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Right Theory, Wrong Reasons: Dynamic Interpretation, the Charter and “Fundamental Laws”

Randal N.M. Graham*

I. INTRODUCTION

Section 7 of the Charter is one of those rare and wonderful texts that inspire judges to discuss interpretive theory. This should come as no surprise. The language of section 7 is so vague and open-textured that it provides little guidance to those who interpret and apply it. Indeed, the text of section 7 includes phrases and concepts that are “as enigmatic and amorphous as any in our jurisprudence”.¹ Does section 7’s reference to “liberty” encompass freedom of contract? What are the boundaries of “fundamental justice”? What is the meaning of “life”? The nebulous language of section 7 provides no answers to these questions, yet judges are compelled to grapple with questions of this nature whenever Charter litigants rest their claims on section 7’s text.

Because of their vague and amorphous nature, the words of section 7 lack the clarity or precision necessary to constrain the outcomes of judicial decisions. As a result, judges asked to interpret section 7 are forced to contend with fundamental questions of adjudicative theory. Judges applying section 7 must consider how much discretion interpreters have when interpreting vague constitutional text, and reflect on the extent to which the lawgiver’s intention can impose constraints on the meaning given to legislative language. More fundamentally, judges interpreting section 7 must ask themselves what it truly means to

* Associate Professor, University of Western Ontario Faculty of Law. Some of the text of this essay has been adapted from chapters 1 and 4 of R. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001). I would like to thank my colleagues Jamie Cameron, Grant Huscroft, Peter Hogg and Jeremy Shaw for their helpful discussions as I prepared this paper.

¹ Mark Carter, “Fundamental Justice in Section 7 of the Charter: A Human Rights Interpretation” (2003) 52 U.N.B.L.J. 243, at 247.

“interpret” legislation — is legal interpretation a dynamic, creative endeavour in which judges are active participants in the generation of meaning, or is it simply the application of the predetermined expectations of the democratically accountable author of the statute’s text? What are the respective powers of interpreter and author? These questions are particularly important in the context of section 7 of the Charter: not only is the section so open-ended that the answers to these questions will govern the section’s application, but — because of the constitutional force of section 7 — a court’s answers to these questions carry important implications for fundamental human rights, for the limits of legislative power and for the division of powers between the government and the courts. In the context of section 7, the court’s adoption of a particular theory of interpretation carries far-reaching implications for the political institutions that shape our nation and our rights.

The purpose of this essay is to examine the interpretive theory typically espoused by courts interpreting section 7. That theory, known as “dynamic” or “progressive” interpretation,² posits that courts should play an extremely active role in the development of legislative meaning, and that a court’s interpretation of legislation (including section 7 of the Charter) is not constrained by the expectations of the legislative author. As we shall see, my view is that dynamic interpretation is — in most cases, at least — the proper method of interpreting the Charter. Unfortunately, Canadian courts have generally misunderstood the rationale for invoking dynamic interpretation, and this misunderstanding carries important implications for the interpretation of legislative texts. Because of the courts’ misapprehension of the reasons for using dynamic interpretation, courts may use dynamic interpretation where its use is inappropriate, or fail to use dynamic interpretation where it is the optimal method of construing legislation. In the hope of avoiding problems of this nature, this essay proposes an alternative rationale for the invocation of dynamic interpretation. Unlike the rationale that has typically been put forward by our courts, the rationale I proffer in this essay corresponds to the actual interpretive practices of Canadian jurists. More importantly, it provides a more principled method of determining

² In Canada, “Dynamic Interpretation” is typically called progressive or “living tree” interpretation. My own preference is to use the phrase “dynamic interpretation” (originally coined by William Eskridge in *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994)), because of the ambiguous and politically charged nature of the term “progressive”.

when dynamic interpretation is the appropriate method of resolving specific interpretive problems.

While section 7 of the Charter could be regarded as Canada's "poster child" for dynamic interpretation, the dynamic approach to interpreting legislation has much broader application. The essay accordingly begins with an overview of dynamic interpretation and its application beyond the realm of constitutional law. Following that overview, the paper describes (in section II) the benefits and weaknesses of dynamic interpretation. Section III of the paper then turns to the interpretation of section 7 itself, using section 7 jurisprudence to demonstrate the courts' traditional rationale for selecting dynamism as the "official method" of interpreting constitutional text. The essay goes on (in section IV) to reject the court's traditional rationale, and concludes (in sections V and VI) by proposing an alternative "meta-theory" of statutory interpretation — one that provides a principled method of determining when dynamic interpretation is appropriate, and when alternative theories of statutory construction are better able to guide the courts in their interpretation of legislative language.

II. DYNAMIC INTERPRETATION

1. Overview

Dynamic interpretation (or "dynamism") is the opposite of originalist construction. Where originalists see the framers' historic intention as the only legitimate guide to interpretation, proponents of dynamism hold that laws should be interpreted by reference to contemporary ideals, with little or no attention paid to the legislator's intent. Where the originalist believes that the lawgiver's expectations govern the meaning of all statutory texts, the dynamist holds that a statute's meaning "is not tied to the framer's original understanding but is permitted to evolve in response to both linguistic and social change".³

While originalists are frequently portrayed as "statutory archaeologists" who search for historical evidence of an Act's intended meaning,⁴

³ Ruth Sullivan & Elmer Driedger, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), at 105.

⁴ See, for example, Pierre-Andre Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, QC: Yvon Blais, 1992), at 7.

proponents of dynamic interpretation refuse to see a statute's meaning as an artifact to be discovered through the use of historical evidence. Instead, the dynamic interpreter sees the statute's text as clay that can be shaped in ways that were not intended by the statute's drafters. Where the requirements of logic or justice suggest that a statute should be interpreted in a way that differs from the intention of the statute's author, dynamic interpretation permits the interpreter to select a construction that fits with current needs and departs from historical expectations. This "dynamic vision" of statutory construction is encapsulated by Francis Bennion's nautical analogy:

[T]he ongoing Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.⁵

According to this view of legislation, the meaning of statutory language must adapt in response to changing social conditions. As time passes and the text is applied to unforeseen situations, the statute's meaning evolves to become something more than what the drafters intended. Indeed, in many instances, the statute may evolve in ways that go against the initial intention of the statute's author.

In *Dynamic Statutory Interpretation*,⁶ William Eskridge provides examples of the manner in which dynamic interpretation can cause a statute to grow in ways that conflict with the expectations of the statute's author. The most striking example Eskridge offers involves the evolution of section 212(a)(4) of the American *Immigration and Nationality Act* of 1952 (the "INA"). Section 212(a)(4) of the INA required the exclusion of certain "aliens" from the United States of America. Included in the prohibited list were aliens "afflicted with psychopathic personality, or sexual deviation, or a mental defect". At the time of the section's enactment in 1952, the purpose behind the provision was clear: the drafters had stated that their purpose in using this statutory language was to prevent homosexual immigrants from entering the U.S. Indeed, Eskridge notes that the phrase "sexual deviation" had been added to the statute in response to a case that decided that "psychopathic personality" was insufficiently precise to be applied to homosexuals. On the advice of the Public Health Service

⁵ Francis Bennion, *Statutory Interpretation*, 2d ed. (London: Butterworths, 1992), at 618.

⁶ William Eskridge, *supra*, note 2, above.

(“PHS”), the legislative drafters had decided that homosexuality was a form of “mental disease” or “sexual deviation” that would be caught by the language used in section 212(a)(4).

An originalist construction of section 212(a)(4) would have referred to legislative intent and made it clear that homosexuality was a “sexual deviation” for the purposes of the Act. Notwithstanding this discriminatory intention, however, by the end of the 1970s even the PHS (which was responsible for enforcing the *INA*) had reinterpreted section 212(a)(4) and announced that the PHS lacked the authority “to exclude gay men, bisexuals, and lesbians pursuant to section 212(a)(4).”⁷ What happened between the date of the statute’s enactment and the PHS’s “reinterpretation” of section 212(a)(4)? The text of the relevant statute remained constant, but its meaning changed radically. According to William Eskridge, this reinterpretation is an instance of dynamic interpretation. Within a decade of the enactment of section 212(a)(4), American courts began to interpret the section in ways that made it difficult to apply the statute’s language to homosexuals.⁸ The reasoning of the courts that reinterpreted (and improved) section 212(a)(4) is best understood by reference to the changes that took place in society’s views concerning homosexuality during the 1960s and 70s. According to Eskridge:

Congress’s targeting of “homosexuals” under one of the medical exclusions rested on the belief, widely held in the 1950s, that “homosexuals” are mentally ill. This view became more controversial by the 1960s, as empirical studies found no correlation between pathology and homosexuality Although the view of homosexuality as a disease was still widely held in the medical community throughout the 1960s, everything changed — almost immediately — after the Stonewall riots in 1969, which triggered gay activism against traditional penalties based on sexual orientation. After Stonewall, it was much harder to dismiss lesbians, gay men, and bisexuals as psychotics, for they not only were showing their faces and talking back, but were working within the medical profession to discredit the earlier views.⁹

⁷ *Id.*, at 54.

⁸ For a review of cases that demonstrate the dynamism inherent in this provision, see Eskridge, *id.*, at 50-57.

⁹ *Id.*, at 53.

Eskridge goes on to point out that after the Stonewall riots,¹⁰ American medical associations removed homosexuality from the list of mental disorders. The language of the INA, by contrast, remained static throughout this period. Only through the use of dynamic interpretation were courts able to disregard the legislature's original intention and permit homosexual immigrants to cross America's borders. As a result of drastic changes in government policy and shifts in public opinion, even members of Congress eventually admitted that, despite the fact that the actual text of the INA had not been changed, the language used in section 212(a)(4) no longer meant what had initially been intended.¹¹ As a result, the American courts and Congress used dynamic interpretation to allow the statute's language to keep pace with current ideals.

Canadian courts have enthusiastically adopted dynamic interpretation as the "official method" of interpreting Canada's constitutional texts. When interpreting section 7 of the Charter in particular, Canadian jurists have consistently held that constitutional language is best construed through the invocation of dynamic interpretation. Before reviewing the history of dynamic interpretation in the context of the Charter (and in the context of section 7 in particular), it is important to assess the costs and benefits associated with a dynamic approach to statutory construction. Section II, 2. of this essay accordingly provides a brief discussion of the benefits that are typically associated with dynamic construction, while section II, 3. describes the criticisms that are most frequently levelled against it.

2. The Benefits of Dynamic Interpretation

Whether one applies it in the realm of constitutional law or in the interpretation of "ordinary" enactments, dynamic interpretation can be quite useful. The principal benefit of dynamic interpretation is its ability to overcome originalism's flaws. Where originalism fails to respond to linguistic evolution, dynamic interpretation thrives on it. Where originalism fails to recognize the interplay between the interpretation of a law and its application, dynamic interpretation embraces this interplay

¹⁰ The "Stonewall riots" refers to events that took place on June 27, 1969, when homosexual, bisexual, and transgendered patrons of the Stonewall Bar in New York City staged a spontaneous uprising against police harassment. The Stonewall riots are often regarded as the birth of the gay rights movement.

¹¹ 135 *Congressional Record*, ss. 5040-5042, May 9, 1989.

as the ultimate source of statutory meaning. While originalism relies on the fictitious and untraceable notion of legislative intent, “dynamic judges” rely on something that exists: the courts’ assessment of society’s current needs.¹²

Dynamism’s “evolutionary” portrayal of statutory interpretation provides a far more accurate model of judicial interpretation than the description that is provided by originalists. According to Eskridge, the originalists are wrong in their contention that the meaning of a statute is an historical artifact that remains static over time. On the contrary, statutory meaning constantly changes, even where the text of the statute remains constant. As Eskridge correctly notes, the evolution of statutory meaning through the application of law to fact is inevitable. Laws inexorably bend and stretch in ways in which their authors could not have predicted. The direction in which the law “bends” is inescapably influenced by the views of the interpreter, views that will be coloured more by the current legal context than by any historical beliefs held by the legislative body that was responsible for the legislation’s enactment. This inescapable process is described by Sullivan and Driedger as the means by which “the courts can make the adjustments required for a comfortable fit between the current needs of subjects and the original law”.¹³

Like Eskridge, Côté contends that dynamic interpretation does a better job than originalism of “dealing with the dynamic relationship between drafter and interpreter”.¹⁴ According to Côté, the drafters of statutory language do not establish the legislation’s meaning, as meaning is always “born of interpretation”.¹⁵ Over time, as the law is applied to more and more unforeseen situations, the statute’s meaning evolves into something beyond that which was envisioned by the legislative author. Francis Bennion describes the forces behind this evolutionary process as follows:

Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history. While their

¹² This is not to suggest that a court’s assessment of society’s needs will always be correct.

¹³ Sullivan & Driedger, *supra*, note 3, at 107.

¹⁴ Côté, *supra*, note 4, at 20.

¹⁵ *Id.*

language may endure as law, its current subjects are likely to find that law more and more ill-fitting.¹⁶

The dynamic interpreter of language, unlike the originalist, plays an active role in the development of meaning. While the originalist plays an essentially passive role in unearthing historical intention, the dynamic interpreter enters a partnership with the statute's original drafters, assisting in the creation of meaning through the application of abstract language to concrete fact.

Leaving aside any normative implications of the interpreter's role in creating a statute's meaning, one cannot help but acknowledge that this "dynamic" description of judicial interpretation is far more accurate than originalism's depiction of the interpretive process. An interpreter of language cannot help but be influenced by the context in which an interpretive problem arises. As Côté notes:

Legal interpretation goes beyond the mere quest for historical truth. The judge, in particular, does not interpret a statute solely for the intellectual pleasure of reviving the thoughts that prevailed at the time the enactment was drafted. He interprets it with an eye to action: the application of the statute. Legal interpretation is thus often an "interpretive operation", that is, one linked to the resolution of concrete issues. Most authors recognize that the application of statutes returns to influence their interpretation.¹⁷

The facts that surround an interpretive problem will inevitably colour the judge's view of the meaning of a legislative passage. Context is impossible to ignore. For this reason, Côté argues that any form of interpretation that ignores the significant role of factual context is both "difficult" and "dangerous",¹⁸ and paints a bleak and inaccurate picture of the practice of judicial interpretation. Originalism is simply wrong in its contention that interpretive problems can be resolved by reference to predetermined meanings: interpretive problems that arise as time goes by are not *resolved* by statutory language — on the contrary, the resolution of these problems typically leads to marginal changes to the meaning of the statutory text. This evolution of the meaning of legislation is inevitable. As a result, dynamism's account of interpretation is far more accurate than the originalist description.

¹⁶ Francis Bennion, *Statute Law* (London: Oyez Publishing Ltd., 1980), at 618.

¹⁷ Côté, *supra*, note 4, at 15.

¹⁸ *Id.*, at 16.

Beyond its obvious descriptive power, dynamism has demonstrated the power to promote justice in difficult cases. Because dynamism explicitly recognizes the “evolutive” nature of language, dynamic interpretation can permit an archaic law to evolve and respond to society’s current vision of justice. This is particularly evident in the realm of human rights, where the public’s views of what qualifies as “justice” or as a “basic human right” often evolve at a pace that outstrips the speed with which a legislature can amend its statutes. According to William Eskridge, dynamic interpretation permits the court to respond to current views of justice and evolving notions of basic human rights by using old or out-dated statutes in creative and unexpected ways. As an example Eskridge points to the decision of the U.S. Supreme Court in *United Steel Workers v. Weber*.¹⁹

In *Weber*, the United States Supreme Court was called upon to interpret section 703(a)(1) of the American *Civil Rights Act* of 1964, which prohibited employment-related discrimination on the grounds of “race, color, religion, sex or national origin”. The problem before the Court in *Weber* involved the legality of private affirmative action programs. Under a collective agreement entered into by Kaiser Aluminum and the United Steelworkers, Kaiser Aluminum had established a training plan designed to eliminate racial imbalances in the workforce. The collective agreement required 50 per cent of the places in the program to be reserved for African Americans, who would be selected to fill positions in the Kaiser Aluminum Plant. One of the side effects of the program at issue in *Weber* was the rejection of certain highly qualified white workers in favour of less experienced black employees. One of the white labourers who was passed over due to the program was Brian Weber, who filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) pursuant to section 703(a)(1) of the *Civil Rights Act*. According to Weber, the literal terms of the *Civil Rights Act* prohibited affirmative action programs on the grounds that such programs amounted to employment-related discrimination based on “race” and “colour”. Indeed, Weber presented substantial evidence to the effect that the original intention of the drafters of the statute had been to prevent affirmative action programs from being created. Among the evidence presented by Weber was an interpretive memorandum submitted to the Senate by the drafters of the relevant provision. According to this

¹⁹ 443 U.S. 193 (1979).

memorandum, section 703(a)(1) would ensure that employers would not be permitted “to prefer Negroes for future vacancies”.²⁰ In essence, the memorandum established that the purpose of section 703(a)(1) was to require “colour-blind” hiring, whereby employment vacancies would be filled by reference to objective, job-related criteria without reference to race or colour. Clearly, the original intention of the drafters of section 703(a)(1) was to prohibit the kind of program at issue in *Weber*. As a result, the use of originalist construction would have required the Court to rule in *Weber*’s favour.

Surprisingly, the Court abandoned its traditional originalist position and ruled that Kaiser’s affirmative action program was permissible under the statute. According to Brennan J. for the majority, the program at issue in *Weber*, while not in line with the framers’ expectations, advanced the overall goals and “spirit” of the statute. As a result, despite the apparent intention of the drafters, who had firmly believed that affirmative action would be prohibited by the statute, the Court in *Weber* decided that a “dynamic” interpretation of the Act did more to achieve the legislation’s objectives.²¹

According to William Eskridge, the Court’s decision in *Weber* demonstrates the utility of dynamic interpretation. Clearly, one purpose of the statute at issue in *Weber* had been to eliminate racial imbalances in the workforce. Unfortunately, the “colour-blind” approach envisioned by Congress was unsuccessful: in 1974, 10 years after the statute was passed, only 1.83 per cent of the workers in Kaiser’s plant were African American, despite the fact that persons of African descent made up 39 per cent of the area’s workforce. The epidemic of racial inequality that had given rise to the need for section 703(a)(1) had not been cured despite the efforts of the legislation’s creators. Eskridge notes that the problem arose because of objective hiring practices: Kaiser traditionally hired only experienced craft-workers. Because of their past exclusion from the workforce, black workers were simply unqualified for the jobs at Kaiser’s Plant. In order to remedy this problem, Kaiser Aluminum

²⁰ 110 *Congressional Record* 7213, Clark-Case memorandum.

²¹ Note that *Weber* might initially seem like an instance of purposive interpretation (a specific form of originalism discussed in Graham, *supra*, note *, c. 1). *Weber* cannot, however, truly be characterized as an example of originalist construction. The court openly rejected the construction that was advocated by the drafters of the legislation. The ability to stray from the legislator’s original understanding while claiming to support the legislator’s purpose reveals a difficulty of purposive interpretation. Depending on the court’s characterization of the “objective” of a legislative provision, the court can actually rely on this objective to defeat the true (expressed) intention of the legislative author.

and the United Steelworkers Union had created the plan at issue in *Weber* and thereby improved the racial balance in the workforce. Under an originalist approach to interpretation, Kaiser's proactive attack on discrimination would have failed, and the overall objective of the statute at issue in *Weber* (i.e., the promotion of racial balance) would not have been reached. Only the Court's surprising adoption of a dynamic interpretation of the anti-discrimination law permitted the law to achieve its purpose of promoting equality in the workplace.

Dissenting in *Weber*, Rehnquist J. invoked an originalist construction and noted that the drafters of section 703(a)(1) would not have supported a law that permitted employers to engage in affirmative action. Clearly, this originalist approach respected the framers' expectations. What it failed to do, however, was to advance the important goal of racial equality: a strictly "colour blind" approach to hiring, while in line with the drafters' intentions, would have perpetuated the unjust inequalities that existed in the workforce. Unskilled black workers would have been ineligible for higher paying positions because of a lack of experience that had been caused by generations of discriminatory hiring. Section 703(a)(1) of the *Civil Rights Act*, while designed to eliminate employment-related discrimination, was simply inadequate for this purpose. Only through the device of dynamic interpretation could the statute be reshaped in a way that permitted it to achieve its ultimate goal. By allowing the courts to inject an up-to-date view of social policy into the outdated (and often inadequate) language of statutory provisions, dynamic interpretation permits courts to achieve just and fair results²² where originalist construction is inadequate for this task.

3. Problems with Dynamic Interpretation

Despite the many advantages of dynamic interpretation, proponents of originalism have found no shortage of flaws in dynamic construction. The easiest way to demonstrate these flaws is to turn the typical justifications for originalist construction²³ on their head: originalism is

²² Of course, white workers (such as Mr. Weber) who were passed over for employment as a result of private affirmative-action programs may not see the result in *Weber* as just and equitable. The court's decision to approve such programs clearly required a careful balancing of the interests of skilled white workers and disadvantaged black applicants (who lacked skill due to historical discrimination) — a balancing of interests that could not have been attempted had the court been forced to rely on originalist construction.

²³ For a full review of the benefits and weaknesses of originalism, see Graham, *supra*, note *, c. 1.

said to promote certainty in the law, whereas dynamism is inherently unpredictable. While originalism is said to provide an “objective” check on judicial power, dynamic construction’s highly subjective nature can give judges an almost unfettered discretion to interpret laws in surprising and whimsical ways.

One of the most obvious flaws with dynamic interpretation is its unpredictable nature. The lack of any objective signpost (such as legislative intent) pointing the way to a statute’s meaning makes it difficult to foresee the manner in which a provision will be construed. Even statutes that have already been subjected to judicial interpretation may be “re-interpreted” in unpredictable ways. The reliability of precedents is seriously diminished when a future “dynamic interpreter” may claim that social ideals have changed in a way that supports a new and creative construction of legislative language. While a statutory provision may remain unamended for generations, the judicial interpretation of that provision may go through several changes.

Consider the Court’s decision in *Weber* (discussed above). In that case, the Court decided that, despite the intention of the drafters who were responsible for its enactment, the anti-discrimination provision of the *Civil Rights Act* did not prohibit affirmative action programs. In reliance on the Court’s decision in *Weber*, employers may have felt free to create affirmative action programs in order to foster a more egalitarian workplace. But what would happen if the *Civil Rights Act* continued to be subjected to dynamic interpretation? Imagine what would occur if the political culture of the nation underwent a shift to the right (a scenario that is easy to imagine given current political trends): if the courts were to take the view that “modern social ideals” were incompatible with “reverse discrimination”, employers who had created affirmative action plans might find themselves subjected to legal censure. The courts’ continued use of dynamic construction could sacrifice consistency on the altar of changing ideals, making it dangerous for the members of the public to order their affairs in reliance on past judicial decisions. According to dynamism’s critics, such problems can be avoided by reliance on historical (and therefore static) legislative intention as the touchstone for judicial interpretation.

The ability of the courts to interpret statutes in unpredictable ways points to an even greater problem with dynamic interpretation. Through dynamic construction, the courts take on a legislative role, deciding not what the legislator meant when enacting a law, but what the legislator *should* have said. According to Earl Crawford:

If the courts were permitted to ignore the expressed intent of the legislature, they would invade the province of the legislature ... The legislature would become a nonentity. Legislative power would in fact be wielded by the judiciary. The courts would actually make the laws.²⁴

The vision of a judiciary with limitless legislative power does not sit well with dynamism's critics. According to Sullivan and Driedger, this criticism of dynamic construction is rooted in "the idea that in a democracy certain kinds of decisions should be taken by an elected legislature rather than the courts".²⁵ Simply put, a non-elected judiciary has no right to make decisions that are the province of a politically accountable legislative body.

The indeterminate nature of dynamic interpretation is the source of the critics' fears that dynamic construction will tread on the legislature's power. While it may sound theoretically feasible to allow an Act to evolve in response to changing social conditions, in practice this gives rise to a host of problems. Who decides when social conditions have changed to such a degree that the "judicial amendment" of legislation is required? Who defines the prevailing "social and legal context" that directs the evolution of legislation? Who should decide the degree to which a provision must evolve to respond to the requirements of justice or changing ideals? These decisions fall to the courts, with no fixed, external frame of reference (such as legislative intent) to act as a means of reining in judicial power. Courts will be charged with the task of determining whether or not existing statutes meet the needs of modern society, and will tailor those statutes in accordance with their own subjectively determined views of justice. According to proponents of dynamic interpretation, no check on this form of judicial power is needed: if the drafters of legislation are unhappy with the court's construction of an enactment, the legislature is free to amend the statute. Unfortunately, this is not always feasible. Eskridge acknowledges that legislative bodies are largely unaware of judicial interpretation, and only respond to judicial construction where highly political problems are involved. Unless an election is on the line, the legislature may lack the political will to "correct" a creative judicial construction of legislation.

²⁴ Earl Crawford, *The Construction of Statutes* (St. Louis, MO: Thomas Law Book, 1940), at 245.

²⁵ Sullivan & Driedger, note 3, *supra*, at 106.

Sullivan and Driedger echo this point, noting that “legislatures cannot engage in continuous monitoring and adaptation of legislation”.²⁶ Where the judiciary’s view of “social needs” or “modern ideals” is incompatible with that of the elected branch of the government, the legislature lacks the ability (or at least the political will) to counter judicial amendments to legislation.

Owing (in part) to the many weaknesses of dynamic interpretation, Canadian courts have refrained from endorsing dynamic interpretation as the courts’ “official theory” for interpreting legislation. Instead, our courts have adopted originalism as the standard method of interpreting most laws. Their preference for originalist construction has been justified numerous times in diverse places. In most instances this preference has been justified on the basis that only Parliament or the legislature has the constitutional power to breathe meaning into the text of legislation. Each statute is an expression of sovereign legislative will, and it is not the place of the courts to usurp the legislator’s power through a “creative” form of judicial interpretation. According to Côté:

This doctrine finds its principal foundation in other doctrines, namely Parliamentary sovereignty and the separation of powers. The judge, who is the ultimate interpreter of laws, is not cloaked in the legitimacy of democratic election. Consequently, he must confine himself to being, in the words of Montesquieu, “the mouthpiece for the words of the law”. It is Parliament, or whomever has been delegated legislative power by Parliament, which bears the responsibility for the political choices of legislative activity ... These principles postulate the predetermination of the meaning by Parliament, the passivity of the interpreter on the political level, and the latter’s submission to the sovereign will expressed in the enactment.²⁷

Similarly, Dickerson notes that in a constitutional democracy:

... the legislature calls the main policy turns and the courts must respect its pronouncements. In such a relationship, it would seem clear that so far as the legislature has expressed itself by statute the courts should try to determine as accurately as possible what the legislature intended to be done.²⁸

²⁶ *Id.*, at 107.

²⁷ *Id.*, at 9.

²⁸ Reed Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown, 1975), at 67.

Out of deference to this separation of powers, Canadian courts have repeatedly held that originalist construction is the “official theory” of statutory interpretation in Canada — the theory of choice for the interpretation of “ordinary” laws.²⁹ Dynamic interpretation has no role in the interpretation of ordinary enactments, it is argued, because it is not the court’s place to change the meaning of laws created through the democratic process.

Despite our courts’ repeated rejection of dynamic interpretation as a method of interpreting “ordinary” legislation, our courts have (for quite some time) been perfectly happy to depart from their originalist leanings and embrace dynamic construction for the purpose of construing the text of Canada’s Constitution. As a result, the courts’ choice between originalism (on the one hand) and dynamic interpretation (on the other) has traditionally depended upon the nature of the statute being interpreted: where the statute being interpreted is a constitutional document (such as the Charter or the *Constitution Act, 1867*) the courts will use dynamic interpretation.³⁰ Where the statute being interpreted is an “ordinary” statute, the court will use originalist construction, interpreting the statute by reference to the historical will of the statute’s author. The courts’ use of dynamic interpretation in the context of the Canadian Constitution — and specifically in the context of section 7 of the Charter — is discussed in the next section of this essay.

III. DYNAMIC INTERPRETATION AND THE CONSTITUTION

1. Overview

While Anglo-Canadian jurists sometimes use dynamic construction when resolving difficult cases, our courts rarely *acknowledge* the use of dynamic interpretation in the interpretation of “ordinary” statutes. Where they have been willing to openly adopt a dynamic approach to interpretation, however, is where the language of the Canadian Constitution requires judicial interpretation. In cases involving constitutional language, the courts abandon their traditional originalist stance in favour of a more dynamic approach to interpretation. The use

²⁹ See, for example: *R. v. Perka*, [1984] 2 S.C.R. 232; *R. v. McIntosh*, [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27.

³⁰ As we shall see in section IV, 1., below, dynamic interpretation has also been embraced in the context of the interpretation of human rights enactments.

of dynamic interpretation when construing the Constitution is commonly known as the “living tree” approach, and has become the official method of constitutional interpretation.

The “living tree” method of construing the Constitution was established by the Privy Council in *Edwards v. Canada (Attorney General)*.³¹ In that case, the Privy Council was asked to interpret section 24 of the *Constitution Act, 1867*, which provides (in part) as follows:

The Governor General shall from Time to Time, in the Queen’s Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become a Member of the Senate and a Senator.

The question in *Edwards* was whether or not the phrase “qualified Persons” in section 24 included female persons, permitting women (as well as men) to occupy places in the Senate.

Despite historical evidence that the framers of section 24 had not envisioned women in the Senate, the Privy Council in *Edwards* determined that the section’s reference to “qualified Persons” should not be construed in accordance with the framers’ expectations. Instead, the Constitution’s provisions must be permitted to evolve in response to changing ideals and shifting social conditions. In Lord Sankey’s opinion:

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. “Like all written constitutions it has been subject to development through usage and convention”: Canadian Constitutional Studies, Sir Robert Borden (1922). Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation. ...³²

As a result, the “living tree” approach to interpretation was adopted by the Privy Council as the principal doctrine of constitutional construction.

³¹ [1930] A.C. 124 (P.C.).

³² *Id.*, at 136.

The “living tree” approach to interpreting constitutional language has been embraced by Canada’s courts. For example, in the *Provincial Electoral Boundaries* case,³³ the Supreme Court of Canada held that “the Charter is engrafted onto the living tree that is the Canadian Constitution”, and that the Canadian Constitution “must be capable of growth to meet the future”.³⁴ Similarly, the Court in *Hunter v. Southam Inc.*³⁵ declared that as a “living tree”, the Constitution of Canada “must ... be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers”.³⁶ As a result of these and numerous other decisions, it would appear that where the construction of the Constitution’s language is at issue, the Court will employ a “progressive”, “dynamic” or “living tree” approach to interpretation.

2. Dynamic Interpretation and Section 7 of the Charter

The Supreme Court of Canada has repeatedly used discussions of section 7 as occasions for justifying the dynamic approach to constitutional construction. This has led to some remarkably “dynamic” interpretations of section 7 — interpretations which do not merely stray from the meaning intended by section 7’s original authors, but which completely override the framers’ intentions. The most famous (or perhaps “infamous”) example is the decision of the Supreme Court of Canada in *B.C. Motor Vehicle*.³⁷

In *B.C. Motor Vehicle*, the Court was called upon to interpret the meaning of “fundamental justice” in section 7. More specifically, the Court was required to determine whether the principles of fundamental justice were restricted to procedural matters (such as the right to a fair hearing) or whether those principles extended to embrace substantive matters, permitting the courts to invalidate laws on the ground that the substance of the law was unacceptable. From an originalist perspective, the meaning of “fundamental justice” in section 7 was clear: the framers

³³ *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158.

³⁴ *Id.*, at para. 42.

³⁵ [1984] 2 S.C.R. 145.

³⁶ *Id.*, at 155.

³⁷ *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486.

of section 7 had intended the phrase to have procedural content only. According to Assistant Deputy Minister Strayer, one of the legal officials responsible for drafting section 7:

... it was our belief that the words “fundamental justice” would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to policy of the law in question.

This has been most clearly demonstrated in the United States in the area of property, but also in other areas such as the right to life. The term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness ... the term “fundamental justice” appears to us to be essentially the same thing as natural justice.³⁸

Several framers of section 7 echoed Strayer’s belief that “fundamental justice” encompassed procedural justice only. Indeed, Jean Chrétien, then Canada’s Justice Minister, suggested that “natural justice” (which has a settled procedural meaning) and “fundamental justice” were essentially interchangeable.

It is not surprising that the framers of section 7 felt that the phrase “fundamental justice” referred only to procedural due process. The federal government had already used the phrase “fundamental justice” in section 2(e) of the *Canadian Bill of Rights*,³⁹ and in that context it had been given a purely procedural meaning. As Carter notes:

... fundamental justice in the Bill of Rights is little more than another name for “natural justice”. Natural justice is a well-established concept that is concerned with the standards of fair procedure, rather than the substantive fairness of the objective or outcome of the process.⁴⁰

Indeed, the purely “procedural” meaning which the phrase “fundamental justice” had been given in the context of the *Canadian Bill of Rights* was one of the principal reasons for the reuse of that phrase in section 7 of the Charter. According to Carter:

³⁸ *Id.*, at para. 36.

³⁹ S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

⁴⁰ Mark Carter, “Fundamental Justice in Section 7 of the Charter: A Human Rights Interpretation” (2003) 52 U.N.B.L.J. 243, at 247.

... the principles of fundamental justice replaced a reference to “due process” in the draft of what is now section 7 of the *Charter*, specifically so as to placate concerns that our courts would engage in substantive review of government activity as had occurred in the United States.⁴¹

The framers of section 7, knowing that the phrase “fundamental justice” had been interpreted (in the context of the *Canadian Bill of Rights*) to have procedural content only, simply transplanted the phrase into section 7. Quite sensibly, they expected the phrase “fundamental justice” to mean the same thing in the context of section 7 that courts had said it meant when it was used within the *Bill of Rights*. As a result, it is clear that the authors of section 7 intended “the principles of fundamental justice” to have procedural content only, and not to allow the substantive review of the policies underlying legislation.

Despite overwhelming evidence that the drafters of the Charter intended “fundamental justice” to have procedural content only, the Court in *B.C. Motor Vehicle* gave the phrase a broad, substantive meaning. Speaking for a majority of the Court, Lamer J. (as he then was) acknowledged the historical evidence noted above but claimed that this historical understanding of the language used in the Charter was inappropriate. In adopting a decidedly dynamic interpretation of section 7, Lamer J. claimed that the framers’ understanding of constitutional text was neither binding upon the court nor particularly convincing. According to Lamer J. for the majority, the language of section 7 required a forward-looking, progressive interpretation regardless of what the constitutional drafters had intended. In his view:

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.⁴²

By acknowledging the potential for “growth” and “adjustment” in the Constitution’s provisions, the Court in *B.C. Motor Vehicle* made it clear that where the Constitution’s language is being interpreted — particularly the broad and open-textured language found in section 7 — a dynamic form of construction is both permitted and required.

⁴¹ *Id.*, at 247-48.

⁴² *Supra*, note 37, at para. 52.

The Supreme Court's commitment to the "dynamic approach" to interpreting section 7 is further demonstrated by the Court's decision in *R. v. Morgentaler*.⁴³ In that case, the Court was asked to determine whether the *Criminal Code* provisions regulating abortion services contravened section 7 of the Charter. Specifically, the Court was asked to determine whether *Criminal Code* restrictions on abortion violated women's "security of the person" in a manner that was inconsistent with the principles of fundamental justice.

An originalist construction of the Charter would surely have led to the conclusion that section 7 had no bearing on the *Criminal Code*'s abortion regulations. In *Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the Canadian Charter of Rights and Freedoms*,⁴⁴ Stephens undertakes an examination of the views held by the Charter's authors with respect to section 7 and "the abortion question". As an example, Stephens points toward the following statement made by Jean Chretien's Parliamentary Secretary in the House of Commons:

Because this is a matter on which there exist fundamentally different views in Canada, the *Charter* does not seek to take a position on ... abortion, believing this is a question better left for the determination by Parliament in the exercise of its ordinary legislative jurisdiction which can be adjusted from time to time as social and moral values evolve. ... With respect to the abortion issue, the *Charter* will not in any way alter the right of Parliament to legislate concerning abortions ... The will of the people of Canada, as expressed through Parliament, shall continue to be the arbiter of the abortion issue.⁴⁵

Jean Chretien himself — then Canada's Justice Minister — echoed these sentiments by making the following statement:

I have stated the position of the government in this matter, that the question of abortion is dealt with in the *Criminal Code* and in no way can the *Charter* be used to interfere with the actions of this Parliament in relation to the *Criminal Code* and abortion.⁴⁶

⁴³ [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30.

⁴⁴ K. Michael Stephens, "Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the Canadian Charter of Rights and Freedoms" (2002) 13 N.J.C.L. at 183.

⁴⁵ *House of Commons Debates* (March 5, 1981) (cited in Stephens, *id.*, at 235).

⁴⁶ *House of Commons Debates* (March 23, 1981), at 8946 (cited in Stephens, note 44, *supra*, at 233).

This is not to suggest that these views were held by everyone involved in drafting the Charter. Indeed, several members of the Progressive Conservative Party (as it then was) feared that, despite the foregoing assurances (as well as similar assurances provided by the Justice Department), section 7 of the Charter was sufficiently open-ended that it might enable a court to interfere with federal laws regarding abortion. As a result, the PC party proposed an amendment to the Charter, one explicitly stating that “Nothing in this *Charter* affects the authority of Parliament to legislate in respect of abortion.”⁴⁷ This amendment was defeated 129-61. The principal reason for its defeat, Stephens argues, was that a majority of Parliamentarians (including Prime Minister Trudeau and members of both the NDP and the Liberal Party) took the view that the amendment was “redundant” — that the amendment added nothing of substance to the Charter, as section 7 had no bearing on the government’s authority to regulate abortion as it saw fit.⁴⁸

Despite fairly convincing evidence that the framers of section 7 believed that the section had no impact on the *Criminal Code*’s provisions regarding abortion, the Court in *Morgentaler* held that the relevant Code provisions violated section 7. The Court further held that the Code’s abortion regulations could not be saved by section 1. As a result, the Code’s abortion regulations were struck down as unjustifiable violations of section 7. This implies, of course, that the authors of section 7 had been wrong about its meaning — they had failed to understand the text they authored. Where the authors of section 7 had been committed to the notion that the provision had no impact on abortion regulations, Dickson C.J. claimed that it was “beyond any doubt” that the Code’s abortion provisions undermined security of the person,⁴⁹ and that this interference with protected rights could not be said to conform to the principles of fundamental justice. As a result, the Court determined that section 7 of the Charter rendered the Code’s

⁴⁷ *House of Commons Debates* (November 27, 1981), at 13436 (cited in Stephens, note 44, *supra*, at 235).

⁴⁸ Of course, there are several ways of looking at Trudeau’s statement that the amendment would be “redundant”. It could mean (a) that the amendment was unnecessary because s. 7 did not impact upon Parliament’s authority with respect to abortion, or (b) that s. 33 ensures that Parliament can continue to legislate as it wishes with respect to abortion, *despite* any impact s. 7 has. There is some evidence that meaning “b” represents Trudeau’s “actual” intent: see *House of Commons Debates* (November 27, 1981), at 13438. A further possibility is that Prime Minister Trudeau was being disingenuous, or engaging in strategic behaviour designed to secure the passage of the Charter over the objections of Conservative Party members.

⁴⁹ *Morgentaler*, *supra*, note 43, at para. 23.

abortion provisions unconstitutional, notwithstanding the fact that section 7 had been agreed to, in part, as a result of repeated assurances that Parliament's laws regarding abortion would not be affected by the provision. In effect, the Court interpreted section 7 dynamically: they adopted an interpretation of section 7 which responded to (the Court's view of) current needs, current values and a current vision of justice, paying little or no attention to the intention of the framers.

Recent Charter jurisprudence has confirmed the Court's commitment to the dynamic interpretation of section 7. Consider the decision of the Supreme Court in *Gosselin v. Quebec (Attorney General)*.⁵⁰ In that case, the Court was asked to determine whether or not certain aspects of Quebec's welfare scheme violated section 7 of the Charter. In particular, the question was whether or not the welfare scheme's alleged failure to provide adequate social assistance to young people constituted a deprivation of "life, liberty and security of the person" within the meaning of that phrase in section 7.

From an interpretive perspective, the most interesting aspect of the *Gosselin* decision has little to do with the case's outcome, or with the Court's views regarding the impact of section 7 of the Charter on Quebec's welfare system. Instead, the importance of *Gosselin* lies in the Court's demonstration of the depths of its commitment to dynamic interpretation. Indeed, certain statements by the majority in *Gosselin* show that the Court's commitment to dynamic construction, and to its vision of section 7 as a "fluid" or "evolutive" provision, is so deep that even decisions of the Supreme Court of Canada cannot halt the evolution of section 7.

Writing for the majority in *Gosselin*, McLachlin C.J. said very little regarding the framers' intention with respect to the meaning of section 7's language. Instead, she focused on the meaning section 7 had been given in prior decisions of the Supreme Court of Canada. Specifically, the Chief Justice noted that the lion's share of past Supreme Court readings of section 7 had suggested that the section applied only to state actions taken in an adjudicative context — a context that was notably absent on the facts of *Gosselin*. Because the *Gosselin* case related to the administration of a welfare system, and not to an individual's treatment during adjudicative proceedings, earlier cases regarding the meaning of section 7 made it appear that section 7 had no bearing on *Gosselin*'s

⁵⁰ [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429.

complaint. Somewhat surprisingly, the Chief Justice (for the majority) went on to hold that these earlier readings of section 7 were no bar to the application of section 7 beyond the adjudicative realm. Indeed, McLachlin C.J. made it clear that, pursuant to the Court's dynamic approach to interpreting section 7, past judicial interpretations of the section can be modified, ignored or even explicitly abandoned where the Court takes the view that a new interpretation is better. According to McLachlin C.J. (for the majority):

... the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely those "that occur as a result of an individual's interaction with the justice system and its administration" ... This view limits the potential scope of "life, liberty and security of person" by asking whom or what s. 7 protects against. Under this narrow interpretation, s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice. ... With respect, I believe this conclusion may be premature ... An adjudicative context might be sufficient, but *we have not yet determined that one is necessary in order for s. 7 to be implicated.*

In my view, it is both unnecessary and undesirable to attempt to state an exhaustive definition of the administration of justice at this stage, delimiting all circumstances in which the administration of justice might conceivably be implicated. The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration.⁵¹

Note the italicized language in this passage. The meaning of section 7 is a matter of judicial determination — not a question of intention or authorial expectations. In the future, section 7 might apply beyond the adjudicative context, because "we" (the judges) "have not yet determined that [an adjudicative context] is necessary". This passage makes two points. First, it reminds us that the framers' intention has little bearing on section 7's meaning. Second, it points out that the Court's earlier interpretations of section 7 — interpretations which suggested that the section applied only where adjudicative proceedings

⁵¹ *Id.*, at paras. 77-79 (emphasis added).

threatened to result in the deprivation of a person's life, liberty or security of the person — did not preclude a holding that section 7 had recently evolved such that it now applied beyond the bounds of adjudicative contexts.

Continuing her review of earlier Supreme Court interpretations of section 7, the Chief Justice noted that earlier courts had been unwilling to construe section 7 in a way that imposed upon the state an affirmative duty to safeguard life, liberty or security of the person. Instead, the Court's earlier jurisprudence had suggested that section 7 imposed no "positive obligations" of any kind: the section merely prohibited certain state *deprivations* of life, liberty and security of the person, imposing no affirmative duty to promote those rights. According to the majority in *Gosselin*, these earlier Supreme Court interpretations of section 7 could not preclude a future court from holding that section 7 had continued to evolve, resulting in a "new meaning" that contradicted earlier holdings of the Supreme Court of Canada. According to the Chief Justice:

Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.

*One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in Edwards v. Attorney-General for Canada ... the Canadian Charter must be viewed as a "living tree capable of growth and expansion within its natural limits" ... It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases.*⁵²

The impact of these statements should be clear. In the context of section 7 of the Charter, the Court's commitment to dynamic construction is so deep that neither authorial intention nor prior judicial interpretations of the section serve as reliable indicators of the section's current meaning. So long as the Court is willing to hold that the current needs of Canadians are now different than they were when previous cases were decided, or when the framers first adopted section 7, the Court is free to hold that section 7's meaning has changed, perhaps embracing concepts that were rejected by the Supreme Court of Canada in the past. The Court's commitment to dynamic interpretation is so

⁵² *Id.*, at paras. 81-82 (emphasis added).

great that neither precedent, authorial intention nor basic notions of certainty and predictability serve to bar the evolution of the meaning of section 7.

The foregoing cases demonstrate that our highest Court views dynamic interpretation as the appropriate method of resolving any interpretive problem arising in the context of section 7 of the Charter. Indeed, section 7 jurisprudence has confirmed that dynamic interpretation is the court's "official" method of interpreting *all* provisions of the Canadian Constitution. The traditional justifications offered for the court's adoption of dynamic interpretation in the constitutional context are discussed in the following section of this essay.

IV. JUDICIAL JUSTIFICATIONS FOR DYNAMIC INTERPRETATION

1. The Amendment Rationale

Why has our Supreme Court so wholeheartedly embraced dynamic construction in the context of the interpretation of Canada's Constitution? Peter Hogg correctly notes that the language of constitutional documents is particularly well-suited for dynamic (or "progressive") interpretation. As Hogg points out:

The idea underlying the doctrine of progressive interpretation is that the *Constitution Act, 1867*, although undeniably a statute, is not a statute like any other: it is a "constituent" or "organic" statute, which has to provide the basis for the entire government of a nation over a long period of time. An inflexible interpretation, rooted in the past, would only serve to withhold necessary powers from the Parliament or Legislatures. It must be remembered too that the *Constitution Act, 1867*, like other federal constitutions, differs from an ordinary statute in that it cannot easily be amended when it becomes out of date, so that its adaptation to changing conditions must fall to a large extent upon the courts.⁵³

Clearly, the need for "dynamic" or "progressive" interpretation is particularly pressing when constitutional language is being considered. As Professor Hogg points out, constitutional language must apply over an unusually long period, due in part to the difficulty involved in

⁵³ Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), at 421.

amending the Constitution's text. As social values change over time, a "static" constitution might no longer meet the needs of the society that it governs. Cumbersome amendment procedures might preclude the formal updating of the constitutional text to meet the current needs of society. As a result, the courts carry out the difficult work of "adapting" the constitution through dynamic interpretation, ensuring that the text remains relevant as society evolves.

While it is intuitively appealing to link the adoption of dynamic interpretation to the difficulty involved in amending constitutional text, this linkage (which I refer to as the "Amendment Rationale") does not fully explain our courts' interpretive practice. Let us suppose, for a moment, that the cumbersome nature of the Constitution's formal amending procedure *is* the principal justification for dynamic interpretation. If that is the case, then we should encounter "dynamic readings" of the Constitution only where two conditions are met, namely (1) the needs of Canadians have evolved in ways that could not have been anticipated by the Constitution's framers, and (2) in the absence of dynamic interpretation, a formal amendment to the Constitution would be needed to cope with these unforeseen developments. It seems to me that this degree of evolution would take time: we should expect to see "dynamic readings" of constitutional language only where a significant period of time had passed between the adoption of the Constitution and its application to a particular set of facts. More importantly, if the "Amendment Rationale" is correct, we should see dynamic construction only where we can credibly assert that the framers of the Constitution could not have foreseen the issue that has given rise to the need for constitutional interpretation.

Consider the dynamic readings of section 7 discussed in the previous section of this paper. The decision of the Court in *BC Motor Vehicle*, which overrode the framers' intended meaning of the phrase "fundamental justice", was handed down only three years after the adoption of the Charter. Had Canadian society evolved so much in the period between the adoption of the Charter and the Court's decision in *BC Motor Vehicle* that the former needed only "procedural due process" while the latter required the court to engage in substantive review of legislative policies? I doubt it. More importantly, the notion of "substantive due process", which was grafted onto the Charter by the Court in *BC Motor Vehicle*, was not a newly evolved concept that the framers had failed to anticipate: they had discussed it and specifically rejected it. As a result, the dynamic reading in *BC Motor Vehicle* did not flow from an unanticipated development that, in the absence of dynamic

interpretation, would have necessitated a formal constitutional amendment. The decision in *Morgentaler* is similarly difficult to justify by reference to the Amendment Rationale: that decision was handed down only six years after the Charter was adopted. Had Canadian society evolved so much in the intervening period that, failing a formal amendment of the Constitution's text, a "judicial amendment" of section 7 was necessary to permit the Charter to keep pace with newly evolved social values — values that had not been anticipated when the Charter was adopted? Had public debates regarding abortion markedly changed focus between 1982 and 1988, such that the framers' expectations regarding the Charter and its application to abortion laws no longer met the needs of our evolving society? The answer to these questions must be "no". Indeed six years after *Morgentaler* was decided, L'Heureux-Dubé J. noted that the Charter was still "in its infancy", and that Canada's "socio-economic context" had not had time to evolve since the time of the Charter's adoption.⁵⁴ For L'Heureux-Dubé J. (who was dissenting on this point), this implied that dynamic interpretation was an inappropriate method of interpreting the Charter. Whether or not one agrees with L'Heureux-Dubé J.'s conclusion, one must accept that, because so little time had passed between the adoption of the Charter and the decisions in *Morgentaler* and *BC Motor Vehicle*, the dynamic readings of section 7 in those cases could not truly have been justified on the ground that the Constitution's formal amendment procedures had prevented the Charter's text from keeping pace with the needs of a radically changed society. As a result, the Court's willingness to construe the Charter dynamically must be rooted in something other than the "Amendment Rationale".

There is a second, more compelling reason for rejecting the "Amendment Rationale" as the true reason behind the Court's adoption of dynamic construction. Simply put, the Amendment Rationale does not accurately explain the courts' interpretive practice. This can be seen when one examines the courts' method of interpreting "ordinary" (that is, non-constitutional) statutes guaranteeing human rights — legislation containing language which, in many important respects, parallels the language found in section 7. In countless cases involving the application of human rights enactments, the Supreme Court of Canada has held that such statutes must be construed through the invocation of dynamic interpretation: the decisions of the Court in *Ontario (Human Rights Commission) v.*

⁵⁴ *R. v. Prosper*, [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236, at para. 70 (*per* L'Heureux-Dubé J., dissenting).

*Simpsons-Sears Ltd.*⁵⁵ and *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union*⁵⁶ serve as useful illustrations. While the details of these cases are beyond the scope of this paper, suffice it to say that in each case the Court applied dynamic construction to a Human Rights enactment notwithstanding the fact that Human Rights enactments can be amended through ordinary legislative amending procedures.⁵⁷

Why did the Courts in *Sears* and *BCGSEU* feel free to invoke dynamic construction as the appropriate method of interpreting human rights enactments? As we have seen, dynamic construction is typically associated with the interpretation of constitutional text, and the justification typically offered is that constitutions are difficult to amend. Human rights statutes, by contrast, can be amended just as easily as the *Highway Traffic Act*. As a result, the “Amendment Rationale” cannot explain the Court’s preference for dynamic interpretation. The willingness of the Court to use dynamic interpretation must relate to something other than the “Amendment Rationale”. The alternative justification that has been offered by our courts is discussed in the following section of this paper.

2. The “Fundamental Law” Rationale

Canadian courts seem to have noticed that the “Amendment Rationale” does a rather dismal job of explaining the cases in which the courts have invoked dynamic interpretation. Because the Amendment Rationale fails to correspond to our courts’ interpretive practices, Canadian jurists have had to articulate a new and different justification for the adoption of

⁵⁵ [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536.

⁵⁶ [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3.

⁵⁷ Both *Sears* and *BCGSEU* involved the meaning of the word “discriminate” in the context of Human Rights legislation. In *Sears*, the Court created a complicated distinction between “adverse effect” discrimination and direct discrimination, and designed distinct remedial options for each form of discrimination. In *BCGSEU* (decided 14 years after the “bifurcated analysis” of *Sears* had been created) the Court determined that the distinction between “adverse effect” and “direct” discrimination was no longer useful, and accordingly obliterated the distinction between these forms of discrimination. These fundamental changes in the meaning of “discriminate” took place notwithstanding the fact that the relevant statutory language had not been amended (in any material way) during the relevant period. As a result, they are explainable only as instances of dynamic interpretation. For a thorough account of these cases and the interpretive theories espoused by the relevant courts, see R. Graham, *Fair, Large, Liberal, Broad and Generous: The Interpretation of Human Rights Legislation*, published in the proceedings of the National Judicial Institute’s Seminar Series for Federal Court Judges, September 11, 2003.

dynamic interpretation. This alternative justification is that constitutional text, as well as the text of human rights legislation, qualifies as “fundamental legislation”. As “fundamental legislation”, both the Constitution and human rights enactments call for the application of a special form of judicial interpretation. Specifically, such fundamental laws must be interpreted through the invocation of dynamic construction.

Why has the judiciary apparently selected dynamic construction as the appropriate mode of interpreting “fundamental” legislation? No clear reasons have been offered. Instead, when attempting to justify the invocation of dynamic construction in the context of constitutional text or human rights enactments, the courts have simply asserted that the importance of those documents justifies a departure from the courts’ typical (originalist) approach to interpretation. As Lamer J. explained in *Insurance Corp. of British Columbia v. Heerspink*:⁵⁸

When the subject matter of a law is said to be the comprehensive statement of the “human rights” of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are ... more important than all others ... Indeed [such a law] is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.⁵⁹

In the context of interpreting section 7 of the Charter, the Court in *Blencoe v. British Columbia (Human Rights Commission)*⁶⁰ made similar statements to justify the use of dynamic construction. According to LeBel J. in *Blencoe*:

We must remember ... that s. 7 expresses some of the basic values of the *Charter* ... its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long

⁵⁸ [1982] 2 S.C.R. 145.

⁵⁹ *Id.*, at 157-58.

⁶⁰ [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307.

while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.⁶¹

Once again, the “importance” (or fundamental nature) of the law being interpreted was the primary justification for the court’s decision to use dynamic construction. Once again, the linkage between “fundamental laws” and dynamic interpretation was not explained: it was simply taken for granted that a fundamental law must be subjected to dynamic interpretation.

Despite the fact that the linkage between “fundamental laws” and dynamic interpretation has never been satisfactorily explained, it has become an accepted element of interpretive jurisprudence. As a result, where “fundamental” laws are being interpreted, the court invokes dynamic interpretation. Where “ordinary” laws are being interpreted, by contrast, the court purports to rely on originalist construction, also known as the “official theory” of statutory construction.⁶² The reason for this bifurcated approach to interpretation remains, generally speaking, a mystery.

With respect, the courts have been wise to invoke dynamic interpretation in many cases. Unfortunately, the rationale given for the selection of dynamic interpretation in such cases is unsatisfactory: the fact that constitutions and human rights enactments count as “fundamental laws” or “more important” than other statutes provides no basis for interpreting such laws through the invocation of dynamic interpretation. Specific critiques of the “fundamental law” rationale are developed in the following section of this essay.

3. Problems with the Fundamental Law Rationale

I have never been an enthusiastic admirer of the linkage between “fundamental laws” and the invocation of dynamic construction. To begin with, the view that dynamic interpretation is required wherever “fundamental laws” are being construed suggests that certain laws are too important to be maintained and updated through an ordinary democratic process. Where courts declare that a particular statute counts as “fundamental”, the courts claim a primary role in the creation of its

⁶¹ *Id.*, at para. 188. This passage was adopted by the majority of the Supreme Court of Canada in *Gosselin v. Quebec*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, at para. 82.

⁶² See Côté, *supra*, note 4, at 4.

meaning. In other words, where a particular law is deemed to be particularly important, the judiciary claims the authority to control the Act's development — they may engage in acts of judicial amendment, causing the meaning of the enactment to evolve without regard for the intention of the author, or in ways that override the legislator's expectations. Where laws are more mundane, less important, or less-than-fundamental, by contrast, the courts are content to leave the statute's meaning in the hands of the statute's author. This approach seems rather crass: while the legislature is competent to control the meaning and growth of "ordinary" legislation, the truly important laws require the supervision of judges. Indeed, Supreme Court judges have suggested that it would be "dangerous" or "a mistake" to leave the meaning of fundamental laws in the hands of those who wrote and passed them.⁶³ For reasons I hope are obvious, I am uncomfortable with the suggestion that some laws are too important to be left in the hands of those who proposed, developed and passed the laws in the first place.

Leaving aside the political implications of the courts' suggestion that certain laws are so important that the government cannot govern the laws' meaning, it is important to consider the practical impact of the "fundamental law" justification for the invocation of dynamic construction. If the courts' choice of interpretive theory is governed by the question of whether or not a particular law is "fundamental", how can we tell what qualifies as a "fundamental law"? Are constitutional provisions and human rights enactments the only fundamental laws in the statute books? Clearly, Canada's constitutional documents are "fundamental" in nature: they are, after all, the laws that grant our lawgivers the authority to enact other forms of legislation. But why are human rights laws "fundamental"? Are they the only non-constitutional laws that count as "fundamental"? While human rights enactments are undeniably important, are they any more "fundamental" than the *Criminal Code*'s prohibition of murder? Are they more fundamental in nature than laws prohibiting child abuse? Laws establishing federal courts? Laws allowing individuals to safeguard their own property? Surely, many of Canada's laws reflect the fundamental values upon which Canadian society has been built. Is there something *especially* "fundamental" about human rights enactments, making statutes of this nature more important than all others? When Lamer J. (as he then was)

⁶³ Gosselin, *supra*, note 61, at 491-92 S.C.R.

made the original pronouncement that human rights enactments were more important than other statutes, he relied upon no logical justification for this suggestion apart from the fact that there was “no doubt in [his] mind”.⁶⁴ Unfortunately, Lamer J. gave no reasons for his confidence in the unequalled importance of human rights enactments. As a result, the “fundamental law” rationale provides no guidance as to what (apart from human rights enactments and constitutions) might count as fundamental laws, or why such statutes are considered fundamental. If the question of whether or not a particular law is “fundamental” governs the way in which the courts interpret the relevant legislation, it would be useful to have some general notion of what it takes to qualify as a “fundamental” statute. Indeed, some general description of what makes a law count as “fundamental” could allow Parliament to know, in advance, which of its statutes would be reshaped through dynamic interpretation.

Given that, in the context of the interpretation of human rights enactments, the “fundamental law” rationale is often accompanied by references to the “quasi-constitutional” stature of such documents, one might argue that the fundamental nature of such statutes flows from parallels that exist between human rights enactments and the constitution. The most obvious of these parallels relates to the notion of paramountcy: as Lamer J. observed in *Insurance Corp. of British Columbia v. Heerspink*,⁶⁵ much like Canada’s Constitution, human rights enactments are intended to “supersede all other laws when conflict arises”.⁶⁶ As a result, a “fundamental” enactment might be one which has the ability to overrule other statutes in the event of disagreement between two legislative provisions.

While it would be convenient to rely on the notion of paramountcy as an explanation for the courts’ suggestion that human rights enactments are “quasi-constitutional” or “fundamental” in nature, this suggestion is countered by the jurisprudence. In *Robert c. Québec (Conseil de la magistrature)*,⁶⁷ for example, the Quebec Court of Appeal referred to the *Access Act* of Quebec⁶⁸ as “quasi-constitutional” legislation. The Court’s assessment of the *Access Act* was not based on

⁶⁴ *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at 157.

⁶⁵ *Id.*

⁶⁶ *Id.*, at 158.

⁶⁷ [2000] J.Q. no 470, [2000] R.J.Q. 638 (C.A.).

⁶⁸ R.S.Q., c. A-2.1.

any suggestion that the Act could triumph over other statutes in the event of inconsistency: indeed, there is no basis for contending that the *Access Act* should ever triumph over other statutes. On the contrary, the Court's suggestion that the *Access Act* was "quasi-constitutional" was rooted entirely in the notion that access to information (which is regulated by the *Access Act*) is "one of the cornerstones of our democratic system".⁶⁹ Like Lamer J.'s assessment of the importance of Canada's human rights enactments, this amounts to nothing more than a value judgment regarding the relative importance of the subject matter of the relevant statute. The Supreme Court of Canada has made similar value judgments concerning other legislation.⁷⁰ As a result of these cases, it appears that the decision of whether or not a particular law is "fundamental" (and accordingly deserving of dynamic interpretation) involves nothing more than the highly subjective determination of a law's importance relative to other legislation. The decision to declare a law to be "fundamental", "quasi-constitutional" or "more important" than other statutes is a matter of unbridled judicial discretion, providing no useful guidance as to why laws of this nature call for the invocation of dynamic construction.

Perhaps the most important criticism of the "fundamental law" rationale for the use of dynamic interpretation is that this rationale does not explain the actual interpretive practices of the courts. In many cases involving laws which are neither "quasi-constitutional" nor apparently "more important" than other statutes, the Supreme Court of Canada has (without admitting it openly) invoked dynamic construction without reliance on the rationale proffered in cases involving constitutions and human rights enactments. Such cases demonstrate that the Court's invocation of dynamic interpretation is not, in fact, inextricably intertwined with the "fundamental" or "quasi-constitutional" status of a particular Act. The Court's decision in *R. v. Butler*⁷¹ provides a useful example.

In *Butler*, the Supreme Court of Canada applied dynamic interpretation to a statute that was neither part of the Constitution nor "quasi-constitutional" in nature. The provision at issue in *Butler* was

⁶⁹ *Robert, supra*, note 67, at para. 47.

⁷⁰ See also *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, [2002] 2 S.C.R. 773, in which the Supreme Court of Canada referred to the *Official Languages Act* as a quasi-constitutional enactment.

⁷¹ [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452.

section 163 of the *Criminal Code* — a provision that prohibited the sale of obscene materials. The charges against Mr. Butler stemmed from Butler's sale of explicit, "hard core" videos from an adult video store located in Winnipeg, Manitoba. At the time that the charges were laid against Mr. Butler, section 163 of the Code provided as follows:

- 163(1) Everyone commits an offence who,
- (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever ...

The following partial definition of "obscene" was provided by subsection 163(8):

- (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

No further definition of "obscene" was provided by the Code.

The principal issue before the Court in *Butler* involved the constitutionality of section 163. For present purposes, however, the most important aspect of the Court's decision was the manner in which the Court defined "obscene" for the purpose of section 163. Based on a strictly originalist construction, one would expect the term "obscene" to be given the meaning it would have held when the predecessor of section 163 was first enacted in 1892, or perhaps when the statute was substantially redrafted in 1959. In accordance with the tenets of originalism, the meaning of "obscene" should have been determined in accordance with the intention of the provision's historical drafters: drafters who surely expected the section to uphold a standard of morality that would be considered "prudish" by current Canadian standards. Had the Court in fact adopted this originalist (or static) definition, matters that would have been embraced by section 163 at the time that it was drafted would still be illegal today. Such a definition would clearly have criminalized a broad range of behaviour that would otherwise be considered acceptable under current moral standards.

The Court in *Butler* departed from its traditional, static method of interpreting ordinary legislation and adopted a dynamic interpretation of section 163. Writing for the majority, Sopinka J. adopted a dynamic definition of "obscene" that relied on current standards of morality,

permitting the term to evolve along with shifting public values. Rather than criminalizing all forms of expression that would have been viewed as obscene by Parliamentarians at the time of the section's creation, section 163 was allowed to be "redefined" from time to time by the judiciary in order to keep pace with community standards. In adopting this dynamic "community standards" test, Sopinka J. relied on the following passage from the decision of the Manitoba Court of Appeal in *R. v. Dominion News & Gifts (1962) Ltd.*:⁷²

Community standards must be contemporary. Times change, and ideas change with them. Compared to the Victorian era this is a liberal age in which we live. One manifestation of it is the relative freedom with which the whole question of sex is discussed. In books, magazines, movies, television, and sometimes even in parlour conversation, various aspects of sex are made the subject of comment, with a candour that in an earlier day would have been regarded as indecent and intolerable. We cannot and should not ignore these present-day attitudes when we face the question whether [the subject materials] are obscene according to our criminal law.⁷³

The Court accordingly held that the term "obscene" was essentially dynamic, able to change and evolve in accordance with modern community standards. Material that may have been viewed as obscene by the statute's drafters might accordingly escape the legislation's application, depending upon the way in which the material in question was viewed under modern notions of morality.

As noted above, the legislation at issue in *Butler* was neither part of the Constitution nor a "quasi-constitutional" enactment, yet courts have consistently stated that the progressive or dynamic mode of construction used in *Butler* should be limited to these "fundamental" forms of legislation. The *Criminal Code* of Canada, while undeniably important, is not a "fundamental law" in the sense that it establishes basic rights, sows the seeds of responsible government or trumps other legislation in the event of inconsistencies. Indeed, *Criminal Code* provisions have been given clearly originalist constructions on many occasions. It is also important to note that the statute under consideration in *Butler* was no more difficult to amend than any other "normal" statute — any session of Parliament could have provided a new statutory definition of

⁷² [1963] 2 C.C.C. 103 (Man. C.A.), rev'd [1964] S.C.R. 251.

⁷³ *Id.*, at 116-17 (C.A.).

“obscene” that kept pace with current morals or contemporary needs. Why, then, did the Court in *Butler* choose to adopt an interpretation that is ordinarily restricted to constitutional provisions (or at least quasi-constitutional statutes)? In my view, the answer lies in the nature of the language that was being considered in *Butler*. Indeed, I believe that the Court’s decision to rely on dynamic or originalist construction is *inevitably* governed by the nature of the linguistic problem giving rise to the need of interpretation, and — despite judicial dicta to the contrary — has little or no relationship to the relative importance of the statute being considered. The nature of the linguistic problems governing courts’ interpretive choices, and the implications of these linguistic problems for the courts’ selection of an appropriate form of interpretation, are discussed in the following sections of this essay.

V. LINGUISTIC STRUCTURES

1. Unified Theory

As we have seen throughout this essay, the courts’ description of their approach to interpretive theory has been based on a division between “fundamental laws”, which are interpreted by reference to dynamic interpretation, and “ordinary laws”, which should be interpreted by reference to originalist construction. As constitutions and human rights enactments are considered “fundamental”, they are traditionally interpreted in a highly dynamic fashion.

As we saw in section IV, 3., above, there are problems with the “fundamental law” rationale for the invocation of dynamic interpretation. First, it is difficult to predict what qualifies as a “fundamental” or “quasi-constitutional” law. More importantly, the question of whether or not a particular law is “fundamental” is not an accurate predictor of the court’s interpretive practice: in cases such as *Butler*, the Court has shown willingness to interpret “ordinary enactments” in the manner that the Court has said is reserved for fundamental legislation. In sum, the Court’s proposed division of interpretive theory (that is, reserving dynamic interpretation for “fundamental” statutes, and using originalism for all others) is (a) based on an unclear (and rather flimsy) rationale that provides little or no practical guidance to courts faced with a choice between competing interpretive theories, and (b) an inaccurate description of the Court’s interpretive practice. This is not to say that the Court has been wrong to

invoke dynamic interpretation in some cases and originalism in others. On the contrary, it simply suggests that a new approach to “theory selection” is required. The Court is in need of a principled basis for determining whether to invoke originalism or dynamism in cases involving the interpretation of statutory texts.

Elsewhere I have shown that the judiciary’s choice of interpretive theory should not be based on the type of document being considered (that is, constitutional, quasi-constitutional, fundamental or “ordinary”), but on the type of language giving rise to the need for interpretation.⁷⁴ Indeed, there are undeniable structures found in legislative language pointing the way toward the interpretive theory that best resolves specific interpretive problems. For present purposes, it is enough to focus on two specific aspects of legislative language that may guide the courts’ decision regarding the proper method of construing unclear legislation, regardless of the nature of the document being considered. These two linguistic structures are known as “ambiguity” and “vagueness”, and are discussed at length below.

2. Ambiguity

The need for judicial interpretation often arises because of statutory provisions that are ambiguous. A statute may be referred to as “ambiguous” where it supports two or more constructions that are different and specific. For example, the phrase “Universities must have dormitories for male and female students” is ambiguous because it has two specific and different meanings: on the one hand, the phrase could mean that universities must have co-ed accommodations (Interpretation “A”). On the other hand, the phrase could mean that universities must have some dormitories for male students only and some separate dormitories for female students (Interpretation “B”). The author of this statement meant either A or B, but the statement is ambiguous in that a reasonable audience could come away with either interpretation. Similarly, consider the following excerpt from an ambiguous reference letter:

⁷⁴ Much of the text of this section is drawn from R. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001) in which this “language based” theory of construction is expanded by reference to Deconstruction, Critical Legal Studies, and several linguistic structures (such as subtext and analogy) not dealt with in this paper.

“You will be lucky if you can get Geoff to work for you.”

The ambiguity found in this sentence is particularly unfortunate, in that it leads to two potential interpretations that are diametrically opposed: the sentence could mean either (A) that Geoff is an excellent worker and that the recipient of the letter would be lucky to have Geoff join his or her workforce, or (B) that Geoff is lazy and the recipient of the letter would be well advised to refrain from offering Geoff a job. Obviously, the author of this sentence meant either (A) or (B), both of which represent specific meanings. The sentence is ambiguous, however, in that a reasonable reader could come away from reading this sentence either believing that Geoff is lazy or that Geoff would be a valued employee. The sentence itself gives no clues as to which of its two potential meanings is appropriate, and an interpreter of the letter is forced to search for additional information to assist in ascertaining the letter’s meaning.

In order for a passage to qualify as “ambiguous”, the uncertainty of meaning generated by the passage must not be capable of immediate resolution by reference to context. For example, if the sentence “You will be lucky if you can get Geoff to work for you” was found in a glowing reference letter that spent three pages extolling Geoff’s wondrous abilities and admirable work ethic, any apparent ambiguity in the passage would disappear. In the context of an extremely positive reference, the apparently ambiguous sentence would clearly amount to a positive statement regarding Geoff’s employability. By the same token, if the remainder of the hypothetical reference letter clearly indicated that Geoff was a lazy or difficult employee, any apparent ambiguity in the sentence would disappear. No word, phrase or passage that is clear when read in context truly qualifies as “ambiguous”.

Unfortunately, not all problems of construction can be resolved by appeals to context. Indeed, ambiguities of the sort referred to in the preceding paragraphs (*i.e.*, turns of phrase that support two or more specific meanings that cannot be resolved by context) are all too common in Canadian legislation, and frequently give rise to the need for judicial interpretation. Consider the following examples:

Section 21(3), *Canada Business Corporations Act*:⁷⁵ Shareholders and creditors of a corporation, their personal representatives, the

⁷⁵ R.S.C. 1985, c. C-44, s. 21(3) (emphasis added).

Director and, if the corporation is a distributing corporation, any other person, *on payment of a reasonable fee and on sending to a corporation or its agent the affidavit referred to in subsection (7)*, may on application require the corporation or its agent to furnish within ten days from the receipt of the affidavit a list ... setting out the names of the shareholders of the corporation ...

Who is required to pay a fee and supply an affidavit? Only the “other person” referred to in the section, or the Director, Shareholders and creditors as well?⁷⁶

Section 10 of the *Narcotic Control Act*:⁷⁷ A peace officer may, at any time without a warrant, enter and search any place other than a dwelling-house, and under the authority of a warrant issued under section 12, enter and search any dwelling-house *in which the peace officer believes on reasonable grounds there is a narcotic by means of or in respect of which an offence under this Act has been committed*.

Does the italicized language (importing the requirement of reasonable grounds) apply only to searches of “dwelling-houses”, or must the peace officer have reasonable grounds to search “any place other than a dwelling-house” as well? In *R. v. Jaagusta*,⁷⁸ the Provincial Court of British Columbia held that, although the literal language of the section makes it appear that the “reasonable grounds” requirement only applies to dwelling-houses, a comma should be read into the provision immediately preceding the italicized language, causing the requirement of reasonable grounds to be shared by all places that may be the subject of a search.

Section 100 (1.1) of the *Criminal Code*:⁷⁹ The Court is not required to make an order [preventing a criminal from owning firearms or ammunition] where the Court is satisfied that the offender has

⁷⁶ An informal poll of practising lawyers demonstrated significant division on this issue, especially when it was pointed out that other sections of the *CBCA* make it clear that only persons other than shareholders, creditors, and the director are required to pay a “reasonable fee” in order to receive copies of certain documents.

⁷⁷ R.S.C. 1985, c. N-1, s. 10 (emphasis added). Note that the *Narcotic Control Act* has now been repealed and replaced by the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

⁷⁸ [1974] B.C.J. No. 785, [1974] 3 W.W.R. 766 (Prov. Ct.).

⁷⁹ R.S.C. 1985, c. C-46, s. 100 (1.1), as amended (emphasis added). Note that this provision has been significantly redrafted, due (in part) to the presence of this ambiguity. See the current version of s. 113 (as amended by S.C. 1995, c. 39, ss. 139 and 190(e)).

established that ... *it is not desirable in the interests of the safety of the offender or of any other person that the order be made.*

Must the offender establish that he or she requires a firearm for his or her own protection or for the protection of others, or must the offender merely establish that he or she will not be a danger to himself, herself or others if permitted to carry a gun? See *R. v. Austin*⁸⁰ for a full discussion of the ambiguities in this provision.

Even section 7 of the Charter contains at least two easily identifiable instances of ambiguity. Section 7 of the Charter provides as follows:

7. 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.

Does the phrase “of the person” modify the word “security” only, or does it modify the words “life” and “liberty” as well? While the ambiguity is not obvious, it becomes evident when the phrase “life, liberty and security of the person” is compared to the phrase “men, women and children weighing over one hundred pounds”.⁸¹ Similarly, it is unclear whether the text of section 7 refers to two distinct sets of rights (namely, the right to life, liberty and security of the person as well as an independent right not to be “deprived thereof”), or whether the “not to be deprived” clause merely explains the nature of the right to life, liberty and security of the person.

Each of the foregoing provisions is ambiguous in the sense that the provision may give rise to two or more competing meanings, only one of which accords with the intent of the statute’s drafter. A reasonable reader of the provisions may come away with an incorrect impression, simply because of imprecise language or faulty syntax that has been used in the drafting of the enactment being considered. Wherever a statute’s language gives rise to this form of equivocation or uncertainty, the language of the statute may be referred to as “ambiguous”.

⁸⁰ [1994] B.C.J. No. 2583, 94 C.C.C. (3d) 252 (C.A.), revd [1996] S.C.J. No. 7, [1996] 1 S.C.R. 72.

⁸¹ Does this phrase refer to men or women who weigh less than 100 pounds? This question cannot be answered based on the language of the phrase.

3. Vagueness

“Vagueness” must be distinguished from ambiguity. According to Reed Dickerson, vagueness and ambiguity are completely separate concepts that have been blurred by careless lawyers and academics. In Dickerson’s opinion:

It is unfortunate that many lawyers persist in using the word “ambiguity” to include vagueness. To subsume both concepts under the same name tends to imply that there is no difference between them or that their differences are legally unimportant. Ambiguity is a disease of language, whereas vagueness, which is sometimes a disease, is often a positive benefit. With at least this significant difference between the two concepts, it is helpful to refer to them by different names.⁸²

A statement may be referred to as “vague” where the breadth of the language used in the statement gives rise to a range of meanings that may or may not be consistent. For example, consider the phrase “freedom of expression”. What exactly does this mean? Unlike the ambiguous statements set out in the previous section, the phrase “freedom of expression” does not lend itself to a finite number of clear and specific constructions, but instead suggests a continuum of meanings. It may include the freedom to do all things that convey information, including peaceful or violent protest, harassing telephone calls, macaroni art and interpretive dance (Interpretation A). On the other hand, it may include only “valuable expression” that is demonstrably worthy of constitutional protection, *i.e.*, those forms of expression that promote traditional democratic values (Interpretation B). The statement is vague (rather than ambiguous) because the interpreter is not confined to a choice between interpretations A and B. Instead, the interpreter has the freedom to choose from an almost infinite number of meanings that can be plotted along a continuum starting with A (an exceedingly broad interpretation) and ranging to narrow interpretations such as B (or even beyond). It is impossible to claim with any degree of confidence that the utterer of the statement meant either A or B. Indeed, the author of vague language might not have had a single, precise intention when making the vague statement. The author may have had

⁸² Reed Dickerson, “The Diseases of Legislative Language” (1964) 1 Harv. J. on Legis. 5, at 10.

only a rough idea of the meaning being conveyed, or may have wanted the details of the statement's meaning to be ironed out through judicial interpretation.

Viewed from another perspective, a vague word or phrase is analogous to an empty basket into which any number of objects (in this case, meanings) can be placed. The basket might be full, embracing all of the possible meanings that are attributable to the words being considered, or the basket may be relatively empty, embracing only some small category or sub-set of the meanings that could be attributed to the vague word or phrase. Consider, for example, the following legislative passage:

178. Every one other than a peace officer engaged in the discharge of his duty who has in his possession in a public place or who deposits, throws or injects or causes to be deposited, thrown or injected in, into or near any place, (a) an offensive volatile substance that is likely to alarm, inconvenience, discommode or cause discomfort to any person or to cause damage to property ... is guilty of an offence punishable on summary conviction.

This passage (which is found in section 178 of Canada's *Criminal Code*) is replete with vague terminology. Consider the phrase "offensive volatile substance". As a vague legislative phrase, "offensive volatile substance" can be looked upon as an empty basket capable of holding a broad range of meanings — the "basket of meanings" might contain relatively few meanings, embracing only those volatile substances that pose a danger to human health.⁸³ On the other hand, the basket might be filled to the brim, including *any* chemically volatile substance with the potential to offend (by producing a foul odour or an unpleasantly coloured gas, for example). The section itself provides some interpretive guidance: based on the closing language of subparagraph (a), the substance in question must be one that is capable of causing alarm or inconvenience. Using the "basket of meanings" approach, we know that any "offensive volatile substance" that is incapable of causing inconvenience or alarm should be excluded from the basket. This gives rise to further questions of degree, such as the degree of inconvenience or alarm that might be caused by the substance in question. Even with

⁸³ It should be noted that "vague language" is only truly "vague" where the uncertainty of meaning cannot be resolved by appeals to context. If, for example, "offensive volatile substance" was defined or narrowed elsewhere in the legislation, the phrase could no longer be considered vague.

this interpretive guidance, we are uncertain as to whether the basket of meanings associated with “offensive volatile substance” embraces weapons-grade plutonium, pepper-spray or both. The task of the judiciary when faced with vague terminology is to determine the extent to which the basket of meanings must be filled, excluding those potential meanings that do not “fit” with the legislation in question.

A quick perusal of any volume of the Revised Statutes of Canada will reveal that vague legislative phrases are very common. Consider the following examples:

Section 173 of the *Criminal Code*: Everyone who wilfully does an indecent act ... in any place, with intent thereby to insult or offend any person, is guilty of an offence punishable on summary conviction.

What constitutes an *indecent* act? Indecency might include coarse language or vulgar humour, or it may be confined to acts of *extreme* indecency such as violent sex-acts performed in public. Similarly, what is meant by the term “offend”? Does the intention to be ill-mannered constitute an intent to offend, or must the “offender” do something that the audience considers immoral or indecent?

Section 23(1) of the *Food and Drugs Act*:⁸⁴ Subject to subsection (1.1), an inspector may at any reasonable time enter any place where the inspector believes on reasonable grounds any article to which this Act or the regulations apply is manufactured, prepared, preserved, packaged or stored ...

The term “reasonable” is used twice in this section, with no guidance as to what might be a “reasonable” time to conduct a search or a “reasonable” ground for suspecting that certain articles may be present in the place to be searched.

Constitutional laws can be particularly vague. Consider the following passages from the Charter:

Section 11(d): Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

⁸⁴ R.S.C. 1985, c. F-27.

What constitutes a “fair” hearing? Clearly, this fairness must include something beyond an independent and impartial tribunal (which is dealt with separately by the section), but no further guidance is provided.

Section 12: Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Clearly, *some* forms of punishment are permitted under this section, but no definition of cruelty or unusualness is provided.⁸⁵

Section 7 of the Charter is extraordinarily vague, giving rise to a broad range of interpretive problems. As we saw in the previous section, section 7 of the Charter provides as follows:

Section 7: 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.

How broadly or narrowly should the courts define “liberty”? What visions of justice qualify as “fundamental”? Does “security of the person” include economic security, physical security, or something else? As Mark Carter notes, some of the concepts embedded in section 7’s language are “as enigmatic and amorphous as any in our jurisprudence”.⁸⁶

Although some of the aforementioned legislative provisions may contain ambiguous phrases, the problems noted above result from language that is *vague*. Rather than giving rise to two or more specific, contradictory, plausible meanings, the language of these provisions leads to broad ranges of meaning, with little or no guidance as to the meaning intended by each provision’s drafter. The extent to which one must fill the “basket of meanings” associated with each passage is unclear, leading to the need for judicial interpretation.

According to Reed Dickerson, the interpretive problems caused by vagueness flow from the “open texture of concepts” that is inherent in vague language. In Dickerson’s opinion:

Whereas “ambiguity” in its classical sense refers to equivocation, “vagueness” refers to the degree to which, independently of equivocation, language is uncertain in its respective application to a

⁸⁵ Note that this provision also contains an instance of ambiguity. “Compound” problems of this nature, which demonstrate more than one linguistic defect, are dealt with in chapter 6 of R. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001).

⁸⁶ Mark Carter, “Fundamental Justice in Section 7 of the Charter: A Human Rights Interpretation” (2003) 52 U.N.B.L.J. 243, at 247.

number of particulars. Whereas the uncertainty of ambiguity is central, with an “either-or” challenge, the uncertainty of vagueness lies in marginal questions of degree.⁸⁷

Thus, where language leaves the interpreter with a choice between an easily ascertainable number of specific interpretive choices, the problem can be attributed to ambiguity. Where the language being interpreted leads to a broad continuum of meanings (giving rise to “marginal questions of degree”), the problem can be attributed to language that is vague.

4. Implications of Vagueness

The use of vague language in statutory provisions does not necessarily imply a lack of skill on the part of the statute’s drafters. Indeed, by employing vague language in an enactment, the legislature is sending signals to the courts that should help the judiciary select the appropriate means of resolving interpretive problems. By recognizing the existence and implications of these “legislative signals”, courts can come to understand a basic link between originalist and dynamic interpretation: in many cases, the use of vague language may actually imply that the legislature’s intent (which is the touchstone of originalist construction) was to permit the use of dynamic interpretation and to acknowledge the role of judicial “creativity” in the construction and application of legislation.

One implication of vague statutory language is that the legislature sought to avoid making political choices. Consider the difficult decisions that were involved in the drafting of Canada’s *Charter of Rights*. Which kinds of behaviour were worthy of constitutional protection? How far could Parliament go in limiting or overriding basic freedoms? What kinds of remedies are available for a breach of Charter rights? Anyone who has watched the proceedings of Parliament can appreciate the Herculean task involved in getting a group of politicians to agree on these highly sensitive matters. How did the Charter’s drafters finally reach a consensus? By drafting the Constitution in extremely vague language and leaving politically hazardous details to the courts. Rather than making *all* of the difficult, politically charged

⁸⁷ Reed Dickerson, “The Diseases of Legislative Language” (1964) 1 Harv. J. on Legis. 5, at 10.

decisions, the framers agreed on basic principles and left the courts to fill in the blanks. For example, the framers did not have to undertake the difficult task of deciding whether or not particular forms of expression were protected under section 2(b) of the Charter. Instead, the framers simply protected “expression” and left the courts to make the difficult policy choices. Similarly, rather than going to the immeasurable trouble of enumerating the instances in which a Charter-based right may be restricted in the face of competing social policies, the framers chose to enact the exceedingly vague language of section 1, which subjects all Charter rights to “reasonable limits”. Clearly, the difficult task of expounding upon the limits that are “reasonable” has been left to the judiciary, permitting the Charter’s framers to entrench a series of governing principles rather than a comprehensive set of specific rules. This practice is not confined to the drafting of constitutions. Where the drafting of any statute involves difficult and sensitive political choices, vagueness may be employed as an expedient drafting tool to delay the choices by remitting them to future judicial construction.

The use of vagueness as a means of shifting political choices to the judiciary does not amount to an abdication of legislative responsibility. On the contrary, reliance on vague language is often the only means by which the legislature can carry out its duty: in a representative government, statutes are often born of cooperation between legislative actors who are unable to agree on specific details. Even where a majority government holds the reins of state, individual members of that majority may passionately disagree on the contents of proposed legislation. Despite their inability to agree on legislative minutiae, legislators can often compromise through the use of general language that is sufficiently broad to encompass the meanings intended by several “disagreeable drafters” and sufficiently imprecise to avoid entrenching any one drafter’s specific views. This commonly used technique of legislative drafting has been referred to as the use of “more or less intentional obscurities, perplexities, or imperfections, inserted or permitted with a view to facilitate the passage of the Bill through Parliament”.⁸⁸ Through the use of vague language, the passage of bills that might otherwise die on Parliament’s floor can be secured.

The power to garner sufficient votes to ensure the passage of a Bill is not the only reason for using vague language. A second function of

⁸⁸ S.G.G. Edgar, ed., *Craies on Statute Law*, 7th ed. (London: Sweet & Maxwell, 1971), at 28.

vague language is to demonstrate Parliament's intention to grant discretion to the courts and other officials charged with the task of administering legislation. According to Francis Bennion:

By use of a word or phrase of wide meaning, legislative power is delegated to the processors whose function is to work out the detailed effect ... until the details are worked out, it will be doubtful what exactly they are.⁸⁹

Similarly, Reed Dickerson claims that "vagueness is often desirable" in cases where "the legislative client believes it desirable to leave the resolution of uncertainties to those who will administer and enforce the statute".⁹⁰ In other words, contrary to the assumption of originalists, statutory meaning does not precede interpretation in cases involving vague statutory language. Only a rough idea of the legislation's meaning has been established, with the details left to be worked out by courts or administrative officials.

Why would a legislature seek to delegate its powers to judicial or administrative bodies? To put it bluntly, legislators may recognize their own inability to predict the practical ramifications of legislation. The legislator, who lacks the practical experience to understand the appropriate application of an enactment, knows that the members of the judiciary (or other body charged with administering and enforcing legislation) often have the experience and the knowledge required to apply vague statutory language in a manner that is appropriate. Consider, for example, section 11 of the *Narcotic Control Act* ("NCA") (now repealed),⁹¹ which permitted the police to engage in warrantless searches based on "reasonable grounds". The phrase "reasonable grounds" was not defined in the *NCA*. Nowhere in the statute was the judiciary given guidance as to what might constitute "reasonable grounds" for the purposes of the Act. Similarly, section 63 of the *Criminal Code* prohibits "tumultuous disturbances" of the peace. "Disturbing the peace" is not defined. Nor does the Code describe how one could disturb the peace in a "tumultuous" manner. In instances such as these, the drafter has used an extremely broad term for the purpose of

⁸⁹ Francis Bennion, *Statute Law* (London: Oyez Publishing Ltd., 1980), at 120.

⁹⁰ Reed Dickerson, "The Diseases of Legislative Language" (1964) 1 Harv. J. on Legis. 5, at 11.

⁹¹ R.S.C. 1985, c. N-1.

delegating the task of filling in the “legislative blanks” to the judiciary. Judges are able to determine what are “reasonable grounds” for searches because of long exposure to fact situations involving police behaviour. Judges know what “disturbs the peace tumultuously” because of their great experience adjudicating offences against the public order. The legislator, by contrast, has neither the expertise nor the inclination to define these vague terms with specificity. Through the use of the vague language found in these statutes, the legislature acknowledges the judiciary’s expertise and grants courts the discretion to apply and interpret the law as they see fit.⁹²

Finally, the use of vague language may demonstrate the drafters’ intent to permit the language of an enactment to take on a life of its own. One unfortunate aspect of a strictly originalist approach to interpretation is the refusal to acknowledge that the drafters may have *wanted* the courts to use dynamic interpretation when construing certain provisions. According to Peter Hogg, “what originalism ignores is the possibility that the framers were content to leave the detailed application ... to the courts of the future, and were content that the process of adjudication would apply the text in ways unanticipated at the time of drafting”.⁹³ In other words, the drafters may actually be aware of the evolutive nature of statutory language, and hope that the courts employ a progressive or dynamic approach to interpreting the language used in their enactments. The manner in which the legislative drafters signal their intent to leave the stewardship of language to the courts is through the use of vague language, which lends itself to evolution through a dynamic interpretive process.

If the use of vague language implies a delegation of power from the drafters to the courts or an expression of the desire to permit language to evolve, what approach should interpreters take when confronted with vague legislative terms? In my view, the construction of vague language necessarily requires the use of dynamic interpretation. Where the legislature sees fit to express its intention in vague terms, the courts should be free to assume either that (1) the lawgiver wished to delegate the development and detailed application of the statute to the judiciary

⁹² This point is underscored in cases involving statutes that are administered by administrative officials or tribunals. In such cases, the body charged with administering the statute is often staffed by experts in the relevant legislative field.

⁹³ Hogg, note 53, *supra*, at 1392.

(either because of judicial expertise or for reasons relating to political expedience), or (2) the legislature wished to allow the statute to evolve along with changes in society's views or public policy. Whichever reason the lawgiver had for drafting a vague provision, the court is clearly justified in using dynamic interpretation to resolve interpretive problems. Indeed, adopting a strictly originalist approach in these situations is almost impossible. If the drafter had no specific intention (as is often the case where vague language is concerned), then the foundation of originalist construction has disappeared, leaving the court with no choice but to adopt a dynamic construction. As noted above, interpreters cannot help but be influenced by the social and factual context that surrounds an interpretive problem. Where the legislature, through the use of vague terminology, has refrained from providing the court with sufficient guidance to determine the statute's meaning, the court should be free to rely openly on this social and factual context in ascribing meaning to the enactment's language. More importantly, the court should be explicit in its reliance on a dynamic form of construction, openly admitting that its decision is based on current social policy rather than on presumed, specific legislative intent. This approach is more honest than originalist construction in that it openly recognizes the role of application in statutory construction: when interpreting vague statutory provisions, the interpreter will inevitably be influenced by the external factual context. More importantly, the use of dynamic interpretation in the construction of vague language permits the court to respond to current needs while still respecting the framer's intention: if the lawgiver had no specific or detailed intention with respect to a statute's meaning, or chose to enact vague language to avoid a political choice, the judiciary is clearly within its rights to "create a meaning" that is consistent with contemporary ideals. By accepting the delegation of power that is implied by vague language, the courts do not intrude on the legislature's function, but rather respect the author's intention to have the courts make detailed decisions that the drafters lacked the ability (or the inclination) to make.

As we noted in section II, 3. above, courts typically voice reluctance to depart from legislative intention in all cases save those involving constitutional statutes or "fundamental laws" (such as human rights enactments). While human rights enactments and constitutional laws might warrant the invocation of dynamic construction, courts contend that ordinary enactments (such as criminal laws, taxing acts and immigration statutes) must be interpreted through reliance on originalist

construction. Section IV, 2. of this essay demonstrated that, in practice, courts do not truly abide by this bifurcated approach to interpretive theory. On the contrary, the courts appear to choose their interpretive theories based on unclear (or unarticulated) reasons, which may have little or nothing to do with the nature of the document being considered.

Recall the decision of the Supreme Court of Canada in *R. v. Butler*⁹⁴ (discussed in section IV, 3., above). In that case, the Court was asked to interpret section 163 of the *Criminal Code*, which prohibited the distribution of any “obscene” material. As we saw in section IV, 3., the Court in *Butler* construed the word “obscene” in a distinctly dynamic fashion, eschewing reliance on traditional notions of legislative intent. What was it that led the Court in *Butler* to adopt a dynamic approach, rather than adhering to originalist construction? The legislation at issue in *Butler* was neither part of the constitution nor a “quasi-constitutional” enactment, yet (as we have seen) the courts have consistently stated that the progressive or dynamic mode of construction used in *Butler* should be restricted to cases involving these progressive and “evolutive” enactments. In my view, the use of dynamic interpretation in cases such as *Butler* is not driven by the nature of the document being interpreted, but by the nature of the *language* giving rise to interpretive problems.

Like much of the language found in constitutional documents or in the provisions of human rights legislation, the term “obscene” (which gave rise to the interpretive problem in *Butler*) is not ambiguous in the sense that it gives rise to two or more distinct interpretive choices. On the contrary, the word “obscene” is extremely vague in that an almost infinite range of interpretive choices are available. Some might consider the term “obscene” to encompass only the depiction of explicit sexual contact. Some might extend the term to include anything that could make a pastor blush. Between these two extremes are countless variations of meaning, each of which could supply a supportable definition of “obscene”. Because the legislature saw fit to enact section 163 through the use of vague terminology, the Court in *Butler* was free to make up for this lack of precision through the use of a dynamic form of construction.

The language at issue in *Butler* parallels the language at issue in *B.C. Motor Vehicle*, *Morgentaler*, *Gosselin*, *Sears* and *BCGSEU* (discussed above). In those cases, the Court was asked to interpret the

⁹⁴ [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452.

terms “fundamental justice”, “liberty”, “security of the person”, “discriminate” and “discrimination”. The terms in question are not ambiguous in the sense that they give rise to two or more specific and ascertainable meanings. On the contrary, the relevant terms are vague. Consider, for example, the term “liberty”: perhaps it includes nothing beyond freedom from physical restraint. Perhaps it includes privacy interests, as it does in the context of the United States’ Constitution. Perhaps it includes freedom of contract, or the liberty to act however one chooses (subject only to limits prescribed in accordance with section 1). An interpreter of section 7 is not forced to choose between these various options, but may fill the “basket of meanings” associated with the term “liberty” as little or as much as the interpreter desires. Like all vague terms, the term “liberty” gives rise to marginal questions of degree, rather than to the “either/or” challenge that is inherent in ambiguous legislation. The Court’s decisions involving section 7 of the Charter, like the decisions in *Sears*, *BCGSEU* and *Butler*, make it clear that where interpretive problems arise from the use of language of this nature, the use of dynamic interpretation provides a principled means of creating specific statutory meanings.

5. Implications of Ambiguity

Unlike vagueness, which serves a number of purposes in legislative provisions, ambiguity (as described in section V, 2., above) can generally be traced to drafting errors. These drafting problems can be grouped into two specific categories, namely (1) clumsy syntax, or (2) the use of homonyms or terms with multiple meanings. Where either of these common language errors occurs in the creation of legislation, the result is an ambiguous statute that will give rise to the need for judicial interpretation.

The first source of ambiguity was referred to by William Empson as the divergence of language “from the colloquial order of statement” in ways that imply “several colloquial orders from which the statement has diverged”.⁹⁵ Although Empson’s comments were made in the context of poetic interpretation, they are equally applicable in the context of

⁹⁵ William Empson, *Seven Types of Ambiguity*, 2d ed. (Hammondsworth, UK: Penguin, 1961), at 30.

legislation. For an example of this type of ambiguity, consider the following legislative provision:

A ten per cent reduction in federal tax shall be available to all charitable corporations and institutions performing educational functions.

The phrase “charitable corporations and institutions performing educational functions” departs from the “colloquial order of statement” by distributing multiple adjectives across a collection of nouns. Consider the following questions: must charitable corporations perform educational functions in order to qualify for the reduction in federal tax? Must institutions performing educational functions also be charitable in order to qualify for the benefit of the statute? Depending upon the answers that any particular reader gives to these questions, various specific and contradictory meanings of the statute will be generated. In other words, the statute is ambiguous. The ambiguity arises due to grammatical irregularities in the statute, or the departure of the statute’s language from accepted patterns of speech. This particular source of ambiguity is common in legislation, and generally arises due to the drafter’s desire to use as few words as possible when attempting to describe a complex subject.

The second most common source of legislative ambiguity is the unfortunate use of homonyms that cannot be resolved by context. For example, consider the following excerpt from an actual piece of legislation:

... any constable shall take into custody, without warrant, and forthwith convey before a justice, any person who within his view commits [a public order offence].⁹⁶

Consider the possible meanings of the word “view” in this provision. Does it mean “opinion”, in which case the officer may arrest any person who “within the officer’s opinion” is committing an offence, or does the word “view” mean “field of vision”, in which case an officer may arrest only persons who the officer actually sees breaking the law? The section provides no clues as to which of the two meanings is appropriate. Indeed, even context cannot resolve the ambiguity with any

⁹⁶ *Town Police Clauses Act 1847* (U.K.), s. 28.

degree of certainty: in *Wills v. Bowley*⁹⁷ England's highest Court was sharply divided over the proper meaning of "view" in this provision.⁹⁸

If ambiguity can be traced to problems of grammar or the thoughtless use of terms with multiple meanings, what does ambiguous language imply when found in legislation? Unlike vagueness, which can be the government's way of creating judicial discretion or avoiding political choice, "ambiguity" generally implies nothing more than a fallible drafter. While statutes are drafted in vague terms in order to accomplish various legislative objectives, "beyond human fallibility, there is no reason why a legal instrument need be ambiguous".⁹⁹

Ambiguity does not imply the form of "delegation of power" that is inherent in the use of vague provisions. Consider the following samples of ambiguous legislation:

(1) A will shall be void "if the will is duly executed without the [testator's] attestation".¹⁰⁰

(2) The ownership of firearms is restricted to "the son and heir apparent of an esquire, or other person of higher degree".¹⁰¹

Clearly, the authors of each of these statements must have meant to say something specific. The author of statement (1) either meant (a) that the testator's signature must accompany the witness' signature (regardless of who signs first), or (b) that the testator must sign the will before it is executed by witnesses. Similarly, statement (2) is highly ambiguous in that it supports at least three meanings: it could permit the ownership of firearms by (a) all persons of higher degree than esquires; (b) all persons of higher degree than the sons and heirs apparent of esquires; or (c) the sons and heirs apparent of all persons of higher degree than esquires. The language of the statement provides little or no evidence of which of the three meanings should be preferred.

⁹⁷ [1983] 1 A.C. 57 (H.L.).

⁹⁸ Note that, if the "opinion" meaning of "view" is selected, the court will now be faced with a problem of vagueness: must the "view" be based on reasonable grounds, mere suspicion, or something in between? Compound problems of this nature (*i.e.*, interpretive problems involving overlapping instances of vagueness and ambiguity) are discussed in chapter 6 of R. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001).

⁹⁹ Reed Dickerson, "The Diseases of Legislative Language" (1964) 1 Harv. J. on Legis. 5, at 9.

¹⁰⁰ *The Wills Act 1968* (U.K.).

¹⁰¹ 22 & 23 Car. II, c. 25.

Statements (1) and (2) are not vague: neither statement suffers from the use of general language that supports a broad continuum of meanings. Instead, each of the statements supports two or more specific and contradictory meanings which give rise to the need for judicial interpretation. In other words, the statements are ambiguous. The interpretive problems inherent in statements (1) and (2) arose from the authors' inability to convey the intended meaning with precision. The implications that arise where statutes are drafted in vague terms are not present in these cases. There was no failure of the author to form a specific intention. There was no attempt to delegate power to the judiciary. There was no bid by the author to promote the evolution of a statutory provision. All that happened was an unfortunate drafting error, causing the statute's failure to spell out the drafter's intention. In such cases, there is no need or justification for dynamic interpretation. The interpreter's only task is archaeological in nature, requiring the judge to sift through the statute's language in search of clues as to the drafter's intended meaning. Because of the nature of ambiguity (described in section V, 2., above), we can be certain that an "original intention" does exist. The language of an ambiguous enactment supports only a small number of meanings, only one of which can be the meaning that the legislative drafter meant to convey. Because this meaning resides within the enactment from the time of its creation, the job of the interpreter is to discover this meaning and apply it to the facts before the court. In other words, ambiguity must be resolved through originalist construction. All elements of originalist construction, including rules of grammatical construction, contextual interpretation, basic interpretive presumptions (including the mischief rule, the golden rule and countless maxims of construction) and evidence of historical intent are uniquely suited to resolving this form of linguistic conundrum. Through the application of these well-accepted rules of interpretation, the judiciary is able to ferret out the provision's intended meaning and ensure that the legislator's authority as "lawgiver" is respected. The weaknesses of originalist construction are of minimal importance in such cases. Ambiguity (by its very definition) confines the judge's choice to a small number of discrete interpretive options. In cases involving ambiguity, the originalist has no need to carry out an endless, fruitless search for a malleable or hard-to-define intention: the meaning that the drafter hoped to convey will be found within one of a few possible constructions of the ambiguous passage. All that the originalist interpreter must do in such cases is apply the tools of originalism to select the one construction

(from a small number of choices) that exemplifies the statute's "true meaning".

It should be noted that originalist construction is the appropriate method of resolving ambiguities, even in those rare instances where the relevant ambiguity is found in a "fundamental statute" such as the Charter. Consider, for example, section 7 of the Charter, which provides that everyone has the right to "life, liberty and security of the person". As we saw in section V, 2., above, the phrase "of the person" can be read as (a) modifying only the word "security", or (b) modifying each of the words "life, liberty and security". If the phrase "of the person" modifies the word "liberty", for example, no entities other than "persons" are entitled to the liberty rights enshrined in section 7. If the phrase "of the person" does *not* modify the word liberty, by contrast, the right to liberty may extend to "non-person" entities (such as partnerships or social clubs) as well. From a grammatical perspective, the provision can be read either way. This is a problem of ambiguity because it gives rise to an "either / or" challenge: The section *either* protects "liberty of the person" (Interpretation A), or it protects "liberty" with no limitation dependent upon the "personhood" (or lack thereof) of the entity being considered (Interpretation B). The author meant either A or B, and left no evidence of an intention to delegate the choice of A or B to future interpreters. Because of the implications of ambiguous language (identified above), this ambiguity should be resolved through originalist construction, respecting the intention of the legislative author. This is so despite the fact that the ambiguity is located in a "fundamental" enactment. Whether an ambiguity is found in an ordinary enactment, in a provision of the Charter, in the *Criminal Code* or in an Act creating human rights, the ambiguity should be resolved by originalist construction. By the same token, vague language should be interpreted through dynamic interpretation, regardless of the nature of the Act in which it is found.

As noted above, ambiguous statutory language does not carry the same implications as a vague term found in legislation. In cases of ambiguity, the legislative drafter clearly had a specific intent: he or she simply committed a drafting error that failed to make this intention clear. Because the drafter of ambiguous language clearly had a specific intention, the statute contains a "true meaning" that precedes interpretation. Obviously, the legislature has turned its collective mind to a particular problem and proposed a specific solution, despite the drafter's inability to express the proposed solution with precision. As

the elected branch of government has exercised its constitutional mandate and expressed its will in the form of legislation, it is the task of the judiciary to apply the law in accordance with the legislator's expectations. Any departure from originalist construction in these cases runs the risk of clothing the courts with unwarranted legislative power. A failure to give effect to an originalist construction in such cases would also run afoul of Canada's various Interpretation Acts, which command the courts to adopt interpretations that are based on the legislature's historical objectives.¹⁰² As a result, where interpretive problems result from ambiguity (rather than vagueness), an originalist approach to interpretation should be adopted.

6. Summary

A court's choice between originalism and dynamism should not be governed by the court's assessment of whether or not a particular law is part of the Constitution, "fundamental", "quasi-constitutional", or "more than ordinary" in nature. Instead, the Court's selection of interpretive theory should be based on the nature of the linguistic problem giving rise to the need for judicial interpretation. Where the linguistic problem is an instance of vagueness, the Court should use dynamic interpretation: through the use of vague language, the lawgiver has (a) demonstrated a desire to allow language to evolve, (b) sought to avoid a political choice, delegating this choice to the courts or to administrative officials, or (c) simply failed to arrive at a specific intention. Whether the reason for the use of vague language is reason (a), (b) or (c), there is no specific intention to be found: the basis of originalist construction is absent, and the Court is clothed with authority to invoke dynamic construction. In the case of ambiguous language, by contrast, the legislature has made a drafting error, and the only task of the court is to eliminate the mistake. In cases such as this, an originalist approach respects the separation of powers between the judiciary and the legislative assembly: there is a "true intention" to be found, and the job of the court is to correct the author's drafting error, revealing the

¹⁰² This particular criticism applies only where non-constitutional laws are concerned: Canada's various Interpretation Acts do not govern the interpretation of the Constitution.

original intention that was obscured by nothing more than an unintentional slip of the legislator's pen.¹⁰³

VI. CONCLUSION

It is unfortunate, perhaps, that Anglo-Canadian jurists first took note of dynamic construction when interpreting the text of constitutions. When interpreting an inspirational, nation-building document such as Canada's Constitution, it is easy to be distracted by the importance of the document being construed. The interpretation of section 7 is a particularly awe-inspiring enterprise. As the Court noted in *Blencoe*, the text of section 7 expresses some of the basic values upon which Canada is built. When attempting to discern the meaning of legislation governing such values, it is easy to convince yourself that you are engaged in a special interpretive enterprise that shares very little in common with more "mundane" exercises of statutory construction. This has, perhaps, contributed to the unhappy perception that dynamic construction should be reserved for the interpretation of "fundamental statutes". As we have seen throughout this paper, our courts have repeatedly (and mistakenly) claimed that only fundamental statutes should be construed through the invocation of dynamic interpretation, while merely "ordinary laws" are governed by legislative intent. As we have seen, this "bifurcated" approach to theory selection makes no sense. More importantly, it fails to correspond with the actual practices of our courts.

Whether a law is considered a "fundamental law" or simply an "ordinary" enactment, the interpretation of the relevant law can be pursued by reference to a single, unified theory of statutory construction. Under this proposed theory, a court faced with a problem of construction must undertake a careful reading of the statute. The purpose of this reading is to reveal the nature of the linguistic problem plaguing the law. Where the problem is a result of vague language, the

¹⁰³ It seems that Canada's federal courts are now beginning to embrace this method of "theory selection", and recognizing the important distinctions between vagueness and ambiguity. For excellent examples of decisions in which these distinctions are recognized, see the decision of Evans J. (as he then was) in *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1999] F.C.J. No. 1531, [2000] 1 F.C. 146, as well as the decision of Evans J.A. (yes, the same Justice Evans, now elevated to the Federal Court of Appeal) in *De Guzman v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2119 (C.A.) (released December 20, 2005).

court should resolve the problem through dynamic interpretation. Where the source of the problem is ambiguous language, by contrast, the court should rely on originalist construction and resolve the problem by reference to the legislator's intent. The unanswerable question of whether or not a particular law is "fundamental" does not arise: whether interpreting section 7 of the Charter or a dreary set of parking regulations, courts should focus on the textual clues found in legislation, selecting whichever interpretive theory corresponds to textual clues that were left behind by the drafter of the relevant statute. By responding to the author's textual clues, the court ensures that the interpretive theory it adopts, whether originalist or dynamic, respects the intentions and objectives of the legislative author.