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Abstract

In this brief comment I offer some critical reflections on Professor Hogg's proposed approach to Charter interpretation. I suggest that Professor Hogg's attempt to legitimize and constrain judicial review is an exercise in confession and avoidance. On the one hand, he admits that "interpretivism" is explanatorily inadequate, yet on the other he refuses to accept "non-interpretivism" for he realizes that it has the potential to unmask the politics of law. I argue that Hogg's third way - that Charter interpretation should be progressive and purposive - is incapable of bearing the legitimizing weight which he requires in that it necessitates ahistoricism, circularity and a retreat into textual objectivism. By way of conclusion, I suggest that we must abandon the repressive machinations of textual fetishism so that we may honestly confront the nexus between law, politics and power. In turn, this will enable us to demand of powerholders - including judges - that they use their power for democratic rather than mystificatory ends.

Keywords

Constitutional law--Interpretation and construction; Canada; Judicial review

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VENTRILOQUISM AND THE VERBAL ICON: A COMMENT ON PROFESSOR HOGG'S "THE CHARTER AND AMERICAN THEORIES OF INTERPRETATION"*

BY RICHARD F. DEVLIN**

In this brief comment I offer some critical reflections on Professor Hogg's proposed approach to *Charter* interpretation. I suggest that Professor Hogg's attempt to legitimize and constrain judicial review is an exercise in confession and avoidance. On the one hand, he admits that "interpretivism" is explanatorily inadequate, yet on the other he refuses to accept "non-interpretivism" for he realizes that it has the potential to unmask the politics of law. I argue that Hogg's third way – that *Charter* interpretation should be progressive and purposive – is incapable of bearing the legitimizing weight which he requires in that it necessitates ahistoricism, circularity and a retreat into textual objectivism. By way of conclusion, I suggest that we must abandon the repressive machinations of textual fetishism so that we may honestly confront the nexus between law, politics and power. In turn, this will enable us to demand of powerholders – including judges – that they use their power for democratic rather than mystificatory ends.

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Peter Hogg, Brian Slattery, John D. Whyte, Iain Ramsay, and Allan C. Hutchinson all disagreed with earlier versions of this comment. They bear no responsibility for the infelicities which remain.

And that's just the problem with a constitutional Bill of Rights. It is inevitably a Charter of enduring super-rights, rights written in delphic words but in indelible ink on an opaque surface. It turns judges into legislators and gives them a finality which our whole tradition has hitherto professed to withhold from them. It makes the mistake of dressing up policy choices as if they were legal choices.

Lord McCluskey¹

The problem of the legitimacy of judicial review ... is a much less serious problem in Canada than it is in the United States.

Peter Hogg²

[T]he Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

White J.³

I

Ever since Marshall C.J.'s decision in *Marbury v. Madison*⁴ a fundamental problem in American constitutional theory and practice has been to reconcile the apparent contradiction between policy and principle, the good and the right, democratic majoritarianism and the "deviant institution" of activist judicial review. In the last decade and a half this debate has taken on a new, vibrant, and urgent lease on life which reveals that, despite positivist rhetoric, law and

¹Lord McCluskey, "Trusting the Judges" Reith Lecturers 1986, No. 4 *The Listener* (27th Nov. 1986) 12 at 13.

²Peter Hogg, "The Charter and American Theories of Interpretation" (1987) 25 *Osgoode Hall L.J.* 87 at 88.

³White J. dissenting, *Miranda v. Arizona*, 384 U.S. 436 (1966) at 531.

⁴(1803), 5 U.S. (1 Cranch) 137.

jurisprudential discourse are quintessentially political.⁵ Neo-Conservative judges and scholars such as Robert Bork,⁶ William Renquist,⁷ Raoul Berger,⁸ and Richard Posner⁹ have launched a major broadside against the liberalism of the Warren Court by arguing that it is fundamentally undemocratic for non-elected judges to make decisions and advance policies which are neither stated nor implied in the Constitution. A host of liberals have, in different ways, risen as champions of the Court by providing a relegitimation either in substance or process, for activism.¹⁰ The debate, in its most recent manifestation, has concretized in the quest to develop the correct strategy for interpreting the Constitution. Once again, law manifests itself as an arena for political and ideological struggle.¹¹

⁵One of the main catalysts for the most recent round of debate was the manifestly socio-political problem of the legitimacy of abortion, culminating in the Supreme Court's decision in *Roe v. Wade* 410 U.S. 113 (1973).

⁶"Neutral Principles and Some First Amendment Problems," (1971) 47 Ind. L.J. 1.

⁷"The Notion of a Living Constitution" (1976) 54 Texas L. Rev. 693.

⁸*Government by Judiciary* (Cambridge, Mass: Harvard U. Press, 1977).

⁹"The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities" (1974) Sup. Ct. L. Rev. 1.

¹⁰See Laurence Tribe, *Constitutional Choices* (Cambridge, Mass.:Harvard University Press, 1985); *God Bless This Honourable Court* (New York: Random House, 1985); Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986); Owen Fiss, "The Supreme Court, 1978 Term, Forward: The Forms of Justice" (1979) 93 Harvard L.Rev. 1; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); Michael Perry, *The Constitution, the Courts and Human Rights* (New Haven: Yale University Press, 1982); Jesse Choper, *Judicial Review and the National Political Process*, (Chicago: The University of Chicago Press, 1980).

¹¹R.F. Devlin, "Tales of Centaurs and Men" (1989) 27 Osgoode Hall L.J. (forthcoming).

II

What is the relevance of this debate for Canada in view of the fact that the *Charter of Rights and Freedoms*¹² has moved the judiciary centre-stage and initiated a significant change (some would say revolution) in the Canadian politico-legal structure? More pointedly, now that our Platonic guardians¹³ have suggested that they can review decisions of the executive¹⁴ and have actually begun to restructure labour relations¹⁵ need we concern ourselves with the legitimacy of such manifestly political activity?¹⁶

Professor Hogg's article is a timely and important intervention in this politico-legal conjuncture. In response to arguments by Monahan¹⁷ and Fairley,¹⁸ he has peeked into the Pandora's Box and raised "issues that lie at the core of contemporary constitutional discourse — judicial methodology, institutional

¹²Part I of the *Constitutional Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c.11.

¹³L. Hand, *The Bill of Rights* (Cambridge: Harvard University Press, 1958) at 73.

¹⁴*Operation Dismantle v. R.* (1985), [1985] 1 S.C.R. 441, 59 N.R. 1.

¹⁵*Lavigne v. O.P.S.E.U.* (1986), 55 O.R. (2d) 449, *Retail Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery* (1986), 33 D.L.R. (4th) 174.

¹⁶I should point out at this early stage that my own view is not that the current legislative/parliamentary process is perfect or particularly desirable -- Canada is notorious for its elitism and bureaucratic hegemony. The ensuing concerns and critique of the inherently political nature of judicial decision-making is only part of a much larger radical egalitarian democratic challenge to the current centralization of power in contemporary society. In other words, I advocate a plague on both their houses. The democratic answer to "Big Government" and "Big Administration" is not to be found in a "Big Judiciary".

¹⁷Patrick Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C. L. Rev. 87.

¹⁸H.S. Fairley, "Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review" (1982) 4 Sup. Ct L. Rev. 217.

competence, and democratic theory."¹⁹ He suggests that the question of the legitimacy of judicial review is less agonizing for Canadians than Americans²⁰ and goes almost as far as to suggest that it is a non-issue. Hogg advances two reasons in support of his argument. First, the *Charter* incorporates the democratic safety nets of sections 1 and 33 thereby substantially limiting the undemocratic threat posed by the judiciary.²¹ Although I have several reservations about this claim, it is not the main focus of this comment. Second, and more important for my purpose, are Hogg's suggestions with regard to the importance of the interpretation debate for Canada: the judiciary do not have *carte blanche*; review is legitimate only if it is "based exclusively on the words of the constitution"²² which should be interpreted in a "progressive" and "purposive" manner. This answer, in Hogg's opinion, is sufficient to *constrain* the judiciary and therefore forestall any drift towards the slippery slope of the legitimacy of judicial review. Politics and law therefore remain autonomous.

I cannot agree.

Professor Hogg's seemingly modest article is very cleverly constructed. He argues that "non-interpretivism is nonsense; that interpretivism is a concept that is useful only in contrast to non-interpretivism; and that both terms can safely be banished from Canadian constitutional theory."²³ By demonstrating that both extremes are absurd, Hogg seeks to carve out a typically Canadian middle path. Unfortunately, Professor Hogg does not tell us why he deals with non-interpretivism first. Surely it would be more logical to deal with the affirmative claims of interpretivism and then

¹⁹Paul Brest, "The Fundamental Rights Controversy" (1981) 90 Yale L.J. 1063 at 1064.

²⁰Hogg, *supra*, note 2 at 88.

²¹*Ibid.* at 88-89.

²²*Ibid.* at 102.

²³*Ibid.* at 91.

proceed to the negative claims of non-interpretivism. To me, such structural reversal suggests a hidden rhetorical strategy designed to strengthen Hogg's own argument: he is not as far removed from interpretivism as he would have us believe. As will be argued below, Hogg, like the interpretivists he criticizes, is a textual objectivist; he has faith in the controlling power of the legal text which he assumes to have some independent, essential existence outside its community of interpreters.

Hogg succinctly critiques the litany of weaknesses that vitiate the concept of interpretivism. I can accept his criticisms as they operate on the premise that the constitutional text, *per se*, is incapable of providing determinative results. In other words, the reasons why one would want to look at the framers' intentions at all is because we recognize that the text is inadequate.

The critique of non-interpretivism is more difficult to follow. Hogg characterizes non-interpretivism as "the theory that holds that the text is so vague and indeterminate that the courts are inevitably driven to apply standards that are not to be found in the text."²⁴ He suggests that interpretivists turn to morality or some version of natural law in order to justify judicial review. Indirectly, Hogg locates the debate in the context of the larger, but now anachronistic, natural law/legal positivism debate. Conspicuous by its absence is any reference to the more radical analysis that law is politics by another means.

Hogg's response to non-interpretivism is intriguing but ultimately unconvincing. His argument is that history simply does not support its claims. He argues that if the courts could refer to non-legal values such as morality then surely jurisdictions such as New Zealand and the United Kingdom would also have demonstrated activist judicial review because they were unconstrained by anything like a Bill of Rights. Recourse to such extra legal values would be even more attractive.

This turn to comparative constitutional history is ahistorical — it mistakes appearance for reality. Although it is true that the United Kingdom operates on the principle of parliamentary sovereignty, this is only so on a rhetorical level; or as the realists say,

²⁴*Ibid.*

with regard to what the judges say, not what they do. To be blunt, even in the United Kingdom legislative omnicompetence has been effectively restricted by a variety of judicial machinations. The United Kingdom does recognize an implied Bill of Rights.²⁵ More importantly, through clandestine techniques such as canons of construction and principles of interpretation, British courts have frequently negated collectivist Parliamentary policy in favour of individual liberty and private property.²⁶ The politics of statutory interpretation are reconstructed and legitimized as innocent and neutral linguistic analysis. Furthermore, Hogg's argument ignores the changing nature of law in contemporary British society. The vast majority of law is no longer in the form of statutes; delegated legislation is where the action is, and British courts have had a field day striking down administrative decisions as contrary to the "principles of natural justice"²⁷ and, even more expansively, "fairness."²⁸

Professor Hogg perceives bills/charters of rights as essentially *constraining* of judicial activity – they adumbrate the legitimate limits

²⁵ See for example, Lord Lloyd, *Hansard*, Vol. 396, cols. 1322-1324 (November 29th, 1978). In *Somerset v. Stewart* (1772), Lofft 1, 499, Lord Mansfield established that slavery was inconsistent with English law.

²⁶ See J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1; Harry Arthurs, "Rethinking Administrative Law" (1979) 17 Osgoode Hall L.J. 1; Patrick McAuslan, "Administrative Law, Collective Consumption and Judicial Policy" (1983) 46 M.L.R. 1; for a more applied example of juridico-political preference, see Patrick McAuslan, "The Ideologies of Planning Law" (1979) 2 Urban L. & Pol'y 1.

²⁷ Peter Cane, *An Introduction to Administrative Law* (Oxford: Clarendon Press, 1986) c. 5.

²⁸ Martin Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) 28 U.T.L.J. 215.

More specifically, how does Hogg account for the preferences and inconsistencies manifested by leading British decisions such as *Roberts v. Hopwood* [1925] A.C. 578, *Prescott v. Birmingham Corporation* [1955] Ch.210 (CA), *Education Secretary v. Tameside Metropolitan Borough Council* [1976] 3 W.L.R. 641, *Norwich C.C. v. Secretary of State for the Environment* [1982] 1 All E.R. 737 3W.L.R. 641, *Bromley L.B.C. v G.L.C.* [1982] 2 W.L.R. 62 (HL), *R. v. London Transport Executive, ex parte G.L.C.* [1983] 2 All E.R. 262, the "Son of Bromley" case: *Pickwell v. Camden London Borough Council* [1983] Q.B. 962, *Wheeler v. Leicester City Council* [1985] 3 W.L.R. 335 (HL).

of the judicial function.²⁹ My vision however is different: pre-*Charter*, due to both the decentralized nature of legal power³⁰ and the inherent malleability and indeterminacy of constitutional structures and texts, the courts were not particularly constrained at all. What the *Charter* does is not to constrain or limit the judiciary but to further empower them, providing even broader tools to articulate their conception of the good and the right. It all depends upon our point of view.³¹

III

Having supposedly disposed of non-interpretivism, Hogg proceeds to develop his proposals for a distinctively Canadian theory of constitutional interpretation: that the text be applied in accordance with the principles "of progressive and purposive interpretation." This preferred method of interpretation is at best problematic and at worst obfuscating.

Professor Hogg claims orthodoxy by deriving his principle of progressive interpretation from Canada's constitutional history, the so called "living tree" doctrine. Unfortunately this does not take him far. First, we must ask why a doctrine such as this should be considered a (legal) principle, as opposed to a (political) policy. The mere fact that it has been reiterated in a series of cases is obviously inadequate, yet Professor Hogg provides no further guidance. I would suggest that progressive interpretation dovetails rather nicely with the liberal desideratum of evolutionary, cautious, and reformist incrementalism — a political strategy, not just a legal principle. Second, the living tree doctrine is no more than that; it is suggestive rather than informative. I argue that once again it is strategically

²⁹It is of course true that elsewhere Hogg has discussed the empowering effect of the *Charter* on the judiciary, [see his *Constitutional Law of Canada*, 2d ed., (Toronto: Carswell, 1985) at 652-57] but he seems to want to have it both ways: yes they do have more power *vis-à-vis* the elected institutions, but no they are not political. Like Bickel, he seeks to both legitimize and constrain judicial review.

³⁰Devlin, *supra*, note 11.

³¹Robert Samek, *The Legal Point of View* (New York: Philosophical Library, 1974).

empowering, not constraining. Is the Constitution to be interpreted as a rigid and hard red oak, or as a flexible willow? The metaphor increases rather than delimits the horizons of judicial discretion. Moreover, it soon breaks down, for the language of the Constitution, unlike a tree, is not necessarily "natural"; language is socially constructed, "fashioned by particular people for particular reasons at a certain time."³² What appears "natural" in constitutional interpretation is no more than a question of historically contingent, conventional wisdom, a matter of choice, persuasion and/or power, not the product of an oracular text.

That Hogg has faith in the constraining power of such a text becomes apparent when we recognize the terms of his constitutional discourse. A key word upon which his theory turns, is "apply." For example, in the course of his reworking of the doctrine of "framers intent" so that it can reinforce his theory of "progressive interpretation," he claims that:

... it is at least equally plausible to attribute a quite different interpretive intent to the framers ... that they were content to leave the detailed application of the constitution to the courts of the future; that they were content that the process of adjudication would apply the text in ways that could not be anticipated at the time of drafting.³³

Or again,

The doctrine of progressive interpretation is ... faithful to the constitutional text ... based on the words of the constitution.... If general language is apt to apply to a set of modern-day facts, then the doctrine stipulates that the language should be so applied.³⁴

Hogg is indulging in the reification of language, infusing it with a sanctity it does not possess, imposing upon it a burden which it cannot bear. He negates its polysemantic and heterogeneous

³²T. Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota Press, 1983) at 11. Some would go much further and argue that everything we "know" is socially constructed. Gary Peller argues that even the idea of a "tree" is not natural, but part of a broader, contingent epistemological framework. "The Metaphysics of American Law" (1985) 73 Calif. L.Rev. 1151 at 1160-1170.

³³Hogg, *supra*, note 2 at 96

³⁴*Ibid.* at 101.

nature. This dependency upon "application" demonstrates his admitted faith in the now widely discredited positivism — judges only apply the law, they do not make it.

Professor Hogg makes the fundamental error of severing the subject from the object, the interpreter from the text. This leads him to believe that a text can have some ahistorical, acontextual and objective meaning independent of those who interpret it. This is misconceived. The interpreter brings as much — indeed some would say more — to the text than it brings to her; she is both consumer and producer.³⁵ The meanings of a text are a complex product of the interaction of the text and the situated interpreter, resulting in a contingent and unstable equilibrium. The two are constitutively interdependent, their relationship is symbiotic and dialogic³⁶ and therefore irrepressibly open.

Professor Hogg indirectly attempts to escape this criticism by claiming that "the words of the text are (to be) given a meaning that seems natural to contemporary eyes."³⁷ But this, in effect, only increases his dilemma. First, and most obviously, the situations in which the judiciary are called upon to participate are precisely those cases in which no one view is obvious or "natural;" they have to make a choice between competing interpretations. In other words, they have to go beyond the text. Second, even if one perspective could be persuasively argued, the question arises "in whose eyes?" If, as Hogg freely admits at the beginning of his paper, we cannot operate upon an assumption of consensus, then it is impossible to seek refuge in the "contemporary eyes" position. Once we recognize the social, political, economic, moral and gender viewpoints of the judiciary behind those eyes, we are forced to recognize the plasticity

³⁵Even Rupert Cross almost admits as much :

"It is trite learning that the interpreter has nearly as much to say as a speaker as far as the meaning of words is concerned." *Precedent in English Law* (3d) (1977) at 42.

³⁶Mikhail Bakhtin, *Marxism and the Philosophy of Language*, trans. by L. Matejka & I.R. Titunik (New York: Seminar, 1973).

³⁷Hogg, *supra*, note 2 at 102.

of the constitutional text.³⁸ The ideal of a determinative text is a chimera, and we are inevitably compelled to recognize that law, like politics, is a matter of conviction and (rhetorical) power.³⁹

At this point a brief example will help. In the pre-*Charter* era, in theory, the *Constitution Act, 1867*⁴⁰ provided for the division of powers within a federal state. Was this text determinative? Could it provide correct, non-political, purely legal-constitutional answers to social problems? A brief review of the criminal law power suggests not. Section 91(27) provides that the federal government is to have exclusive central control over criminal law. What would have been the effect of applying the living tree doctrine to this power? If taken seriously, it would probably have meant the end of many, perhaps most, areas of provincial autonomy. But other factors — primarily political — intervened to counterbalance this interpretative dynamic and preserve the identity of the provinces. Various sections of section 92 have been interpreted to curtail federal hegemony in this realm. Thus the contradictions between cases such as *McNeil v. Nova Scotia Board of Censors*⁴¹ and *R. v. Westendorp*⁴² can be explained, in large part, by the political desires of the judiciary to refashion the constitution in order to give effect to their preferred political vision. It is no secret that many of Laskin C.J.'s decisions clearly reflect his federalist bias.⁴³ By the

³⁸Moreover, there are homologies between this "contemporary eyes" position and the anachronistic "ordinary language" philosophers of the Oxford School.

³⁹I should perhaps point out that I do not advocate "hermeneutical anarchy," that everything is up for grabs. There *are* constraints but they are to be located within the self-imposed myopia of the community of interpreters (lawyers) which, in turn, is dependent upon their cultural context. Meaning is context bound but that context is potentially boundless. (Katerina Clark & Michael Holquist, *Mikhail Bakhtin* (Cambridge, Mass.: Belknap Press, 1984) at 218-219). The constraints are political and sociological, not legal.

⁴⁰*Constitution Act 1867* (U.K.) 30 & 31 Victoria, c. 3.

⁴¹[1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1, 25 N.S.R. (2d) 128, 36 A.P.R. 128, 19 N.R. 570.

⁴²[1983] 1 S.C.R. 43, [1983] 2 W.W.R. 386, 23 Alta L.R. (2d) 289, 32 C.R. (3d) 97, 2 C.C.C. (3d) 330, 46 N.R. 30, 41 A.R. 306.

⁴³Katherine Swinton, "Bora Laskin and Federalism" (1985) 35 U.T.L.J. 353.

same token, the reason why he was so often in dissent was that his colleagues embraced a counter-vision. In short, the constitutional text, of necessity, was and is a potentially open political forum. Constitutional interpretation is politics by another means. As Orwell reminds us, "in our age there is no such thing as keeping out of politics."⁴⁴

IV

If "progressive interpretation" appears just as amorphous as anything that has gone before, then this is exacerbated rather than modified by the second element of Hogg's proposal — that interpretation be "purposive." Quite rightly, Hogg rejects Ely's process based theory as being unpersuasive and inapposite as a purposive model. Hogg, in contrast, claims that each section of the Charter must be taken to have its own purpose, and therefore must be interpreted in that light.⁴⁵ Once again, rather than seeing this as being restrictive of judicial policy-making I interpret it as being facilitative.

Although "trite," and despite its orthodoxy, purposive interpretation has been anything but the conventional Canadian interpretive tradition. As Eric Tucker has demonstrated in a different context, at best, the wilful Canadian judiciary has reduced purposiveness to one of the plethora of techniques which they can utilize to suit their own purposes; at worst, they have simply ignored and flouted its authority.⁴⁶ There is no reason to believe that they will behave any differently when interpreting the *Charter*; indeed, in view of the very high stakes involved, they will undoubtedly want to retain and expand this flexibility.

⁴⁴ Cited in W.J.T. Mitchell, *The Politics of Interpretation* (Chicago: University of Chicago Press, 1983) at 3.

⁴⁵ Hogg, *supra*, note 2 at 113.

⁴⁶ "The Gospel of Statutory Rules Requiring Liberal Interpretation According to *St. Peter's*" (1985) 35 U.T.L.J. 113.

On further reflection, Hogg's reference to *Hunter v. Southam*⁴⁷ only adds fuel to the funeral pyre for apolitical interpretation. He uses this case to suggest that "purpose" helps add flesh to the necessarily vague words of the *Charter*. He documents how the court considered the protection of privacy to be the purpose of section 8 and this enabled them to determine the meaning of unreasonable, and then concludes that "all this was drawn from the single word 'unreasonable'."⁴⁸ Once again, we are involved in language games; the interpretation of section 8 articulated by the court in *Hunter v. Southam* is *not drawn* from but rather *imputed* to the word "unreasonable." These slippery words do not limit the judiciary, rather they provide them with supplementary creative artillery to make political decisions in the guise of legal deductionism. It is the judiciary who decide what the purpose of the text means, they impute this meaning to the text and, supposedly, we have the determinative legal answer. In short, purposes are as manifestly indeterminate as the text: it all depends upon which level of generality or abstraction the court chooses to articulate that purpose. The approach is circular and self-fulfilling; the answers are hidden in the questions asked.⁴⁹ I agree with Professor Hogg when he claims that "the ruling does not seem to go beyond the realm of interpretation"⁵⁰ but in view of the constitutively creative and voluntaristic nature of interpretation, this is probably not the sort of argument he wishes to make.⁵¹

⁴⁷(1984), 11 D.L.R. (4th) 641, [1984] 6 W.W.R. 577.

⁴⁸Hogg, *supra*, note 2 at 104.

⁴⁹Professor Peck makes a similar point on a grander scale when he suggests that in articulating what s.1 might mean the courts have provided themselves with even broader resources with which to work. "The Developing Analytical Framework For Decision-making Under The Canadian *Charter of Rights and Freedoms*" (1987) 25 Osgoode Hall L.J. 1.

⁵⁰Hogg, *supra*, note 2 at 104.

⁵¹In an excellent example of critical public law theory, Andrew Petter scratches the surface of judicial discourse in *Hunter v. Southam* to articulate the unexpressed assumptions and "taken for granted" animating the psyche of the court. See, "The Politics of The Charter" (1986) 8 Sup. Ct. L. Rev. 473.

V

A third and final example allows us to evaluate whether any interpretative returns could be gained by adopting Professor Hogg's proposal. The issue can be framed as follows: Do the principles of progressive and purposive interpretation aid in determining to whom the *Charter* applies? In light of section 32,⁵² do the rights and freedoms guaranteed by the *Charter* only relate to the public realm, what the Americans call "state action," or can they be given a more extensive interpretation so as to affect interpersonal relations, the traditional private realm?

Academic commentary has lined up upon both sides of the debate.⁵³ Scholarly recourse to both subtle and imaginative

⁵²Section 32(1) reads as follows:

This Charter applies:

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

⁵³H. Brun, "The Canadian Charter of Rights and Freedoms as an Instrument of Social Development," in C. Beckton & A.W. MacKay, research coordinators, *The Courts and the Charter* (Toronto: University of Toronto Press, 1985) at 1; H. Brun & G. Tremblay, *Droit Constitutionnel* (Cowansville, Que.: Editions Y. Blais, 1982) at 628-29; H. Brun & G. Tremblay *Droit Constitutionnel: Supplement* (Cowansville, Que.: Editions Y. Blais, 1985) at 77-8; M. Doody, "Freedom of the Press, the Charter and a New Category of Qualified Privilege" (1983) 61 Can. Bar Rev. 124 at 126-39; D. Gibson, "The Charter of Rights and the Private Sector" (1982) 12 Man. L.J. 213; D. Gibson, "Distinguishing the Governors from the Governed" (1983) 13 Man. L.J. 505; W.R. Lederman, "Democratic Parliaments, Independent Courts and the Canadian Charter of Rights and Freedoms," paper delivered at a Conference in Honour of Norman Ward, "The Canadian House of Commons: Assessments and Prospects," University of Saskatchewan, Saskatoon, Saskatchewan, November 1984 (rev. text January 1985) (to be published in J.C. Courtney, ed., *The Canadian House of Commons: Essays in Honour of Norman Ward* [forthcoming] and in (1986) 11 Queen's L.J. 1; Madoff, "Libel Law, Fiction, and the Charter" (1983) 21 Osgoode Hall L.J. 741 at 756-66; A. Pratt, "The Charter and How to Approach It: A Guide for the Civil Practitioner" (1983) *Advocates' Q.* 425; L. Smith, "Charter Equality Rights" (1984) 18 U.B.C.L. Rev. 351; B. Slattery, "Charter of Rights and Freedoms: Does it Bind Private Persons" (1985) 63 Can. Bar Rev. 148; Y. de Montigny, "Section 32 and Equality Rights" in A.F. Bayefsky & M. Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Agincourt, Ont.: Carswell, 1985) at 565; John Whyte "Is the Private Sector Affected by the Charter" in R. Elliott & L. Smith, eds, *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reports, 1986)

arguments has demonstrated that the text is inconclusive and can be interpreted either way, depending upon which canons of interpretation are adopted or which other sections of the *Charter* are read in conjunction with section 32. Moreover, the lower courts have provided conflicting decisions⁵⁴ and the Supreme Court appears to be thoroughly confused.⁵⁵ This lack of consensus negates Hogg's suggestion that we adopt the approach "which seems natural to contemporary eyes."

Perhaps the principles of progressive and purposive interpretation can provide greater elucidation. One version of a progressive argument might be that section 32 should apply to the private realm because it is clear from Canadian history that the greatest threat to our rights and freedoms comes not from the state, but from private centres of power.⁵⁶ Moreover, as Slattery demonstrates, there are even Canadian and Commonwealth precedents for such an extensive approach.⁵⁷ Yet such an approach conflicts with Hogg's own interpretation of section 32, as expressed elsewhere,⁵⁸ where he categorically states that "The *Charter of Rights* ... does not regulate the relations between private persons and private persons. Private action is therefore excluded from the application of the *Charter*."⁵⁹ Unfortunately, his reasons for such a restrictive interpretation are of little help. First, Hogg draws upon

at 145.

⁵⁴*Re Klein and L.S.U.C.* (1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.); *Blainey v. Ontario Hockey Association* (1985), [1986] 52 O.R. (2d) 225, 21 D.L.R. (4th) 599, Steele J.; *Re Edmonton Journal and A.G.-for Alberta* (1983), 4 C.C.C. (3d) 59, 4 C.R.R. 296 (Alta. Q.B.); *R. v. Lerke* (1984), 13 C.C.C. 515, 11 C.R.R. 1 (Alta. Q.B.).

⁵⁵In *Operation Dismantle*, Dickson C.J., obiter, in reference to s.52 indicated that the Charter might apply to the private realm, *supra*, note 14 at 459-60 but in *Dolphin Delivery*, *supra* note 15, McIntyre J. suggested diverse and perhaps contradictory opinions.

⁵⁶See Devlin, *supra*, note 11; R. MacDonald, "Postscript and Prelude -- the Jurisprudence of the Charter: Eight Theses" (1982) 4 Sup. Ct L. Rev. 321, at 347.

⁵⁷*Supra*, note 53 at 159-60.

⁵⁸*Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 674-678.

⁵⁹*Ibid.* at 674.

sections of the *Charter*, that indicate a more restrictive interpretation is appropriate, yet as I have suggested, there are competing sections which can just as easily support a more expansive approach. Second, he refers to legislative history to support his argument, but surely this contradicts the underpinnings of his own critique of originalism and undercuts the point of his own progressive program. Third, Hogg cites American precedent, but this, too, is unhelpful as the *Charter*, in substance, form, and tradition, is very different from the American *Bill of Rights*. Indeed one of the underlying themes in Hogg's paper is the effort to provide interpretative space so that the Canadian *Charter* can grow independent of the American tradition.

However, perhaps one should not be so hasty to point out these inconsistencies. Perhaps Hogg is correct. To read the *Charter* as applying to the private realm would be more than progressive; it would be revolutionary, challenging the public/private dichotomy which is an integral element of our liberal heritage. Surely such an approach would be going too far, expanding the tentacles of law and legal formalism into hitherto untouched aspects of human interaction. Such an approach would be radical not progressive.

In short, depending upon how one construes "progressive," both the restrictive and expansive approaches can claim conformity with this criterion. As a dispositive hermeneutical concept, "progressive" is, unfortunately, completely underdeveloped by Hogg and therefore interpretatively bankrupt. Much the same can be said of the second element of his thesis, that interpretation be purposive.

What is the purpose of section 32? The question, when articulated in this way, fails to advance the discussion because it still places the burden upon an incompetent text. At best it simply restates the question. At worst, it distracts attention from the actual locus of determination, the judiciary. The more useful question is, which purposes do the courts wish to attribute to the *Charter*? This in turn necessitates an inquiry into the politico-philosophical constitutional vision(s) of the judiciary with all the correlative non-neutral values and choices which necessarily ensue. The invocation of purposiveness adds nothing to the decision-making process, but rather obscures the other more interesting preferences which are being implemented in the process of determining the scope of section 32.

VI

Professor Hogg's paper attempts to guide our response and that of the courts to the challenge of *Charter* interpretation. He has attempted to answer the problem by developing an autochthonous, culturally specific response that does not simply regurgitate one of the "remedies" articulated by our southern peers. Unfortunately, his proposals come perilously close to simply defining the problem out of existence, to espousing jurisprudential closure. His central claim is that the text, in and of itself, is capable of providing adequate guidance to the judiciary so as to inhibit them from indulging in arbitrary decision-making. My critique has been that he has failed to develop the concept of constitutional text sufficiently to enable it to support the constraining burden which he imposes upon it. Affirmatively, I have posited the open-ended, promiscuous, and perennially pregnant nature of the constitutional text, and suggested the political machinations inherent in the deceptively innocent interpretation. In short, it is suggested that the distinction between adjudication and legislation is problematic and that the choices made by the judiciary are, in effect, the same as those made by the legislature.⁶⁰

This comment is written with the (perhaps irrational) belief that rational discourse can make a difference. I suggest that we abandon the repressive⁶¹ and mystificatory potential of textual fetishism which allows power to pose as truth; that we understand

⁶⁰M. Tushnet, "Critical Legal Studies and Constitutional Law: An Essay in Deconstruction" (1983) 36 *Stan. L.Rev.* 623.

⁶¹What Marcuse says about one-dimensional language is rather apt for contemporary jurisprudential discourse:

The word becomes a cliché, and as a cliché governs speech or writing; the communication thus precludes genuine development of meaning ...[T]he noun governs the sentence in an authoritarian and totalitarian fashion, and the sentence becomes a declaration to be accepted - it repels demonstration, qualification, negation of its codified meaning ... [T]his language which constantly imposes images militates against the development and expression of concepts. In its immediacy and directness it impedes conceptual thinking, thus it impedes thinking.

One Dimensional Man, (London: Routledge and Kegan Paul, 1964) at 184.

language as a process, not an artifact;⁶² that we recognize that difficult social, moral, political, and gender-based choices now have to be made in the legal arena; that we freely admit that legal discourse is "jurisgenerative"⁶³ and therefore social praxis; and that we proceed immediately to open-ended communicative action.⁶⁴ I suggest that we seek out emancipatory trojan horses — deviationist sub-texts — within the citadel of contemporary jurisprudential discourse and reconstruct them to advance more radically democratic forms of social interaction. For example, as a strategy of resistance, we might wish to use the Charter commitment (?) to freedom of expression and association to articulate communitarian conceptions of speech and action as strategic counter-paradigms to those which currently monopolize our terms of reference.

In view of the nexus between discourse and power, transformative discursive praxis is a vital element in any attempt to expand effective participation in post-industrial society.⁶⁵

⁶²See Bakhtin, *supra*, note 36. Elsewhere I have argued that both the state and law should also be understood as "relational." See *supra*, note 11.

⁶³Robert Cover "Nomos and Narrative" (1983) 97 Harv. L. Rev. 4.

⁶⁴J. Habermas, "Universal Pragmatics" in *Communication and the Evolution of Society* (Boston: Beacon Press, 1979).

⁶⁵There is, of course, a problem underlying even my own tentative radical proposal. The whole interpretivist/non-interpretivist debate exists in the rarified air of judicial reflection and ebony tower academicism; it is far removed from what law in practice means to the victim of judicial interpretation: the vicious paraphernalia of constitutionally legitimized violence. As I have argued at length elsewhere, the determinative element of contemporary law is its inescapably violent nature. See *supra*, note 11. The violent underpinnings of contemporary law suggest that it is farcical even to contemplate counter-interpretation because the conditions of legal discourse are intrinsically destructive of meaningful communication. See also Robert Cover, "Violence and the Word" (1986) 95 Yale L.J. 1601.