[77] *Ibid.* at 238.

[78] *Reference Motor Vehicle Act*, *supra*, note 54 at 503.

[79] Bork, *supra*, note 1 at 32.

[80] [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler* cited to S.C.R.].

[81] R.S.C. 1985, c. C-46.

> circumstances at least, the deprivation of a pregnant woman's right to security of the person can never comport with fundamental justice. Simply put, assuming Parliament can act, it must do so properly.[82]

Mme Justice Wilson concurred with the majority, but did so on much broader grounds. She held that procedural requirements for obtaining an abortion were purely academic if such requirements could not, as a constitutional matter, be imposed at all; that is if no valid criminal offence in the area could be created.[83] She adopted and expanded Mr Justice Lamer's doctrine of substantive fundamental justice in the following fashion: "While Lamer J. draws mainly upon ss. 8 to 14 of the *Charter* to give substantive content to the principles of fundamental justice, he does not preclude, but seems rather to encourage, the idea that recourse may be had to other rights guaranteed by the *Charter* for the same purpose."[84] She concludes that legislation preventing a woman from seeking an abortion violates freedom of conscience and so cannot accord with the principles of fundamental justice within the meaning of section 7.

Mme Justice Wilson could have reached her conclusion directly simply by relying on subsection 2(a) of the *Charter*, the freedom of conscience subsection. The use of section 7 adds nothing to the logic. In choosing to go the indirect route, she greatly expanded the substantive content of fundamental justice. This is pure judicial legislation. It runs counter to the original understanding of the text of the *Charter*; to the meaning which the public in 1981 generally ascribed to it.

Prior to the *Charter*'s ratification, the question of the impact of the *Charter* on the power of the Government to legislate in the areas of abortion and capital punishment was expressly raised and debated in the Joint Committee. There was concern that these two issues not be determined preemptively by the Courts as had happened in the United States. Prior to the *Charter*'s ratification, and in an effort to reassure all sides, the federal Government formally adopted the following position: "The government agrees that such matters as abortion and capital punishment should be left to be dealt with from time to time by the democratically elected representatives in Parliament, as evolving social and moral issues."[85]

The Minister underscored this position in his testimony before the Joint Committee:

> If you write down the words, "due process of law" here [in section 7], the advice I am receiving is the court could go behind our decision and say that their [Parliament's] decision on abortion was not the right one ... and it is a danger, according to legal advice I am receiving, that it

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[82] *Morgentaler*, *supra*, note 80 at 73.
[83] *Ibid.* at 161-62.
[84] *Ibid.* at 175.
[85] COMMITTEE PROCEEDINGS, *supra*, note 59 No. 49 at 14 (30 January 1981).

> will very much limit the scope of the power of legislation by the Parliament and we do not want that; and it is why we do not want the words "due process of law".[86]

At the time the *Charter* was ratified, it enjoyed very broad based popular support.[87] At that time, abortion and capital punishment had become transcendant, single issue questions which were deeply divisive. It would be surprising if the *Charter* could have enjoyed the support which it did unless it was commonly understood that it did not predetermine the substantive outcome of the abortion or capital punishment debates.

If the scope of section 7 has been broadened by the courts beyond anything understood at the time of its adoption, the scope of section 15 has been unduly restricted. In the case of section 7, the courts have defeated the original understanding of the section by expanding the definition of fundamental justice to include a substantive element. In the case of section 15, the courts have defeated the original understanding of the section by restricting the definition of equality to eliminate arbitrary treatment. In both cases, the democratic principle has been the loser.

IV. INTERPRETIVISM AND SECTION 15 OF THE *CHARTER*

Subsection 15(1) of the *Charter* provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Subsection 15(2) permits affirmative action programs that have as their object, "the amelioration of conditions of disadvantaged individuals or groups...".

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[86] *Ibid.* No. 46 at 43 (27 January 1981). *See also* the testimony of the Assistant Deputy Minister, *ibid.* No. 46 at 33 (27 January 1981).

[87] Prime Minister Trudeau cited the relevant polls in a speech made during the constitutional debate before the House of Commons. He quoted a Gallup Poll published in *The Montreal Gazette* (6 August 1980) which showed that 91% of Canadians thought that the Constitution should guarantee basic human rights. He also cited a poll published in *The Toronto Star* (8 January 1981) in which 83% of those questioned agreed that the Constitution should include a charter of rights and freedoms: Canada, HOUSE OF COMMONS DEBATES at 8506-07 (23 March 1981). *See also* COMMITTEE PROCEEDINGS, *supra*, note 59 No. 41 at 93 (20 January 1981) where Mr Jake Epp, member of Parliament for Provencher told the Joint Committee on behalf of the Official Opposition that: "It is also the popular will that we have a Charter of Rights and Freedoms for the Canadian people embedded in the constitution."

The key interpretive problem in construing section 15 is determining who is entitled to claim the equality rights which it guarantees. The answer will depend on the kinds of distinctions between individuals or between groups which the section permits the law to make. For example, distinctions between individuals on the basis of colour are clearly inadmissible. The example becomes more difficult if a government, anxious to reduce highway accidents, passes the following law: "People weighing 100 pounds cannot drive a car". The law will reduce the number of highway accidents because there will be fewer people on the road. However, there is no correlation between weight and driving ability. Does section 15 give equality rights to thin people? Is a law which draws a distinction on the basis of weight constitutionally permissible?

In *Andrews* v. *Law Society of British Columbia*,[88] the Supreme Court of Canada struck down a statute which prevented otherwise qualified non-Canadians from practising law in the province. The Court was prepared to review and to hold invalid, in these circumstances, a distinction based on citizenship. Mr Justice McIntyre, writing for the majority, began his reasoning with a statement of the exact issue posed by section 15: "What kinds of distinctions will be acceptable under s. 15(1) and what kinds will violate its provisions?"[89] He held that the prohibited categories were not limited to the specific categories enumerated in the section.

In making this point, Mr Justice McIntyre is true to the original understanding of the text. Prior to the *Charter* being ratified, the Joint Committee spent considerable time debating the scope of equality review. Section 15 was the subject of submissions from 31 groups and 15 individuals and it was amended in Committee as a result of these submissions. After hearing the submissions, Justice Minister Chrétien made the following statement:

> I want to make clear that the listing of specific grounds where discrimination is most prohibited does not mean that there are not other grounds where discrimination is prohibited. Indeed as society evolves, values change and new grounds of discrimination become apparent. These should be left to be protected by ordinary human rights legislation where they can be defined, the qualifications spelled out and the measures for protective action specified by legislatures.
>
> . . .
>
> But if legislatures do not act, there should be room for the courts to move in. Therefore, the amendment which I mentioned does not list certain grounds of discrimination to the exclusion of all others. Rather, it is open-ended and meets the recommendations made by many witnesses before your Committee. Because of the difficulty of identifying legitimate

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[88] [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

[89] *Ibid.* at 169.

> new grounds of discrimination in a rapidly evolving area of the law, I prefer to be open-ended rather than adding some new categories with the risk of excluding others.[90]
>
> . . .
>
> So we have opened it [Section 15] up, we have a descriptive list of the six items that are there and we say that the others will evolve and if there is evident cases of discrimination that the court could intervene because the list is not limiting the areas of discrimination. It is descriptive of areas of discrimination.[91]

After stating that the enumerated categories did not exhaust the scope of equal protection, Mr Justice McIntyre reasoned that categories of distinction analogous to the enumerated categories would attract equal protection rights.[92] Analogous categories would exhibit the same characteristics as were exhibited by the enumerated categories.[93]

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[90] COMMITTEE PROCEEDINGS, *supra*, note 59 No. 36 at 14-15 (12 January 1981).

[91] *Ibid.* No. 37 at 22 (14 January 1981). *See also* the testimony of the Acting Minister of Justice, Robert Kaplan, *ibid.* No. 41 at 18 (20 January 1981):

> But the advise we are given from the lawyers, and I will ask them to enlarge upon it, is exactly that, that using this expression "in particular" [in Section 15] means that other forms of discrimination and *discrimination based on other characteristics of the individual* would be covered by the general introductory words. [emphasis added]

Note how clearly this evidence confirms that the list of illustrations are examples of the general proposition. This is in complete contrast with respect to the situation in the case of section 7, discussed at *supra*, note 72.

[92] *Ibid.* at 175 and 180.

[93] One might ask why any specific categories were enumerated at all in section 15. Apart from helping to illustrate the content of equal protection, there were two other reasons for listing specific examples of discrimination. The first is historical: the *Canadian Bill of Rights* had enumerated certain categories of prohibited discrimination. It would not have appeared proper to leave these out of the new *Charter*. The other is political: certain groups expected to see their claim to equality specifically mentioned. *See* COMMITTEE PROCEEDINGS, *supra*, note 59 No. 41 at 23-24 (20 January 1981), where Deputy Minister of Justice Tassé explains this consideration to the Joint Committee:

> We think that to use the expression "in particular" would have the effect of emphasizing, underlining that there are some grounds which are more invidious than other grounds. They are the ones which are specifically mentioned in the clause.
>
> We also think that, in effect, the way in which the clause is structured, it would be open to the court to add to the list if they were placed before a situation where, in effect, there were any grounds other than those which are specifically mentioned, and they would come to the conclusion that that is an unreasonable distinction, that it should not be condoned and it would be open to them to declare that there is discrimination that is not acceptable.
>
> But perhaps the test which would apply there would have to be a higher one than the test which may be applied in the case of those grounds which the clause does underline.

The first of these characteristics was categorization based on "irrelevant personal differences". Mr Justice McIntyre stated: "[T]he admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another."[94] He also made reference, in defining discrimination, to prejudicial "distinction[s] ... relating to personal characteristics of the individual or group".[95]

The second of these characteristics was "socially destructive" categorization; the third was categorization which re-enforced "historically practiced" discrimination. Mr Justice McIntyre stated: "The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practiced bases of discrimination".[96]

The final characteristic, borrowed from the *Carolene Products* case,[97] was aimed at isolating "discrete and insular minorities". In specifically recognizing citizenship as a category analogous to the enumerated categories, Mr Justice McIntyre referred to non-citizens as "a good example of a 'discrete and insular minority' who come within the protection of s. 15".[98]

The last of these four characteristics does not, in fact, accurately describe the nature of the enumerated categories. The protection offered by the enumerated categories is not limited to discrete and insular minorities. For example, the enumerated category of "sex" insures equal protection of women even though women constitute a majority within society. The enumerated category of "religion" protects members of a majority religious faith from discrimination just as it protects religious minorities. Each of the enumerated categories protects any group defined by the prohibited distinction regardless of the group's majority or minority status. It would be too restrictive, therefore, to insist that only minority groups could achieve analogous category status. The "discrete and insular minority" characteristic is underinclusive and so must be discarded.

In their testimony before the Joint Committee, the authors of the *Charter* set out the three characteristics which they understood to define the enumerated categories. It is possible to answer Mr Justice McIntyre's question about the kinds of distinctions which would be acceptable under subsection 15(1) by referring to the original understanding of those who ratified the section. Two of the three characteristics identified before the Joint Committee correspond with two of the remaining three characteristics identified by Mr Justice McIntyre. One does not.

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[94] *Andrews*, *supra*, note 88 at 165.
[95] *Ibid.* at 174.
[96] *Ibid.* at 175.
[97] *Supra*, note 48.
[98] *Andrews*, *supra*, note 88 at 183.

There is agreement that the enumerated categories are based on immutable, or semi-immutable human characteristics. Our race, our religion, our age, define us. They are givens. They cannot be easily changed, if at all, without profoundly altering who we are. In a passage cited earlier, Acting Minister of Justice Kaplan made the same observation before the Joint Committee. He was dealing with the words "in particular" in section 15, the words used to connect the general mandate of equality to the specific examples of discrimination. Those words, he testified, meant that "discrimination based on other characteristics of the individual would be covered by the general introductory words".[99]

There is also agreement that each of the enumerated categories is based on a distinction generally recognized as being unacceptable or, in the words of Mr Justice McIntyre, as being "socially destructive". Acting Minister of Justice Kaplan made the following statement before the Joint Committee on this point:

> I think there might be found a consensus among Canadians that these grounds which are enumerated are those which have the highest degree of recognition in Canadian society as being rights which ought to be recognized and the general statement [i.e. "equal protection ... without discrimination": section 15] gives the possibility down the road not only of those on Mr [Svend] Robinson's list [referring to the list proposed by the New Democratic Party for inclusion - marital status, political belief, sexual orientation and disability] being recognized, but of others which may not have occurred to him of being included in the future as being unacceptable grounds of discrimination.[100]

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[99] COMMITTEE PROCEEDINGS, *supra*, note 59 No. 41 at 18 (20 January 1981).

[100] *Ibid.* No. 41 at 23 (20 January 1981). There are two possible concerns with the requirement that a legislative distinction must be generally recognized as unacceptable before it will attract judicial review as a violation of equal protection. It could be argued that the legislature's use of the categorization is proof of its general acceptability. A similar argument was made early in the life of the *Charter* with respect to section 1: if a legislature passes a law, such a law must be reasonably justified in a free and democratic society. The same argument could be made concerning the reasonableness of a search and seizure law being challenged under the section 8 "reasonable search and seizure" provision of the *Charter*. The answer to the argument is identical in each case. The *Charter* mandates judicial review. Judicial review requires the Courts to make an independent evaluation of whether the standards set out in the *Charter* have been met. With respect to section 15, it is possible for legislatures to adopt distinctions which do not conform with what is generally acceptable in the society. The *Charter* authorizes and requires the court to decide whether this is the case.

The other argument is that the requirement of general acceptability will make section 15 insufficiently proactive. The *Charter* cannot legitimately be made more proactive than its ratifiers intended. Although it is clear that the ratifiers intended "equal protection" to be open-ended, it is also clear that open-endedness had its limits. One of those limits was the existence of a "consensus" before use of a categorization became prohibited by section 15. This is not surprising. Section 15 is amorphous and potentially extremely broad. It is a device used to strike down legislation passed by democratically elected assemblies. Some real restraint on judicial innovation in these circumstances is appropriate.

Finally, before the Joint Committee, but not in Mr Justice McIntyre's judgment in *Andrews*, stress was placed on the fact that each of the enumerated categories was capable of definition. This meant that the distinction on which the category was based was sufficiently clear that it was possible to tell who was genuinely in the category and who was not. In that sense, the enumerated categories were based on workable, and not excessively amorphous, differentiations. In explaining why certain examples of discrimination had been enumerated, Justice Minister Chrétien told the Joint Committee: "Race, national or ethnic origin, colour, religion, and sex were all found in the Canadian Bill of Rights and are capable of more ready definition than others."[101] With respect to certain other examples which were not enumerated, Chrétien testified: "I am not here as a judge to determine what marital status means, what sexual orientation means. It is because of the problem of the definition of those words that we do not think they should be in the constitution."[102]

These three characteristics describe the basic components which the ratifiers saw in the enumerated examples of equal protection. As such, the three characteristics provide a neutral definition of equal protection; one which represents the general understanding of the principle held at the time of its adoption. That definition can be summarized as follows: equal protection prohibits categorization on the basis of immutable or semi-immutable human characteristics which are definable and which are generally recognized as being unacceptable.

On several occasions, those testifying before the Joint Committee used the word "maturity" to describe the enumerated categories. In this context, the word was used to summarize the limitations placed on the scope of equal protection, namely that any analogous categorization must be capable of definition and must be generally recognized as unacceptable. It was in this sense that Justice Minister Chrétien used the term "maturity" in the following testimony:

> The position is that the list enumerated there is not exclusive and any other rights on discrimination the court could intervene.
>
> The problem is we say that these rights have to mature in the Canadian society. For example, we still have a Human Rights Commission and we will still pass legislation on different groups to make sure that their rights are protected, but they have to mature and this list that I have enumerated, excluding the others, we have opened up that clause [section 15(1)] so that other types of discrimination can be taken care of by the courts, if Parliament and legislative assemblies do not intervene.

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[101] *Ibid.* No. 36 at 14 (12 January 1981).

[102] *Ibid.* No. 48 at 31 (29 January 1981). *See also ibid.* No. 48 at 29 (29 January 1981), where Mr Fred Jordan, Senior Counsel, Public Law, Department of Justice, gave the same explanation for why political belief was not included in the enumerated list of categories of prohibited discrimination.

> But to start to enumerate more in that category where their rights are starting to be protected by legislation and so on, and if there is discrimination against the handicapped and so on, we say that the court can intervene even if we do not want to enumerate them at this time because many of those rights are difficult to define. It is in the process of maturing, that is why it is not there.
>
> But before, the clause was limiting the element of discrimination. Now it is not limiting them; other types of discrimination can be covered by the courts too.
>
> . . .
>
> Just to give you an example. In the Charter of Rights as presented by Mr Diefenbaker, the word "age" was not there at that time, but over the years it has gained maturity and it is finding its place...[103]

The term "maturity" was not used in this context to suggest that a history of past discrimination would have to be established before a distinction would be recognized as analogous to an enumerated categorization. It is clear from the above passage that the categories of discrimination were left open. New, analogous categories could emerge and could attract section 15 protection, even absent a past history of discrimination, so long as the categories could be defined and were generally recognized as being an unacceptable basis for distinction. In *Andrews*, Mr Justice McIntyre wrote that the enumerated categories reflect, "historically practiced ... discrimination".[104] However, there is nothing in the original understanding of the principle of equal protection which makes a pattern of past discrimination a necessary prerequisite for the establishment of an analogous category.

Mme Justice Wilson in *Andrews*, and even more so in *R.* v. *Turpin*[105], adopted a criterion different from those adopted by Mr Justice McIntyre for the purpose of identifying analogous categories. She held that in order to claim equal protection, an individual or group had not only to be prejudiced by the particular law in question, but had also to demonstrate social, political and legal disadvantage even apart from the challenged law. In *Turpin* she wrote:

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context. ... A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinctions being challenged.

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[103] *Ibid.* No. 36 at 31 (12 January 1981).

[104] *Supra*, note 88 at 175.

[105] [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8 [hereinafter *Turpin* cited to S.C.R.].

. . .

> Similarly, I suggested in my reasons in *Andrews* that the determination of whether a group falls into an analogous category to those specifically enumerated in s. 15 is "not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society".[106]

In *Turpin*, an Ontarian charged with murder argued that her treatment violated section 15 of the *Charter*. Her contention was based on the fact that the *Criminal Code*[107] permitted an Albertan charged with murder to be tried by judge alone whereas a person in the same position in Ontario was obliged to be tried by judge and jury. The law differentiated between the two individuals on the basis of geography. This differentiation had some historical justification. In pioneer Alberta, juries were difficult to assemble. That justification no longer exists. The issue was whether a differentiation based on geography for the purpose of determining mode of trial violated the accused's equality rights under section 15.

Mme Justice Wilson held that for these purposes geography did not constitute an analogous category. She stated:

> Differentiating for mode of trial purposes between those accused of s. 427 offences in Alberta and those accused of the same offences elsewhere in Canada would not, in my view, advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society. A search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice would be fruitless in this case because what we are comparing is the position of those accused of the offences listed in s. 427 in the rest of Canada to the position of those accused of the offences listed in s. 427 in Alberta.[108]

Mme Justice Wilson's requirement of discrimination "apart from and independent of the particular legal distinction being challenged"[109] was not part of the original understanding of the principle of equal protection. It is pure judicial lawmaking. There are three interpretivist reasons for suggesting that there is no constitutional basis for reading the Wilson restriction into section 15.

First, in textual terms, the Wilson restriction runs counter to the actual words used by the section. Those words grant equal protection rights to "every individual". They do not limit the grant to those individuals who suffer discrimination "apart from and independent of the particular legal distinction being challenged". In other words, the section itself defines who is to receive equality protection and that

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[106] *Ibid.* at 1331 and 1332.
[107] R.S.C. 1985, c. C-46.
[108] *Turpin*, *supra*, note 105 at 1333.
[109] *Ibid.* at 1331.

definition is expressly unrestricted. It is sometimes said, correctly, that section 15 must be limited in some way or it would make lawmaking impossible. Almost all laws draw distinctions between categories or groups. However, in order to be compatible with the wording of the Constitution, which nowhere defines "equal protection ... without discrimination", such a limitation must be a limitation on the scope of the right being granted and not a limitation on the categories of recipient, which are defined as "every individual".[110]

Mme Justice Wilson justified restricting the categories of recipient for whom equal protection was available in terms of the purpose of section 15. She held that purpose to be, "remedying or preventing discrimination against groups suffering social, political and legal disadvantage".[111] This is the purpose which she wishes the section to have; there is no evidence that this is the purpose which it was generally understood the section would have at the time it was included in the *Charter*. In their testimony to the Joint Committee, the authors of the section never indicated that a restriction was envisaged on the categories of recipients eligible for equality protection. They did discuss the definition or scope of protection and even then stressed that it was "open ended" so as to permit the inclusion of other grounds of discrimination as those other grounds evolved.[112] There is nothing to support the idea that individuals suffering arbitrary treatment at the hands of a law would not be protected unless they were under some additional social, political or legal disadvantage unrelated to the law itself.

Second, in contextual terms, if the availability of subsection 15(1) equality rights is limited to individuals disadvantaged apart from the law in question, there would be no need for a subsection 15(2) affirmative action provision. The purpose of the affirmative action provision is to permit unequal treatment of advantaged individuals in

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[110] Such a limitation would have to be a universally applicable limitation, and would have to apply to "every individual", in order to conform to the text of section 15. An example of such a limitation would be the restriction of review on equal protection grounds to laws whose means are not related, or not sufficiently related, to the ends which the law seeks to achieve. This is the kind of approach which Mr Justice McIntyre began to develop in *MacKay* v. *The Queen*, [1980] 2 S.C.R. 370 at 401, 114 D.L.R. (3d) 393 at 418-19, for dealing with the *Canadian Bill of Rights* equality provision.

[111] *Turpin*, *supra*, note 105 at 1333.

[112] COMMITTEE PROCEEDINGS, *supra*, note 59 No. 36 at 14 (12 January 1981), No. 37 at 22 (14 January 1981), and No. 41 at 23 (20 January 1981).

order to remedy existing social, political and legal disadvantage to which other individuals are subject.[113]

Third, in historical terms, even though the Constitution contains no precise definition of the equality rights which it grants, as shown above, there did exist a common understanding at the time the Constitution was adopted about the kinds of criteria which the courts would use in defining those rights. Those criteria are set out above. None of them makes discrimination "apart from and independent of the particular legal distinction being challenged"[114] an element in the definition of what constitutes equal protection.

The Wilson criterion gives the judge a wide discretion, unbounded by any constitutional norm, in determining who is, and who is not, to enjoy equal protection rights. The issue of whether someone has suffered social, political and legal disadvantage apart from the law under review is highly subjective. At one point, Mme Justice Wilson qualified this requirement by holding that it had to be demonstrated, "in most but perhaps not all cases".[115] This means that not only is the requirement highly subjective, but it is one which a judge could choose to apply intermittently according to his or her personal preferences. *Turpin* indicates that those accused of murder do not constitute a favoured category for equal protection purposes. Future cases will be necessary in order to determine which groups do, and do not, enjoy judicial favour in terms of being granted equal protection rights.

At the same time, the Wilson restriction excludes from equal protection certain individuals and groups who should be included on the basis of the original understanding of the equal protection principle when it was adopted. In particular, it excludes those who are arbitrarily treated by a particular law,[116] but who are under no other social,

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[113] There is no doubt that the original understanding was that subsection 15(1) would set out a broad right to equal treatment for all individuals while subsection 15(2) would create an exception permitting affirmative action programs favouring certain disadvantaged individuals. *See ibid.* No. 36 at 15 (12 January 1981), where Justice Minister Chrétien makes this clear in his testimony before the Joint Committee:

> Subsection 15(2) of the draft Resolution permits affirmative action programs to improve the conditions of disadvantaged persons or groups. ... This section permits programs designed to achieve equality which might otherwise be precluded by the rules against discrimination in subsection 15(1). ... It is simply an assurance that an affirmative action program based on a recognized ground of non-discrimination will not be struck down only because it authorizes reverse discrimination for the purpose of achieving equality.

[114] *Turpin*, *supra*, note 105 at 1331.

[115] *Ibid.* at 1332.

[116] Arbitrary treatment is the imposition by law of burdens upon, or the denial of benefits to, individuals or groups, where such an imposition or denial is unrelated, or not sufficiently related, to the purpose for which the law was adopted. It is irrational legislative action.

political or legal disadvantage apart from the law in question. Mr Justice McIntyre's requirement of "historically practised discrimination", a requirement which, as shown above, forms no part of the original understanding of the equal protection principle, would have the same overly restrictive effect. Individuals arbitrarily treated by a law which discriminated on a never-before-tried basis would find themselves excluded from equal protection under the McIntyre approach.[117]

It is difficult to see why all victims of arbitrary treatment at law would not be entitled to equal protection regardless of whether or not there had been a past history of discrimination and regardless of whether or not the victims had been the subject of other social, political or legal disadvantage. The text of section 15 of the *Charter* is broadly stated; no less than four equality rights are set out in order to insure that the scope of the protection provided would not be unduly narrowed.[118] Justice Minister Chrétien emphasized the wide sweep of the equality principle in testifying before the Joint Committee. He told the Committee that, "a provision on 'equality rights' must demonstrate that there is a positive principle of equality in the general sense...".[119] If an arbitrary legal distinction is based on an immutable or semi-immutable human characteristic, one which is clearly definable and one whose use would be generally recognized as unacceptable, the original understanding of section 15 was that that would suffice to attract review on equal protection grounds.

This explains why *Turpin* was wrongly decided, regardless of what one feels about the relative social, political or legal disadvantages under which accused persons may or may not labour. The distinction in issue in *Turpin* was geography. It is a definable and relatively immutable personal characteristic. While it might once have had some relevance in the context of jury availability, it is now clearly irrelevant and arbitrary. For that reason, there is little doubt that its use in this context would generally be recognized as unacceptable.

This also explains why the earlier posited hypothetical law prohibiting underweight persons from driving should be considered a violation of equal protection as it was originally understood. Weight is a relatively immutable characteristic, one which is easily definable,

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[117] This perhaps explains Mr Justice LaForest's caution in adding the following qualification to his concurrence with Mr Justice McIntyre's judgement in *Andrews*, *supra*, note 88 at 194:

> [T]here may well be legislative or governmental differentiation between individuals or groups that is so grossly unfair to an individual or group and so devoid of any rational relationship to a legitimate state purpose as to offend against the principle of equality before and under the law as to merit intervention pursuant to s. 15.

[118] Subsection 15(1): "... equal before and under the law and ... equal protection and benefit of the law...".

[119] COMMITTEE PROCEEDINGS, *supra*, note 59 No. 36 at 14 (12 January 1981).

and one which represents categorization that would generally be recognized as unacceptable. Using the Wilson approach, however, there would be no violation of equal protection. Underweight persons labour under no other "social, political or historical" disadvantage apart, in this case, from the burden which the hypothetical law would impose. Nor would there be a violation adopting the McIntyre past history of discrimination criteria. It would be difficult to establish a long history of discriminatory practice against thin people.

In her reasoning in *Andrews* and in *Turpin*, Mme Justice Wilson wrote her own criteria, and with it her own personal preferences, into section 15 of the *Charter*. She may have been concerned about preventing equality rights from being turned against the already disadvantaged by being adopted by the relatively advantaged. For example, in order to guarantee women equality in areas in which they have been historically disadvantaged, it might be necessary for a law to grant women certain privileges which men do not enjoy. Such a law would be vulnerable to attack by a male as discrimination based on sex contrary to section 15. However, this is precisely the situation which the ratifiers of the Constitution understood would come under the subsection 15(2) affirmative action exception to the subsection 15(1) equal protection principle. Situations in which unequal treatment might be necessary to produce equal outcomes are provided for in subsection 15(2). It is in the use of subsection 15(2), rather than in a judicial constitutional amendment restricting the scope of subsection 15(1) equal protection, that Mme Justice Wilson will find a constitutionally legitimate way for aiding the disadvantaged.

One concludes, after examining sections 7 and 15, that Canadian judges have been as willing as their American counterparts to substitute their own political preferences for the objectives actually established by the ratifiers of the Constitution. This development is more surprising in the Canadian context than in the American. Because much of the Canadian Constitution is a contemporary effort, the original understanding of difficult sections of the *Charter* is well documented and unobscured by the passage of time.

In dealing with section 7, Canadian judges have followed the American judiciary in expanding process rights to include a substantive element. In dealing with section 15, Canadian courts have adopted a more restrictive view of equal protection than that envisaged by the *Charter*'s framers by potentially excluding certain cases of arbitrary treatment. In this they run counter to the American experience. Either way, divergence from the original understanding of the Constitution, whether in a more liberal or a more conservative direction, poses the same problem. How can a non-elected judge legitimately interpret the Constitution in a fashion contrary to the way in which it was generally understood at the time of its adoption? How can an undemocratic judiciary invalidate the laws passed by a democratic assembly using an interpretation of the Constitution based simply on personal judicial preference?

V. THE LIMITS OF INTERPRETIVISM

As mentioned above, Bork observed that the idea of applying the Constitution according to the understanding generally held at the time of its ratification was an idea which was now "outside the mainstream" in the United States.[120] The same observation probably can be made in Canada. As the discussion in Part IV of this article shows, Canadian judges, while sometimes endorsing the interpretivist method of construction,[121] have felt free to substitute their own constitutional principles for those understood when the document was ratified. Nor have Canadian legal academics embraced the interpretivist approach.[122]

Those opposed to interpretivism argue that it cannot be done, it should not be done, and it was never meant to be done. Each of these arguments will be considered in turn.

The claim that interpretivism is impossible to do takes three forms. Some argue that no general understanding ever exists about the meaning of laws at the time they are adopted or, if such an understanding ever exists, it is not discoverable. Others accept that it is possible to talk in terms of original understanding, but argue that for certain provisions two or more interpretations were widely held at the time the text was adopted. Still others argue that even if a unique, original understanding can be discovered with respect to a constitutional provision, this understanding will be of little use in determining the constitutionality of the particular law in issue. The ratifiers of the Constitution simply did not consider whether that particular law would or would not be constitutional when they adopted section 7 of the *Charter*.

Typical of the academic comment on the viability of interpretivism, is the following observation made by Professors Black and Smith: "A more practical problem is that it will be frequently impossible to determine what the framers thought about the issue at hand, and the general language of the section will be capable of bearing all the proffered interpretations."[123] Professor Hogg argued that the "exceedingly vague terms" used in the *Charter* would make judicial review "even more policy laden" than judicial review in federalism cases.[124]

If it was impossible for there to exist a general understanding about the meaning of a law at the time of its adoption, the enterprise of lawmaking would be impossible. Any law would be nothing more

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[120] *Supra*, note 1 at 143.

[121] *Supra*, note 27 and accompanying text.

[122] *See, e.g.*, W. Black & L. Smith, *The Equality Rights* in G.-A. Beaudoin & E. Ratushny, eds, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, 2d ed. (Toronto: Carswell, 1989) 557 at 576-79; Hogg, *supra*, note 28 at 96-100, 261, 323-24 and 653.

[123] Black & Smith, *ibid.* at 577.

[124] *Supra*, note 28 at 653.

than a formula of words signifying a myriad of things to a myriad of people around which a majority haphazardly developed. Without some notion of general understanding, neither democracy nor the rule of law could function. In such a system, the personal preference of a judge about the meaning of a law would be as legitimate as any other interpretation. However, human communication is such that words do convey meaning and common understanding.

As Professor Hogg has pointed out, difficulty arises where the words of a law are so broad or vague that the common understanding meant to be conveyed by those words is unclear. At that point, the only way to determine the original understanding is to go beyond the words to alternate sources. With respect to the interpretation of the *Charter*, those sources are plentiful[125] and, as the above analysis of sections 7 and 15 demonstrates, are useful. Peter Russell, originally an opponent of *Charter* entrenchment, stressed the importance of relying on historical sources as an interpretive tool in an article written shortly after the *Charter* was adopted:

> [T]here is one change in the methodology of judicial decision making that Canadian judges should consider. That is softening, if not discarding, the taboo against the use of legislative history in interpreting the general language of the Charter. There was an extensive parliamentary discussion of the Charter. If counsel and judges mine the record of this discussion, I think there is less danger of the Canadian judiciary constituting itself a constituent assembly fabricating constitutional law without reference to the expectations of the original framers.[126]

Some argue that interpretivism is impossible where vague constitutional language is deliberately adopted in order to camouflage unresolved differences.[127] In such circumstances it would be futile to search

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[125] *See* Hogg, *ibid.* at 660-65.

[126] P.H. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms* (1983) 61 CAN. BAR REV. 30 at 52-53. *But see Reference Motor Vehicle Act*, *supra*, note 54 at 508, where this suggestion was lost on Mr Justice Lamer when he rejected the idea that the comments, "of a few individual public servants, however distinguished, ... can in any way be determinative". The point is that those public servants were appointed by the government, participated with the government in drafting the *Charter*, and gave evidence on the meaning of *Charter* provisions, evidence which was consistent with evidence given by the Minister of Justice and other members of the government, which was uncontradicted, and which was known to all eleven governments before any of them ratified the *Charter*.

[127] The provision of the Meech Lake Accord which proposed inclusion in the Constitution of an interpretive clause recognizing Quebec as a "distinct society" is an example of this. The meaning of such a clause was never clear. Opponents of the Accord, and some of its Quebec supporters, argued that the provision would give Quebec the power to achieve its nationalist aspirations. Supporters of the Accord, and some of its opponents inside Quebec, argued that the provision did not alter the division of powers within Confederation and would make little, if any, real difference to the status quo. *See* P.W. Hogg, MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED (Toronto: Carswell, 1988) at 11.

for any common understanding which the words might have had at the time they were adopted. The words were chosen precisely because they could accommodate contradictory interpretations. Rather than reflect a common understanding, they reflect mutual difference. Rather than agree, the ratifiers agreed to disagree.

The option of using "fudge" words to paper over genuine differences is part of contract negotiation practice. It is a tactic whereby the parties can postpone settling a contentious issue in the hope that it does not arise in the future or, if it does, that it will be easier to resolve at that time. The vague language enables each party to read into the agreement an interpretation which suits its own point of view. This tactic will work where the disagreement is over a secondary matter. Agreeing to disagree over a minor point in the interest of getting an overall agreement makes sense where there is a common understanding on the major issues. It will be rare, however, that the parties will want an agreement so badly that they will be prepared to risk leaving vague an important point on the gamble that it can be won later. Disagreement on important matters will undermine the desire to enter into an agreement at all.

The above is even more true in the constitutional context, where the stakes are dramatically higher than they are in the contractual context. While interpretivism will make no sense in situations in which constitutional negotiators have deliberately adopted vague language to cover over differences, such situations will be rare and will usually be confined to relatively minor points.[128]

Others argue that interpretivism is impossible because there was no common understanding at the time the Constitution was ratified about the outcome of current specific problems. Those adopting the *Charter*, for example, did not appear to have turned their mind to the specific question of whether the availability of trial by judge and jury to an Albertan charged with murder, but not to an Ontarian, would violate equal rights.

Bork considers this problem.[129] He argues that the Constitution contains principles which, at the time the Constitution was adopted, were commonly understood to be protected from hostile legislative or executive action. When faced with a specific fact situation, the court must first identify the relevant constitutional principle to be applied. It must then apply that principle in the same way as the principle would have been applied had the fact situation arisen when the principle was first constitutionalized. There will be difficult cases in which judges will disagree on how the relevant principle would have been applied. Not all cases, however, will be difficult ones. Over a number of

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[128] The eventual failure of the "distinct society" clause illustrates this. This word formula was insufficient to paper over the major difference of opinion which separated proponents and opponents of the Accord.

[129] *Supra*, note 1 at 163.

decisions, it will be possible to tell if the courts are respecting the constitutional principle. Moreover, the attempt to follow a constitutional principle as it was originally understood will help to ensure that courts do not stray into areas not protected from legislative or executive action. It will prevent judges from tackling controversies which the constitution never meant the courts to resolve.

Aside from those who maintain that interpretivism cannot be done, a second major attack comes from those who argue that interpretivism should not be done. The fear is that it would fix the meaning of the Constitution at the moment of its creation and thus, over time, render the Constitution unworkable. Curiously, this concern is repeatedly voiced in the judgments rendered immediately after the *Charter*'s adoption. Thus, Mr Justice Lamer, in *Reference Motor Vehicle Act*, declared: "If the newly planted 'living tree' which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth."[130] If there was ever a context in which the original understanding of the ratifiers was not yet out of date, it is the one in which cases are to be decided immediately after the *Charter*'s adoption.

A theory of progressive constitutional interpretation, rather than an interpretivist theory, is said to overcome this difficulty. According to this former theory, the language of the Constitution "is continuously adapted to new conditions and new ideas"[131] rather than being given the meaning which it had at the time it was adopted. A frequently cited statement describing the progressive interpretation doctrine was made by Chief Justice Dickson in *Hunter* v. *Southam Inc.*:

> 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, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.[132]

The argument for progressive interpretation is powerful not only as a pragmatic response to an evident necessity, but also because it challenges the principle of original understanding on its own terms. Professor Hogg argues that progressive interpretation "is probably not

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[130] *Supra*, note 54 at 509.

[131] Hogg, *supra*, note 28 at 343.

[132] [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641 at 649 [hereinafter *Hunter* cited to S.C.R.].

inconsistent with the intentions of the framers, for they were statesmen who must have understood that their handiwork would have to adapt to changes in society".[133]

Bork acknowledges this: "A constitution is supposed to produce workable government. ... Results that are particularly awkward, in the absence of evidence to the contrary, were probably not intended."[134] However, Bork makes a distinction between applying old values to new circumstances and creating new constitutional values or principles and applying those.[135] The former is progressive interpretation in its legitimate form; the latter is "social engineering from the bench".[136] He continues as follows: "When we say that social circumstances have changed so as to require the evolution of doctrine to maintain the vigor of an existing principle we do not mean that society's values are perceived by the judge to have changed so that it would be good to have a new constitutional principle."[137]

The progressive interpretation method is often expressed in slogans. The first slogan, cited by Chief Justice Dickson in *Hunter*, is taken from a statement by Viscount Sankey L. C. in *Edwards* v. *A.-G. Canada*: "The British North America Act planted in Canada a 'living tree' capable of growth and expansion within its natural limits."[138] Until the advent of the *Charter*, the "living tree" justification was used to avoid an inflexible interpretation of the division of powers between governments, an interpretation which would have withheld necessary jurisdiction from Parliament or legislatures.[139] It cautioned courts in federalism cases to exercise restraint before striking down legislation passed by elected majorities. The "living tree" notion tended to legitimize judicial review by limiting its operation.

The effect of the "living tree" idea is precisely the opposite in the *Charter* context. A progressive, as opposed to a neutral, approach to interpreting the *Charter* is simply an invitation to the judiciary to strike down legislation not on the basis of principles found in the Constitution, but rather on the basis of principles which a particular judge feels should be placed in the Constitution given new conditions and new realities. Such an approach, because it is not based on constitutional principles envisaged by the ratifiers, heightens, rather than diminishes, the counter-majoritarian difficulty associated with judicial review. The correct way to keep rights protection up to date is not through judicial fiat but rather through constitutional amendment or through ordinary legislation aimed at giving individuals new rights.

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[133] *Supra*, note 28 at 343.
[134] *Supra*, note 1 at 165.
[135] *Ibid.* at 169.
[136] *Ibid.* at 84.
[137] *Ibid.* at 169.
[138] (1929), [1930] A.C. 124 at 136, (*sub. nom. Re Section 24 of the B.N.A. Act*) [1930] 1 D.L.R. 98 (P.C.).
[139] Hogg, *supra*, note 28 at 341.

The next slogan is the "frozen right" slogan borrowed from the *Canadian Bill of Rights* cases. A theory developed in those cases to the effect that the *Canadian Bill of Rights*' only protected rights which existed in law when the *Bill* was passed in 1960. Those favouring a progressive interpretation of the *Charter* justify their approach by pointing out that the *Charter* is in part remedial legislation adopted to overcome inadequacies in the application of the *Bill*.

These critics of interpretivism commit an error when they equate interpretivism with the notion of frozen rights. When those interpreting the *Canadian Bill of Rights* spoke of frozen rights they were in reality refusing to apply the principles contained in the *Bill* to newly emerging fact situations. They adopted this approach because of their reluctance to use an ordinary statute of Parliament, which the *Bill* was, to strike down another, more recent, ordinary statute of Parliament. Interpretivism insists that only principles contained in the *Charter* as it was understood at the time of adoption be used to strike down legislation. However, it does not freeze the application of those principles by preventing their elaboration to cover fact situations which have emerged since the *Charter*'s ratification.

Bork rejects the kind of frozen rights interpretation which was practiced by the Canadian courts when considering the *Canadian Bill of Rights*:

> A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair, and reasonable meaning, fails in his judicial duty. That duty, it is worth repeating, is to ensure that the powers and freedoms the founders specified are made effective in today's altered world.[140]

The final slogan used to justify progressive interpretation is drawn from a famous observation made by Justice Marshall in *McCulloch* v. *Maryland* where, in his decision, he stated that, "we must never forget that it is a *constitution* we are expounding".[141] Supporters of progressive interpretation have taken from this statement the implication that the Constitution should not be given an overly legalistic construction but rather one in which judges are capable of fashioning new principles to meet new conditions.

Bork placed Marshall's words in their proper context:

> [Marshall] also wrote there that it was intended that a provision receive a "fair and just interpretation," which means that the judge is to interpret what is in the text and not something else. And, it will be recalled, in *Marbury* v. *Madison* Marshall placed the judge's power to invalidate a legislative act upon the fact that the judge was applying the words of a

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[140] *Supra*, note 1 at 169 n. 12.

[141] 17 U.S. (4 Wheat.) 316 at 407 (1819) [emphasis in original].

> written document. Thus, questions of breadth of approach or of room for play in the joints aside, lawyers and judges should seek in the Constitution what they seek in other legal texts: the original meaning of the words.[142]

Interpretivism is neither a pro- nor an anti-progressive method of constitutional interpretation. It simply requires that the principles of the ratifiers, and not the principles of the judges, be elaborated and applied in dealing with new fact situations. Talk of "living trees", "frozen rights" and "*constitutions* we are interpreting" is simply the sloganeering which judges hide behind when they want to legislate their own opinions into the Constitution. Slogans are the stuff of politics, not of law. It is not surprising to find judges resorting to slogans to justify their resort to politics. However, the search for the legitimacy of judicial review will have to be found elsewhere.

The third attack on interpretivism is the strongest. Leaving aside the questions of whether interpretivism can, or should, be done, there are those who argue that it was never meant to be done. Their argument turns the doctrine of interpretivism against itself. They maintain that it was generally understood at the time the Constitution was adopted that judges would, in deciding constitutional issues, incorporate into the Constitution their own policy preferences. In effect, the ratifiers of the Constitution, according to this theory, were completely prepared to let judges decide certain issues guided primarily by judicial discretion. It is completely plausible that a society might accept a degree of governance by a council of sages, a degree of benevolent dictatorship, at the cost of some democracy. The only question is whether that is what the ratifiers understood was happening when the *Charter* was adopted.

Bork deals with this issue, in the American context, in the following manner:

> [T]he problem is that a people who believed that their liberties depended upon the system of representation they created spent their time debating that and spent very little time discussing the role of the courts. Had so momentous a role for judges been contemplated, it would have been the center of discussion. It would not, as is the fact, have gone wholly unmentioned... Now the Founders could not have contemplated both that the judiciary would play a quite insignificant role and, simultaneously, that they had delegated to judges the power to create new constitutional rights not mentioned in the Constitution. As before, the claim that the Founders intended judges to make up rights not specified in the Constitution itself is obviously inconsistent with the historical record.[143]

The Canadian experience is different. Unlike the case with the American Constitution, section 52 of the *Charter* expressly mandates

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[142] *Supra*, note 1 at 145.
[143] *Ibid.* at 183-84.

judicial review. Judicial power to strike down laws passed by democratically elected majorities did not have to be inferred from the Constitution as it was in *Marbury* v. *Madison*.[144]

Those who adopted the *Charter* keenly debated the role the judiciary would play in determining the rights and freedoms of Canadians, and the limitations which entrenchment would impose on parliamentary supremacy. They were aware of the American experience of judicial activism in the interpretation of their *Bill of Rights*. Premier Lyon of Manitoba originally opposed *Charter* entrenchment because he saw it as a departure from British democratic tradition. Premier Blakeney of Saskatchewan feared the emergence of a doctrine of substantive due process which would threaten social welfare legislation and other legislation aimed at redistributing economic advantages.[145]

After the *Charter*'s adoption, constitutional scholars were virtually unanimous in concluding that the judiciary would be exercising a greatly expanded policy function. Writing in 1983, Professor Russell described the Supreme Court's new role as that of a kind of national Senate reviewing the reasonableness of provincial laws and policies. He concluded: "[I]n this day and age, it is only on the basis of a blind, and most anachronistic view of the judicial process that the policy making role of the judiciary, above all in interpreting the broad language of a constitutional Bill of Rights, could be denied."[146]

Professor Lederman reached the same conclusion:

> What is new is this: the Charter sets up a system for subsequent review by the courts of some of the results or products of the ordinary legislative process, but not all of them. This is a power to *re-assess* the compromises of conflicting societal values and interests embodied in certain of the ordinary laws passed by the legislature... So the judge must ask himself: in this context, which of these accepted and competing societal values is the more important? ... It is in the end a personal ethical preference which has complex roots.[147]

Professor Hogg was of the same opinion:

> A generous interpretation of the Charter is, as noted earlier, the course of judicial activism. It involves the risk that judges will impose their own policy preferences in opposition to those of the enacting Parliament or Legislature. That risk is abundantly demonstrated by the history of the

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[144] *Supra*, note 9.

[145] *See generally*, R. Romanow, J. Whyte & H. Leeson, CANADA ... NOTWITHSTANDING: THE MAKING OF THE CONSTITUTION, 1976-1982 (Toronto: Carswell/Methuen, 1984) at 110, 219 and 245-46.

[146] *Supra*, note 126 at 42.

[147] W.R. Lederman, *Assessing Competing Values in the Definition of the Charter of Rights and Freedoms* in Beaudoin & Ratushny, eds, *supra*, note 122, 127 at 144-45 and 152 [emphasis in original].

> interpretation of the American Bill of Rights, which was briefly related in the previous section of this chapter. Nevertheless, that risk was freely and publicly assumed when the Charter was adopted.[148]

Some members of the judiciary have indicated that they accept the idea that the *Charter* gives them an enhanced policy-making role. The Attorney-General of Ontario, in his factum in the *Reference Motor Vehicle Act* case, was concerned that courts not conduct themselves as a kind of judicial "super-legislature" which would freely "question the wisdom of enactments" and adjudicate upon the merits of public policy. The Attorney-General pointed out that, "the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and are given effect in the laws of the land". In his decision, Mr Justice Lamer replied:

> This is an argument which was heard countless times prior to the entrenchment of the *Charter* but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.[149]

Care must be taken in this context not to turn a description of reality into a normative statement. In their debates, were the ratifiers of the *Charter* saying that entrenchment should result in judges adjudicating on the merits of public policy, or only that such a result would inevitably take place? Against the normative view is the fact that there is nothing in the *Charter*, including section 52, the section that authorizes judicial review, that would permit judges to substitute their own policy preferences for those of the enacting Parliament or legislature. The intense debate over each of the provisions of the *Charter*, together with the nature of the bargaining and ratification process leading to its adoption, nowhere suggests that the framers understood that the courts would be able to pour whatever content they wanted into the vessel which was created.[150] The inclusion of the section 33 override clause and the section 1 saving clause indicate that the framers wanted to provide safety valves which might be used to save legislation threatened by a judiciary anxious to substitute its own view of public policy in place of the legislature's.

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[148] *Supra*, note 28 at 659.

[149] *Supra*, note 54 at 497.

[150] *See Reference re Public Service Employee Relations Act*, *supra*, note 27 at 394.

It is not surprising that the ratifiers of the *Charter* felt that entrenchment would inevitably lead to a greater scope for judicial policy-making. Although the ratifiers were asking the courts to adjudicate on the basis of the principles contained in the *Charter*, they were cautious individuals. They had seen judges in action both here and in the United States. They knew that there might be difficulty in discovering the original understanding of certain constitutional principles, that mistakes could be made in the application of those principles, or that some judges would simply insist on being wilful. It is with this kind of imperfection in mind that the ratifiers recognized that the ideal of perfect judicial neutrality was unattainable and that, as a result, the personal ethical preferences of judges would sometimes come into play in constitutional adjudication.

Despite this, the cohabitation of the democratic principle with judicial review is more uneasy in the Canadian *Charter* context than it is under the American *Bill of Rights*. In the United States, given the background of the War of Independence, and the absence of any specific clause providing judicial review in the American Constitution, it is not difficult to argue that the principle of self-government is the guiding constitutional norm. In Canada, the case is not so clear. When judicial review was formally adopted as the mechanism for guaranteeing rights and liberties, the ratifiers understood that a significant break with the tradition of parliamentary sovereignty was being made. They knew of the potential weaknesses of judicial review, including the opportunity which it might give for judicial policy-making and they formally adopted it anyway. In their debates, they even hinted at a policy-making role for the courts. Justice Minister Chrétien, in his testimony before the Joint Committee dealing with section 15, said: "We have opened [section 15] up to [include] other types of discrimination that can be covered by the courts if the Parliament or assemblies do not take care of the problem."[151]

There is another reason for thinking that the common understanding at the time of the *Charter*'s adoption admitted a greater policy role for the judiciary. Professor Hogg has observed that perhaps Canadians "really are content that some political choices be made by judges despite their lack of democratic accountability".[152] The ratifiers also knew that Canadians have tended to place great faith in their judges.[153]

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[151] COMMITTEE PROCEEDINGS, *supra*, note 59 No. 36 at 31 (12 January 1981).

[152] *Supra*, note 28 at 99.

[153] In 1989, Canadians were polled on the amount of "respect and confidence" which they had in certain institutions in Canadian Society. The Supreme Court of Canada placed at the top of the list with 57% of Canadians indicating that they had a "great deal/quite alot" of confidence in the institution, only 8% of those polled indicated they had "very little" confidence in the Court. By way of contrast, 38% of those polled had a "great deal/quite alot" of confidence in the House of Commons and 30% in political parties. *See* Gallup Canada Inc., Release, "Confidence in Political Parties Declines" (9 February 1989).

VI. CONCLUSION

The core problem created by the entrenchment of a charter of rights in a democratic constitution is this: how can non-elected judges legitimately refuse to give effect to laws passed by duly-elected legislative assemblies? Professor Russell, following a suggestion made by Robert Dahl in the United States, gives one possible answer. He argues that judges, even though unelected, may not be all that undemocratic:

> Because politicians play the crucial role in the selection of judges it is unlikely that the ideological profile of the judiciary will differ dramatically from that of the countries' dominant political elite. Changes in judicial attitudes may lag behind changes in the political culture, but in the long run these attitudes will reflect major shifts in popular political orientations.[154]

Mr Justice LaForest offers another answer. He suggests that the judicial role will be constrained by a kind of institutional dialogue which the *Charter* will create between the courts and the legislatures:

> Courts in the United States and other countries that have Bill of Rights in the end give way to the sustained will of the legislative branch of government. The latter, after all, is elected by the people. What the *Charter of Rights* ensures is sober second thought. A court can, after the heat of battle has died down, examine in specific context what Parliament or a legislature has authorized and reject it. If Parliament or the legislature insists, and it will often do so in a different form than that which originally reached the court, the courts will I am convinced, defer in fact, if not necessarily in form, to a legislative body's repeated view of the proper limits of a right.[155]

Interpretivism should be understood as an additional answer in these efforts to legitimize judicial power. It works neither by trying to democratize that power, nor by trying to harmonize it, through dialogue, with competing institutions. It works by trying to define and limit the judge's role. It does this by insisting that constitutional adjudication be based on neutral principles rather than on judge's personal policy preferences. Neutral principles are to be found by giving the text of the Constitution the same meaning which it was generally understood to have by the informed public at the time of its ratification.

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[154] *Supra*, note 127 at 49. *See also* R. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker* (1957) 6 J. OF PUB. L. 279 at 294.

[155] G.V. LaForest, *The Canadian Charter of Rights and Freedoms: An Overview* (1983) 61 CAN. BAR REV. 19 at 25-26. It is interesting to speculate how this dialogue might have evolved with respect to the Quebec language law, had it not been cut off by the inclusion in that law of a section 33 notwithstanding provision. *See Charter of the French Language*, R.S.Q. 1977, c. C-11.

Robert Bork is prepared to press interpretivism to its limit, and he does so cogently. It may be that it cannot be pressed as far in the Canadian context, either because of difficulties in applying the theory, or because the original understanding of Canadians was that judges would play a somewhat greater legislative role than had been imagined for their American counterparts. However, there is nothing in the original understanding of the *Charter* which envisages a judicial policy-making role except as a last resort where neutral application of the *Charter*'s principles proves impossible. This follows from the effort made by the ratifiers of the *Charter* to explain precisely its principles prior to adoption and by their concern to protect the role of Canadian democratic institutions. The above analysis of sections 7 and 15 suggests that it will be possible most of the time to apply the *Charter* in accordance with the way in which it was originally understood.