1988

Ventriloquism and the Verbal Icon: A Comment on Professor Hogg's "The Charter and American Theories of Interpretation"

Richard F. Devlin FRSC
Dalhousie University, richard.devlin@dal.ca

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

BY RICHARD F. DEVLIN**

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

** Sessional Lecturer, Osgoode Hall Law School, York University, Toronto.

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

jurisprudential discourse are quintessentially political.[5] Neo-Conservative judges and scholars such as Robert Bork,[6] William Renquist,[7] Raoul Berger,[8] and Richard Posner[9] have launched a major broadside against the liberalism of the Warren Court by arguing that it is fundamentally undemocratic for non-elected judges to make decisions and advance policies which are neither stated nor implied in the Constitution. A host of liberals have, in different ways, risen as champions of the Court by providing a relegitimation either in substance or process, for activism.[10] The debate, in its most recent manifestation, has concretized in the quest to develop the correct strategy for interpreting the Constitution. Once again, law manifests itself as an arena for political and ideological struggle.[11]

---

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

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

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

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

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

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

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

competence, and democratic theory."[19] He suggests that the question of the legitimacy of judicial review is less agonizing for Canadians than Americans[20] and goes almost as far as to suggest that it is a non-issue. Hogg advances two reasons in support of his argument. First, the *Charter* incorporates the democratic safety nets of sections 1 and 33 thereby substantially limiting the undemocratic threat posed by the judiciary.[21] Although I have several reservations about this claim, it is not the main focus of this comment. Second, and more important for my purpose, are Hogg's suggestions with regard to the importance of the interpretation debate for Canada: the judiciary do not have *carte blanche*; review is legitimate only if it is "based exclusively on the words of the constitution"[22] which should be interpreted in a "progressive" and "purposive" manner. This answer, in Hogg's opinion, is sufficient to *constrain* the judiciary and therefore forestall any drift towards the slippery slope of the legitimacy of judicial review. Politics and law therefore remain autonomous.

I cannot agree.

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

---

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

[20] Hogg, *supra*, note 2 at 88.

[21] *Ibid.* at 88-89.

[22] *Ibid.* at 102.

[23] *Ibid.* at 91.

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

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

---

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

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

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

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

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

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

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

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

Or again,

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

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

---

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

[33] Hogg, *supra*, note 2 at 96

[34] *Ibid.* at 101.

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

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

---

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

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

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

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

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

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

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

---

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

[48]Hogg, *supra*, note 2 at 104.

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

[50]Hogg, *supra*, note 2 at 104.

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

arguments has demonstrated that the text is inconclusive and can be interpreted either way, depending upon which canons of interpretation are adopted or which other sections of the *Charter* are read in conjunction with section 32. Moreover, the lower courts have provided conflicting decisions[54] and the Supreme Court appears to be thoroughly confused.[55] This lack of consensus negates Hogg's suggestion that we adopt the approach "which seems natural to contemporary eyes."

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

---

at 145.

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

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

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

[57] *Supra*, note 53 at 159-60.

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

[59] *Ibid.* at 674.

VI

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

This comment is written with the (perhaps irrational) belief that rational discourse can make a difference. I suggest that we abandon the repressive[61] and mystificatory potential of textual fetishism which allows power to pose as truth; that we understand

---

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

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

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

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