

## THE TROUBLE WITH LIVING TREE INTERPRETATION

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### INTRODUCTION

Two questions have been posed at this symposium. The first asks: ‘Who wins under a bill of rights?’, while the second asks: “‘Living tree’ interpretation of bills of rights: How much harm would this metaphor cause?” My task is to answer the second question, but I want to set up my answer to that question by saying something about the first.

Who wins under a bill of rights? The answer is: ‘rights-seekers’. But not just *any* rights-seekers; the winners are those whose rights enjoy the protection of the bill of rights. They win because their moral claims have been given increased status: inclusion in a bill of rights converts them to legal rights, and as such they can be litigated. Rights-seekers will not win every case, of course – judges may be more sympathetic to some sorts of cases than others<sup>1</sup> – but they will win many and their victories may be substantial.

Rights-seekers will also enjoy greater *political* success once their rights are protected in a bill of rights. Claims that would otherwise be required to compete for attention in the political process are given a leg-up once they acquire the status of legal rights. Policy development and legislative-drafting processes are affected, since governments attempt to comply with bills of rights. Thus, rights-seekers get two bites at the apple. They can participate in the political process, where they might win. Should they be dissatisfied with a particular political outcome, however, they can shift their claims to the courtroom.<sup>2</sup> Litigation raises the prospect of outright victory for rights-seekers rather than the compromise that is often the product of the political processes, and is attractive for that reason. Indeed, litigation may be such an attractive option that rights-seekers may eschew the political process in favour of it.<sup>3</sup>

The extent to which rights-seekers win under a bill of rights depends to a large extent on the approach that courts take in interpreting it. That approach will not only determine the

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<sup>1</sup> Paul Rishworth emphasized this point in his comments to me. Judges’ sympathies will sometimes reflect public sympathies. So, for example, unpopular expression (hate speech, pornography, defamation) is unlikely to find much support amongst judges (with the important exception of the United States). In other contexts, however, judges’ sympathies may reflect elite opinion, in opposition to public sympathies. Judicial opposition to the death penalty and support for same-sex marriage are examples here.

<sup>2</sup> In contrast, not only do those whose rights are not protected by a bill of rights have no such legal recourse, their ability to prevail in the political process will be compromised. Their claims are treated as interests, as such subordinate to the rights that are protected in the bill of rights if they come into conflict.

<sup>3</sup> Passage of a bill of rights is bound to encourage the formation of interest groups designed to pursue litigation. LEAF, the Women’s Legal Education and Action Fund, is the prototype of this sort of group in Canada. It was formed in order to advance feminist positions primarily in equality litigation under s 15 of the *Canadian Charter of Rights and Freedoms* (the ‘*Charter*’), and has participated in most of the leading cases – in many cases as intervener, advancing positions designed to enhance the prospects for success in future litigation. See Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund* (2005).

outcome of rights litigation, it will also influence the decisions taken in the political process. This is where the second question comes in. 'Living tree interpretation' refers to the practice of interpreting bills of rights as organic documents, such that the meaning of the protected rights and freedoms evolves. The question posed assumes that living tree interpretation causes harm, but of course this is contestable; everything depends upon what constitutes harm.

On one level, harm might be understood as aberrant judicial decisions – decisions interpreting the bill of rights that may be difficult, if not practically impossible, for the elected branch of government to reverse. Of course, aberrant decisions are most easily recognized in retrospect, and for every aberrant decision there may be a decision that comes to be regarded as enlightened and ahead of its time. Here we face a considerable problem: if there are no right answers to rights questions – or as Jeremy Waldron has argued, there is in any event no way of establishing which is the right answer in a manner that is itself uncontroversial<sup>4</sup> – then we should expect disagreement when it comes to characterizing controversial judicial decisions in any event. Whether a particular judicial decision is considered aberrant or enlightened may depend on whose ox is gored.<sup>5</sup>

Beyond the impact of particular judicial decisions, however, harm might be understood in terms of harm to the constitutional or political order. Here, too, there is considerable room for argument based on one's premises. Opponents of bills of rights consider that judicial review of legislation undermines the quality of democratic governance and political institutions. It is problematic regardless of the interpretive approach courts come to adopt, but living tree interpretation is especially problematic because it tends to increase the scope of judicial review by increasing the scope of the protected rights. In contrast, proponents of bills of rights consider judicial review a necessary corrective for failings of the democratic processes and political institutions they consider more or less inevitable. From this perspective, living tree interpretation is preferred because it facilitates the most expansive conception of judicial review, and hence the best means of ensuring the effectiveness of the check it plays on the operation of the democratic processes.

It is usually assumed that courts must choose between living tree interpretation and some form of originalism, an interpretive approach based on the premise that the provisions of bills of rights have meanings that are relatively fixed, whether by the intentions of those

<sup>4</sup> Jeremy Waldron puts the point this way: 'The assumption of disagreement has nothing to do with moral relativism or non-cognitivism. It is perfectly compatible with there being a truth of the matter about rights and the principles of constitutionalism — only, it assumes that our condition is not one in which the truth of the matter discloses itself in ways that are not reasonably deniable.' See Waldron, 'Some Models of Dialogue Between Judges and Legislators' in Brodie and Huscroft (eds), *Constitutionalism in the Charter Era* (2004) 7, 11-12 (Huscroft and Brodie eds, *Constitutionalism*) also published in (2004) 23 *Sup Ct L Rev* 7, 11-12 (Waldron, 'Some Models').

<sup>5</sup> *Roe v Wade*, 410 US 113 (1973), establishing a constitutional right to abortion in the United States, is an example in this regard. Many regard *Roe* as poor constitutional law despite their agreement with the substantive outcome. *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791 ('*Chaoulli*') is a good Canadian example. In that case, the Court ventured into the public health care debate and struck down Quebec legislation prohibiting the sale and purchase of private health insurance – legislation designed to preserve the public health system. Some of the strongest supporters of judicial review under the *Charter* oppose the decision, and counsel judicial restraint. See, eg, Sujit Choudhry, 'Worse than *Lochner*' and Kent Roach, 'The Courts and Medicare: Too Much or Too Little Judicial Activism?' in Flood, Roach, and Sossin (eds), *Access to Care, Access to Justice* (2005) 75 and 184. See also Roy Romanow, 'In Search of a Mandate', at 521. Romanow was one of the politicians responsible for passage of the *Charter*, and headed a royal commission that recommended preservation of the public health care monopoly. His impassioned, personalized opposition to *Chaoulli* reads like a plea for originalism, which he would otherwise reject. He is not the first politician to be surprised at how his bill of rights has turned out, and he will not be the last.

who drafted them<sup>6</sup> or the original meaning of the terms themselves.<sup>7</sup> Originalism is liable to be parodied as ‘ancestor worship’,<sup>8</sup> a ‘quaint American ritual’,<sup>9</sup> and rule by the ‘dead hand of the past’.<sup>10</sup> It is said to result in ‘frozen rights’.<sup>11</sup> And so on.

If we were forced to choose between living tree interpretation and the parodied version of originalism,<sup>12</sup> living tree interpretation would seem preferable – it is like preferring progressive interpretation to regressive; forward thinking to backward. But we are not forced to make a choice of this sort. The real choice is between matters of degree: *how much* evolution will living tree interpretation be understood as allowing? For some judges, the living tree metaphor is understood as a licence for constitutional change; for others, originalism-inspired considerations suggest the need for greater caution.

Yogi Berra once said: ‘it’s tough to make predictions, especially about the future’.<sup>13</sup> If experience with the *Canadian Charter of Rights and Freedoms* is any guide, however, living tree interpretation will cause greater change than anticipated – and not only to the way in which protected rights are understood. More important, it will increase the importance of judicial review and the role of the courts, regardless of the nature of the particular bill of rights.

### LIVING TREE INTERPRETATION

The living tree metaphor was coined by Lord Sankey in *Edwards v Canada (Attorney General)*,<sup>14</sup> a decision of the Judicial Committee of the Privy Council interpreting the *British*

<sup>6</sup> Former Federal Court of Appeals Judge Robert Bork is the most well known modern proponent of intention-based originalism. His nomination to the US Supreme Court in 1987 became mired in political controversy based on his views on constitutional law, and he was not confirmed in the Senate. Bork discusses the failed nomination and his interpretive theory in *The Tempting of America* (1990). See also *Coercing Virtue: The Worldwide Rule of Judges* (2003); ‘Neutral Principles and Some First Amendment Problems’ (1971) 47 *Indiana Law Journal*.

<sup>7</sup> US Supreme Court Justice Antonin Scalia is the most well known proponent of text-based originalism. See Scalia, ‘Originalism: The Lesser Evil’ (1989) 57 *University of Cincinnati Law Review* 849, and *A Matter of Interpretation* (1997) 37-47.

<sup>8</sup> Michael Kirby attributes the phrase to Justice Ian Binnie of the Supreme Court of Canada in ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 *Melbourne University Law Review* 1, 2.

<sup>9</sup> Kirby, *ibid* 1.

<sup>10</sup> The dead hand metaphor is commonplace in American law as well. Michael Moore puts it this way in ‘A Natural Law Theory of Interpretation’ (1985) 58 *Southern California Law Review* 277, 357:

‘The dead hand of the past ought not to govern, for example, our treatment of the liberty of free speech, and any theory of interpretation that demands that it does is a bad theory.’

<sup>11</sup> The frozen rights metaphor is common in Canada.

<sup>12</sup> The sheer volume of law review articles written about originalism is testimony to its continuing importance in the United States and the sophistication of the concept. Important recent discussions of originalism include Randy Barnett, ‘An Originalism for Nonoriginalists’ (1999) 45 *Loyola Law Review* 611; Howard Gillman, ‘The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building’ (1997) 11 *Studies in American Political Development* 191; Keith Whittington, ‘The New Originalism’ (2004) *Georgetown Journal of Law and Public Policy*.

<sup>13</sup> Lawrence Peter ‘Yogi’ Berra, catcher for the New York Yankees, and Major League Baseball coach and manager, is known widely for his malapropisms. See <<http://www.yogiberra.com/>> at 1 September 2006.

<sup>14</sup> [1930] AC 123 (*Edwards*). The idea of living or organic constitutionalism was well known in American constitutional law prior to articulation by the Privy Council. US Supreme Court Justice Brandeis discussed the idea of a living constitution in terms similar to the Privy Council’s living tree metaphor in a draft opinion in 1922: ‘Our constitution is not a strait-jacket. It is a living organism. As such it is capable of growth — of expansion and of adaptation to new conditions.’ However, at

*North America Act 1867* ('BNA Act'),<sup>15</sup> which served as Canada's constitution. The case had nothing to do with bills of rights, but the case has had an important influence on the establishment of living tree interpretation in litigation under the *Canadian Charter*.

The question in *Edwards* was whether s 24 of the *BNA Act*, which provided that 'qualified persons' could be appointed to the Canadian Senate, allowed the appointment of women as well as men. The government referred the question to the Supreme Court of Canada<sup>16</sup> and that Court held that common law incapacity precluded women from being considered qualified persons for purposes of Senate appointments. On appeal, however, the Privy Council (then Canada's highest court) advised that women were eligible for appointment to the Senate. In a famous passage Lord Sankey remarked as follows:

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. ...

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 so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.<sup>17</sup>

*Edwards* looks unremarkable today, but in its time the Privy Council's decision was perceived as radical; it marked a departure from what had been understood to be well-established interpretive principles.<sup>18</sup> Nevertheless, *Edwards* did not invite judicial activism.

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the request of Chief Justice Taft, Brandeis removed these remarks from his dissenting opinion. The story is told by Alexander Bickel in *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2<sup>nd</sup> ed, 1986) 106-8. Justice Holmes' remarks from *Missouri v Holland*, 252 US 416, 433 (1920) are also oft-cited: 'when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism...'. See also *McCulloch v Maryland*, 17 US (4 Wheat) 415 (1819), in which Chief Justice Marshall described the constitution as 'intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code.'

<sup>15</sup> That *BNA Act* became the *Constitution Act 1867* (*Constitution Act*, 1867 (UK), 30 & 31 Vict, c3, reprinted in RSC 1985, App II, No 5) as part of the *Canada Act 1982*, which repatriated the Canadian Constitution from the UK. The *Canada Act 1982* also included the *Constitution Act 1982*, which sets out a constitutional amending formula, and includes the *Canadian Charter of Rights and Freedoms*. Peter Hogg, *Constitutional Law of Canada* (1997, updated in looseleaf) ch 1.2 (Hogg, 'Constitutional Law').

<sup>16</sup> The *Supreme Court Act*, RSC 1985, c S-26, s 1, establishes a reference procedure that allows the federal government to ask the Court to provide 'advice' on questions of law and fact (s 53). Canadian provincial governments have a similar reference power to their provincial courts of appeal (from which appeal can be taken to the Supreme Court of Canada). The Court's advice is invariably accepted, and reference decisions are treated as ordinary precedents. Indeed, many of the most important constitutional law decisions of the Supreme Court of Canada are made in the context of reference questions.

<sup>17</sup> *Edwards* [1930] AC 123, 144-5.

<sup>18</sup> The Privy Council's decision was subject to criticism on this account. Henderson, 'Eligibility of Women for the Senate' (1929) 7 *Canadian Bar Review* 617, argues that the Supreme Court of Canada's decision followed the law, then understood, and that the Privy Council's decision reflected its status as an advisory body 'not bound to follow precedent nor to determine matters presented

In using the living tree metaphor, Lord Sankey suggested that growth and development through judicial interpretation should be slow and incremental. For good measure, Lord Sankey added that growth was subject to ‘natural limits’.

*Edwards* did not concern the division of powers between the federal Parliament and the provincial legislatures, but extension of living tree interpretation to questions of federalism soon followed.<sup>19</sup> In the context of federalism, however, it is noteworthy that living tree interpretation performs a different function. Under the *BNA Act* lawmaking power was divided between the provincial legislatures and the federal Parliament: one level of government or the other has lawmaking authority in particular areas. Thus, living tree interpretation facilitates the passage of legislation rather than precludes it.<sup>20</sup> As Peter Hogg describes it, in the context of federalism living tree interpretation is ‘the course of judicial restraint’.<sup>21</sup>

It is important to emphasize this last point because the role played by living tree interpretation in the context of bills of rights is fundamentally different: it impedes, rather than facilitates, the passage of legislation. Every accretion to the scope of constitutionally protected rights as a result of living tree interpretation diminishes the scope of legislative law making authority. Thus, Peter Hogg describes living tree interpretation of bills of rights as ‘the course of judicial activism’.<sup>22</sup>

## BILLS OF RIGHTS AS LIVING TREES

Although *Edwards* was inspired by the demand for equality, it was not a human rights case; the *BNA Act* did not protect individual rights.<sup>23</sup> Nevertheless, to modern eyes *Edwards* – often called *The Persons* case – is a rights case, and it helped inspire the decision of the Supreme Court of Canada to embrace living tree interpretation under the *Charter*. Justice Dickson explained in *Hunter v Southam*:

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

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upon grounds of law alone, but entitled, if not obliged to advise on grounds of public policy, and to take into account matters of political expedience.’

<sup>19</sup> *British Coal Corp v The King* [1935] AC 500; *AG Ontario v AG Canada (Privy Council Appeals)* [1947] AC 127, discussed in Hogg, *Constitutional Law*, above n 15 chs 15.9(f), 33.7(b).

<sup>20</sup> This argument is made more fully by Morton and Knopff, ‘Permanence and Change in a Written Constitution: The “Living Tree” Doctrine and the *Charter* of Rights’ [1990] *Sup Ct L Rev* 533, and Hogg, *Constitutional Law*, above n 15, ch 33.7(b). Of course, to facilitate passage of legislation by one level of government is to preclude passage by the other (unless lawmaking power is concurrent). Judicial decisions enforcing a division of powers inevitably have a normative dimension, as courts shape the nature of the federation and in particular the extent to which it is centralized. The Privy Council, Canada’s highest court until 1949, enhanced provincial lawmaking powers at the expense of federal. The Supreme Court of Canada has, since that time, tended to be more supportive of federal powers.

<sup>21</sup> Hogg, ‘Canada: Privy Council to Supreme Court’ in Jeffrey Goldsworthy ed, *Interpreting Constitutions: A Comparative Study* (2006) 55, 88 (Hogg, ‘Canada: Privy Council to Supreme Court’).

<sup>22</sup> *Ibid.*

<sup>23</sup> Lord Sankey said that the case did not concern ‘any question as to the rights of women’ (*Edwards* [1930] AC 123, 137).

growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.<sup>24</sup>

Justice Dickson's premises are, of course, correct: constitutions are designed to provide a framework for government and, where they include a bill of rights, for the protection of individual rights, and they are designed to endure. They are not easily repealed or amended. The question is: what follows from this? Do these premises lead inexorably to the conclusion that bills of rights should be interpreted as living trees?

In my view Justice Dickson gets it backwards.<sup>25</sup> The difficulty in amending a constitutional bill of rights like the *Charter* does not suggest that it should be interpreted in a manner that allows for its 'growth and development', if that is a euphemism for change. On the contrary, the difficulty in amending the *Charter* suggests that the Court should be circumspect in interpreting its provisions. After all, if it is difficult to change the *Charter* through the process of constitutional amendment, how much more difficult should it be to change the *Charter* through judicial interpretation? Judicial interpretation that changes the *Charter* establishes a substantial burden on those opposed to that change to amend the *Charter* to overcome it. There is no reason why the difficulty in amending the *Charter* should be borne by those opposed to change rather than those who favour it.

Moreover, the argument for interpretation that changes constitutional bills of rights overlooks the ability of legislatures to respond to societal change, and the greater legitimacy of change when it is accomplished through democratic processes.<sup>26</sup>

The argument for caution in interpreting bills of rights might be assumed to have less force where statutory bills of rights are concerned. Judicial decisions interpreting statutory bills of rights do not establish difficult burdens to overcome; any such decision can, in theory, be overcome by ordinary legislation – albeit perhaps by conforming to a manner and

<sup>24</sup> [1984] 2 SCR 145, 155 ('*Southam*'). See also *Law Society of Upper Canada v Skapinker* [1984] 1 SCR 357, 366-7 ('The *Charter* is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the *BNA Act, 1867* (now the *Constitution Act, 1867*').

<sup>25</sup> The argument that follows draws on Huscroft, 'A Constitutional 'Work in Progress'? The *Charter* and the limits of progressive interpretation' in Huscroft and Brodie Eds, *Constitutionalism*, above n 4, 413, also published at (2004) 23 *Sup Ct L Rev* 413 (Huscroft, 'Work in Progress?').

<sup>26</sup> As Jeff Goldsworthy notes, it is often simply assumed that it is the judiciary's role to change the constitution through interpretation:

Whenever non-originalists trot out the tired old refrain that 'we', 'today's Australians', 'the present generation', etc, should not be bound by 'the dead hand of the past', they really mean that the judges should not be bound by it. They assume that the judges speak for 'us', and imply that to limit the judges' ability to change the Constitution by pseudo-interpretation is to limit 'our' ability to do so democratically. The assumption is highly questionable, and the implication plainly false.

Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 4 *Melbourne University Law Review* 677, 686 (replying to Justice Michael Kirby, 'Constitutional Interpretation and Original Intent', above n 8) (Goldsworthy, 'Interpreting the Constitution'). See also Antonin Scalia, 'Romancing the Constitution: Interpretation as Invention', in Huscroft and Brodie eds, *Constitutionalism*, above n 4, 337, 340 (Scalia, 'Romancing the Constitution'), criticizing majestic description of evolving liberty from *Lawrence v Texas*, 539 US 558, 578-9 (2003): 'This modest passage somehow skips over the technical detail of *who it is* that is to pronounce the "oppressiveness" of prior beliefs, and to banish them entirely (through constitutional proscription) from government at all levels. The Court simply assumes that that is its own mission.'

form requirement of some sort. This suggests there is little reason for judges to constrain the exercise of their interpretive discretion, but there are competing considerations. Most important, the judicial mandate under a statutory bill of rights must be understood as having been limited by the decision to deny the judiciary the sorts of powers that usually come with a constitutional bill of rights model.

How, then, are statutory bills of rights likely to be interpreted?

In my view, the symbolic force of rights is likely to lead courts to interpret statutory bills of rights as living trees.<sup>27</sup> The substance of rights is likely to be considered more important than the form in which they are protected. No one supposes that commitments to concepts like freedom of expression, due process, and equality are transitory in nature, even if a bill of rights is passed as ordinary legislation, and so it is easy for courts to conclude that rights should not mean anything less in the context of a statutory bill of rights than a constitutional model. Thus, living tree-style interpretation is common not only in Canada<sup>28</sup> and South Africa,<sup>29</sup> which have constitutional bills of rights, but also in countries with statutory bills of rights including New Zealand<sup>30</sup> and the UK.<sup>31</sup> The focus on rights rather than the form of a bill of rights is demonstrated in the portability of precedent when courts engage in comparative law analysis.

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<sup>27</sup> Canada's experience with the statutory *Canadian Bill of Rights 1960* is an exception here, but judicial attitudes have changed considerably since then. Indeed, the perception that the *Canadian Bill of Rights* failed because of judicial indifference may provide inspiration for broad interpretations of other bills of rights, just as it did with the *Canadian Charter*.

<sup>28</sup> The Supreme Court of Canada recently described it as 'one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.' *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 [22] ('*Marriage Reference*').

<sup>29</sup> See generally Heinz Klug, 'South Africa: From Constitutional Promise to Social Transformation' in Goldsworthy ed, *Interpreting Constitutions*, above n 21, 266.

<sup>30</sup> For example, the New Zealand Court of Appeal inferred a remedial jurisdiction under the *NZ Bill of Rights Act* in *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, despite the deliberate exclusion of such a provision from the Act. The availability of remedies in other jurisdictions – many of which had entrenched, constitutional models – was telling for Cooke P, who simply asserted: 'In other jurisdictions compensation is a standard remedy for human rights violations. There is no reason for New Zealand jurisprudence to lag behind' (at 676). See also *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA), in which the Court of Appeal 'locate(d) the Bill of Rights within the tradition of constitutional, rather than statutory, interpretation' (Rishworth, Huscroft, Optican, and Mahoney, *The New Zealand Bill of Rights* (2003) 44 (Rishworth et al, *The New Zealand Bill of Rights*).

<sup>31</sup> See, eg, *Brown v Stott* [2003] 1 AC 681, 703 per Lord Bingham ('*Brown*') and *N (FC) v Secretary of State for the Home Department* [2005] UKHL 31 [21] per Lord Hope of Craighead, both emphasizing that the European Convention on Human Rights, which the UK courts interpret via the Human Rights Act, is a living instrument, while emphasizing the limits of living tree interpretation. The Privy Council reiterated the living tree approach in the context of interpreting rights protected under the Belize constitution in *R v Reyes* [2002] 2 AC 235 [26] per Lord Bingham:

[T]he court must begin its task of constitutional interpretation by carefully considering the language used in the constitution. But it does not treat the language of the constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society.

## THE CONSTRAINTS ON LIVING TREE INTERPRETATION

The decision to adopt living tree interpretation is not problematic *per se*. It all depends on how much interpretive generosity or license the metaphor is understood as permitting. Some judges liken their interpretive role to that of artists, with rights as a blank canvas.<sup>32</sup> Others are more modest.

The older a bill of rights is, the more likely it is that its guarantees will be required to be understood in the context of new and unforeseeable circumstances. The obvious example here is of new communication technologies, many of which post-date freedom of expression guarantees in bills of rights. No one doubts that it is appropriate for courts to interpret the freedom of expression as including these forms of communication. It is simply a new means of exercising the right, rather than a change to the right itself.

But to say that a bill of rights must be interpreted in light of new and unforeseeable circumstances is not to say that it can be interpreted to mean *anything* that its words may bear. This point too, is uncontroversial. The difficulty lies in determining the parameters of permissible interpretation.<sup>33</sup> There is not much prospect of agreement about these parameters when it comes to the broad moral concepts that bills of rights include, not least because of different normative conceptions about the roles of the various branches of government. Some consider that change through judicial interpretation is both necessary and appropriate, while others do not.

There is a further problem: it is difficult to agree on what constitutes change in any event.<sup>34</sup> The most radical interpretation of a provision in a bill of rights may be defended – even by originalists – on the basis that it does not constitute change because the earlier understanding was simply incorrect. Meanwhile, evolution that proceeds on what appears to be an incremental basis through common law interpretive methodology may result in considerable change over time. No single decision may be problematic, but a series of decisions may lead inexorably to a result that goes well beyond anything that might have been contemplated when the bill of rights was drafted. A case law-heavy bill of rights may come to mean something unintelligible from its terms.

This matters, I think, because the terms in which rights are protected in a bill of rights reflect political bargains and compromises that were relevant to the decision to pass it. Lord Bingham of Cornhill has put the point this way:

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<sup>32</sup> Justice Rosalie Abella of the Supreme Court of Canada develops this metaphor in ‘Public Opinion, The Courts, and Rights: The Charter in Context’ (2003) 19 *Sup Ct L Rev* 421, 423-4 (written while she was a member of the Ontario Court of Appeal).

<sup>33</sup> See, eg, Jeffrey Goldsworthy, ‘Interpreting the Constitution’, above n 26; ‘Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence’ in Sujit Choudhry ed, *The Migration of Constitutional Ideas* (forthcoming).

<sup>34</sup> In *R v Prosper* [1994] 3 SCR 236, 287, L’Heureux-Dube J wrote in dissent:

I doubt [living tree interpretation] can be used to interpret a constitutional document, such as the *Charter*, which is still in its infancy at a time when the socio-economic context has not evolved. Besides, the ‘living tree’ theory has its limits and has never been used to transform completely a document or add a provision which was specifically rejected at the outset. It would be strange, and even dangerous, if courts could so alter the constitution of a country [internal citations omitted].

The irony of Justice L’Heureux-Dube emphasizing caution in regard to living tree interpretation is that she was one of the most activist judges in interpreting the *Charter*. This makes the point, I suppose, that change is in the eye of the beholder. Elsewhere, Justice L’Heureux-Dube has lauded living tree interpretation and its potential for advancing equality, and women’s rights in particular. See ‘The Legacy of the ‘Persons Case’: Cultivating the Living Tree’s Equality Leaves’ (2000) 63 *Saskatchewan Law Review* 389.



The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European Court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' (*Edwards v Attorney General for Canada* [1930] AC 124, 136 per Lord Sankey LC), but those limits will often call for very careful consideration.<sup>35</sup>

Thus, proponents of living tree interpretation insist that living tree interpretation is subject to serious constraints. Ronald Dworkin, defending what he calls the 'moral reading' of the *US Bill of Rights*, calls these constraints the requirements of 'integrity':

Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges... Judges must defer to general, settled understandings about the character of the power the Constitution assigns them.<sup>36</sup>

It is arguable, however, just how seriously Dworkin takes the constraints of integrity; as Michael McConnell has noted, it is difficult to find cases in which they require him to accept interpretations he opposes.<sup>37</sup> But whether or not Dworkin observes integrity-based constraints in interpreting constitutional rights is less important than the fact that he acknowledges a need to do so at all.<sup>38</sup> The purpose of these constraints is, after all, to limit the scope of judicial discretion in interpreting the bill of rights – to legitimize the exercise of judicial authority. In short, the requirements of 'integrity' serve a purpose similar to originalism, which Dworkin's moral reading repudiates.<sup>39</sup>

Consider Dworkin's example of the limits on judicial discretion in interpreting the equal protection clause:

Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that

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<sup>35</sup> *Brown* [2003] 1 AC 681, 703.

<sup>36</sup> Dworkin, 'The Moral Reading and the Majoritarian Premise' in *Freedom's Law* (1996) 10-11 (Dworkin, 'The Moral Reading').

<sup>37</sup> Michael McConnell, 'The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's 'Moral Reading' of the Constitution' (1997) 65 *Fordham Law Review* 1269, 1270.

<sup>38</sup> Huscroft, 'Work in Progress?', above n 25, 429.

<sup>39</sup> Jeffrey Goldsworthy, 'Dworkin as an Originalist' (2000) 17 *Constitutional Commentary* 49, 53 notes that Dworkin's interpretive theory itself depends on the judgment that the framers of the US Constitution intended to enact abstract moral principles that courts would interpret and apply. Cf Randal Graham, *Statutory Interpretation: Theory and Practice* (2001), who argues that living tree interpretation is best understood as a species of originalism, in so far as it gives effect to the intention that the framers wanted meaning to evolve.

interpretation simply does not fit American history or practice, or the rest of the Constitution.<sup>40</sup>

The beauty of this example is that it is so obvious that everyone can agree. The notion that a provision of the *US Bill of Rights* – a state-limiting bill of rights – could be interpreted to require some form of socialism is as absurd to Dworkin the moral interpreter as it would be to his nemesis, US Supreme Court Justice Scalia the originalist. Beyond easy cases like this, however, there is ample room for disagreement when it comes to integrity. Does the decision of the US Supreme Court interpreting the due process clause to establish constitutional protection for abortion<sup>41</sup> – an outcome of which Dworkin approves – really ‘fit American history or practice, or the rest of the Constitution’?

Dworkin’s equal protection example demonstrates that there must be limits on living tree interpretation, whether explicit or implicit in the terms in which the rights are set out or in the broader purpose of the bill of rights itself. But Dworkin’s willingness to resolve issues like abortion and euthanasia<sup>42</sup> using the vague terms of the *US Bill of Rights* shows what is really at stake here. When the right case comes along, the temptation for Dworkin-inspired judges to inflate and develop a bill of rights to give effect to their own values can be great, even in a well-functioning democratic order.

Dworkin asserts that this concern is ‘exaggerated’ given the constraints of integrity,<sup>43</sup> but I am not reassured. At the end of the day the constraints depend upon judges for their explication and application in particular cases; the ones who are supposed to be constrained are the ones charged with doing the constraining. Dworkin acknowledges that judges can abuse their power (‘of course’), but all he can say is that the moral interpretation he espouses ‘is a strategy for lawyers and judges acting in good faith, which is all any interpretive theory can be’.<sup>44</sup> But judges acting in good faith may well change things considerably. As Peter Hogg and Allison Bushell put it, ‘Judges have a great deal of discretion in ‘interpreting’ the law of the constitution and the process of interpretation inevitably remakes the constitution in the likeness favoured by the judges.’<sup>45</sup>

Aileen Kavanagh’s answer to this concern is no more satisfying. On her account, the difference between interpretation and wilfulness is subjective intention: it is enough that judges *intend* to interpret the constitution. A judicial decision counts as an interpretation of

<sup>40</sup> Dworkin, ‘The Moral Reading’, above n 36, 11.

<sup>41</sup> *Roe v Wade*, 410 US 113 (1973) modified in *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833 (1992) (‘Casey’).

<sup>42</sup> Does assisted suicide fit American history or practice, or the rest of the Constitution? According to Dworkin, the answer is yes. He was lead author of the ‘The Philosopher’s Brief’, signed by luminaries John Rawls, Judith Jarvis Thomson, Robert Nozick, TM Scanlon, and Thomas Nagel, which argued that the prohibition on assisted suicide was unconstitutional. According to the brief, the US Bill of Rights protects the right of individuals to make the ‘most intimate and personal choices central to personal dignity and autonomy. That right encompasses the right to exercise some control over the time and manner of one’s death.’ The brief is set out in the New York Review of Books, <<http://www.nybooks.com/articles/1237>> at 1 September 2006. The US Supreme Court unanimously rejected the attempt to extend constitutional protection to assisted suicide in *Washington v Glucksberg*, 521 US 702 (1997) and *Vacco v Quill*, 521 US 793 (1997), and The Philosopher’s Brief was ignored. See Richard Posner, *The Problematics of Moral and Legal Theory* (1999) (arguing that this reflects the irrelevance of moral philosophy).

<sup>43</sup> Dworkin, ‘The Moral Reading’, above n 36, 11. Aileen Kavanagh makes the same assertion in ‘The Idea of a Living Constitution’ (2003) 16 *Canadian Journal of Law and Jurisprudence* 55, 77 (Kavanagh, ‘Idea of a Living Constitution’).

<sup>44</sup> Dworkin, ‘The Moral Reading’, above n 36, 11.

<sup>45</sup> Hogg and Bushell, ‘The Charter Dialogue Between Courts and Legislatures’ (1997) 35 *Osgoode Hall Law Journal* 75, 77 (Hogg and Bushell, ‘Dialogue’).

the constitution ‘if it is an attempt to answer the question “What does the Constitution mean?”’<sup>46</sup>

This is too broad for my liking, but Kavanagh goes on to argue that constraints on judicial discretion are inherent in the judicial method itself. Judges are constrained, for example, by such things as a duty to give reasons:

[I]f judges decide to change the law, then there must be good reason for it. The reasons in favour of changing the law must outweigh all the advantages that accrue to a more conservative decision. These include the values of predictability and certainty in the law, as well as continuity in legal doctrine. Thus, departures from established precedent must be well justified and defended. Cavalier disregard for constitutional doctrine will not attract respect and honour for a judge of the constitutional court, but a willingness to make the right decision, despite unpopularity or political consequences does.<sup>47</sup>

This seems to me to be a claim that judicial power will be kept in check by judges’ egos – that judges will be dissuaded from going too far by their desire to be respected and honoured. Kavanagh does not identify *whose* respect and honour judges are likely to seek, but presumably it will not be that of the elected branch, the very body the judges suppose requires their oversight. I suspect it will be that of the elite, prominent among which will be other jurists – domestic and foreign – and legal academics.

I wonder why it is appropriate for the elite to be the check on judicial power, but it is not clear how strong a constraint Kavanagh has in mind in any event. Consider her conception of living tree interpretation:

[I]n order to deliver a just decision, judges must always consider the possibility of adopting an innovative interpretation. The metaphor of the ‘living Constitution’ is a way of acknowledging this possibility and its value in constitutional adjudication. It also supports the fact that we need judges to be active lawmakers who do not shirk their creative role of resolving unresolved disputes about the requirements of the law and changing those requirements when needs be.<sup>48</sup>

Thus, Kavanagh lauds the courage of judges who depart from precedent; the courage of judges who withstand popular or political criticism and reproach; and the courage (and possibly greatness) of judges who make the right decision despite these pressures. In short, she supposes that a great judge is a judge who ‘does the right thing’:

[T]he decision to depart from established law because this will improve the law or provide the only way of resolving a case in a just manner, rightly deserves acclaim. A great constitutional judge must take responsibility for the development of

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<sup>46</sup> Kavanagh, ‘Idea of a Living Constitution’, above n 43, 59.

<sup>47</sup> Kavanagh, *ibid* 78. Wil Waluchow makes a similar claim: ‘[T]he requirement that judgments be publicly defended in light of constitutional principle, can sometimes work against any political biases to which judges might be subject.’ He immediately qualifies this point, however, by referring to the decision of the US Supreme Court in *Bush v Gore*, 531 US 98 (2000), the wrongfulness and illegitimacy of which, he assumes, speaks for itself; no explanation is provided, and it is not clear whether he is referring to the decision on constitutional violation, remedy, or both. See Waluchow, ‘Constitutions as Living Trees: An Idiot Responds’ (2005) 18 *Canadian Journal of Law and Jurisprudence* 207, 241.

<sup>48</sup> Kavanagh, above n 43, 68.

constitutional law when the law as it stands is inadequate to the task of resolving the issue before the court in a just manner.<sup>49</sup>

There is not a lot of law going on here, and it is easy to see why originalism appeals as a strategy to reign-in judicial discretion.

I think it comes to this: judges will go as far with living tree interpretation of bills of rights – statutory and constitutional – as they are comfortable in going given the way in which they perceive their role, their confidence in their institutional legitimacy and ability and, ultimately, something that is personal to individual judges: their sense of humility.

### CAN JUDICIAL DISCRETION BE CONSTRAINED BY JUDICIOUS DRAFTING?

Concerns about the scope of judicial discretion in interpreting a bill of rights might be assuaged if it were possible to lock-in particular meanings – in effect, to immunize particular rights against changes through interpretation.<sup>50</sup> Justice Scalia of the US Supreme Court has argued that those drafting bills of rights should either be ‘ruthlessly specific’ in drafting the protected rights, eschewing vague concepts like due process and equal protection, or should state that the protected rights are ‘no more and no less than what is reflected in the laws and practices of the current society’.<sup>51</sup>

Even assuming that it would work, however, Scalia’s is a defensive strategy that will not be of interest to most proponents of bills of rights; they are likely to have faith in judicial review and the courts. Nevertheless, there may be *some* meanings they would like to lock-in – if only to preclude other meanings they oppose – and they may attempt to do so. For example, equality provisions are often drafted in an attempt to ensure that ‘affirmative action’ – various programs allowing preferences on the basis of what would otherwise constitute prohibited grounds of discrimination – is permissible.<sup>52</sup> In the absence of such a provision, affirmative action might be controversial, as it is under the equal protection clause of the *US Bill of Rights*.<sup>53</sup>

The case law of other countries with bills of rights is often studied in an attempt to draft the provisions of a bill of rights in a manner that avoids problematic judicial interpretations, but the most important lesson is often overlooked: there can be no guarantees where living

<sup>49</sup> Kavanagh immediately qualifies this by saying that the ‘duty to do justice according to law ... sometimes demands creativity and innovation, but constitutional change must be well considered, carefully reasoned and should manifest respect for the Constitution rather than a maverick disregard of it.’ *Ibid* 79.

<sup>50</sup> I leave aside discussion of the legitimacy of doing so in the context of constitutional bills of rights. See Waldron, ‘A Right-Based Critique of Constitutional Rights’ (1993) 13 *Oxford Journal of Legal Studies* 18 [(Waldron, ‘Rights-Based Critique’)].

<sup>51</sup> Antonin Scalia, ‘The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?’, in Huscroft and Rishworth eds, *Litigating Rights* (2002) 19, 27. To do otherwise, he suggests, is to ‘buy a pig in a poke’. See also Scalia, ‘Romancing the Constitution’, in Huscroft and Brodie eds, *Constitutionalism*, above n 4, 19, 27.

<sup>52</sup> See, eg, ss 15(2) of the *Canadian Charter* and ss 19(2) of the *New Zealand Bill of Rights Act*. Where agreement on a particular conception of a right or freedom is not possible at the drafting stage, an attempt may be made to remove contentious matters from the ambit of a bill of rights. Section 48 of the *Victoria Charter of Human Rights and Responsibilities* purports to remove abortion in this manner. Styled a ‘Savings provision’, it reads as follows:

Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

<sup>53</sup> A sampling of the cases includes *Grutter v Bollinger*, 539 US 306 (2003); *Adarand Constructors Inc v Pena*, 515 US 200 (1995); *Metro Broadcasting Inc v FCC*, 497 US 547 (1990); *Richmond v JA Croson Co*, 488 US 469 (1989); *Regents of Univ of Cal v Bakke*, 438 US 265 (1978).

tree interpretation is concerned. The clearest of drafting intentions may prove to be irrelevant, as the following Canadian examples demonstrate.

***Fundamental change to intended meaning is possible***

Section 7 of the *Canadian Charter* is the poster-child for this problem. It has become one of the most difficult provisions in the *Charter* because of the way in which the Supreme Court of Canada has interpreted it, and yet the record is clear that it was intended to be a much simpler provision. It is styled as a legal right – it comes under the heading ‘Legal Rights’ in the *Charter* – and 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.

Peter Hogg describes the history and purpose of the provision as follows:

Before the legislative committee that reviewed the draft Charter of Rights, a parade of witnesses, including the Minister of Justice, who was responsible for the drafting, the officials who had actually prepared the drafts, and academic lawyers familiar with the jurisprudence of the United States, explained that the words ‘fundamental justice’ had been chosen in preference to ‘due process’ in order to avoid the substantive due process jurisprudence of the United States [pursuant to which the US Supreme Court has inferred additional substantive rights]. While fundamental justice did not have a clear meaning in pre-Charter jurisprudence, it was a concept that was intended to cover procedural due process only, not substantive due process. The committee accepted this interpretation.<sup>54</sup>

In other words, fundamental justice was considered synonymous with natural justice, then understood as providing procedural protection only. Nevertheless, only three years following passage of the *Charter* the Supreme Court of Canada held that s 7 included the very thing that the framers of the *Charter* had sought to avoid: substantive due process. According to the Court, the right allows the Court to examine not only the way in which laws operate, but also the substantive justification for the law itself. In *Re B.C. Motor Vehicle Act*<sup>55</sup> the Court made all of the usual arguments about the difficulty of ascertaining legislative intention, and then said that the danger of interpreting the right in terms of the apparent intention of the framers is that:

the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Obviously, in the present case, given the proximity in time of the *Charter* debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the *Charter*, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. 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

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<sup>54</sup> Hogg, above n 21, 83-4.

<sup>55</sup> [1985] 2 SCR 486 (*‘Motor Vehicle Act Reference’*).

ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.<sup>56</sup>

As Hogg notes, rarely will the history of a bill of rights provide an answer to the very question before the Court. It did so, however, in the *Motor Vehicle Act Reference*,<sup>57</sup> yet the answer turned out to be irrelevant. The Court's decision can be understood as having changed the *Charter* in this sense: substantive due process was not included by those who drafted the *Charter* and, more important, *every attempt was made to exclude it*. The Court's interpretation of the term 'fundamental justice' established constitutional protection for the very thing that the framers of the *Charter* had sought to avoid.

At the level of theory, this can all be explained. The framers of a bill of rights have no right to insist that their intentions be honoured, no matter how clear those intentions may be. The rights they create are subject to interpretation by the courts, and their meaning may evolve.

Nevertheless, one need not be a proponent of originalism to feel uneasy about the *Motor Vehicle Reference*. There is something unseemly about interpretation changing a bill of rights so soon after it has been passed.

***Courts are unwilling to close the door to the possibility of fundamental interpretive change***

Courts committed to living tree interpretation are reluctant to be categorical in adopting or rejecting particular interpretations if the effect of doing so would be to limit the potential evolution of a right. Judges do not want to be on the wrong side of history, nor do they want to put their successors in the difficult position of having to overrule their prior decisions in order to allow the living tree to evolve. In effect, courts are likely to reserve the right to change the interpretation of a bill of rights at a later date.

Consider *Gosselin v Quebec (Attorney General)*,<sup>58</sup> in which the Supreme Court of Canada was asked pursuant to a class-action lawsuit (seeking hundreds of millions of dollars in damages) whether s 7 of the *Charter* was infringed by low-level welfare (dole) benefits for young people (who could receive a higher benefit if they worked or trained). This was a novel claim in many ways; it was widely understood that economic and social rights were omitted from the *Charter* by design and that, in general, the *Charter* does not establish positive obligations.<sup>59</sup>

<sup>56</sup> [1985] 2 SCR 486 [53]. Justice Ian Binnie has referred to Justice Lamer's rejection of the drafter's intention as follows: 'He observed that if someone handed a judge an apple but called it a banana the judge would still be required by his or her oath of office to fearlessly declare it to be an apple.' Binnie, 'Constitutional Interpretation and Original Intent' in Huscroft and Brodie eds, *Constitutionalism*, above n 4, 345, 351.

<sup>57</sup> Hogg, above n 21, 84: 'Not only were the various statements in the legislative history unanimous, they went to the fundamental question of why s 7 had been included in the *Charter* in the first place.'

<sup>58</sup> [2002] 4 SCR 429 ('*Gosselin*').

<sup>59</sup> Charter rights are, in general, civil and political rights, usually understood as negative in their orientation. Of course, some civil and political rights may give rise to positive obligations – for example, the right to a fair trial implies a number of positive state actions. The point here is that the *Charter* was not supposed to include economic and social rights, let alone establish positive obligations on the state in regard to them.

A majority of the Court rejected Gosselin's claim,<sup>60</sup> but did not do so emphatically. On the contrary, Chief Justice McLachlin was at pains to demonstrate that the majority's judgment was anything but final, because the *Charter* must be understood as a living tree:

*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. ...*

*I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.*<sup>61</sup>

The suggestion here is that the plaintiff in *Gosselin* lost not because she could not claim the protection of a *Charter* right, but instead because the Court was not prepared to exercise its interpretive discretion to allow her to do so; the time was not right to change the *Charter*. The Court's decision to 'leave open the possibility' of interpretive change to establish positive obligations under s 7 of the *Charter* invites others to bring cases the Court might find sympathetic.<sup>62</sup> As a result, defeat of the claim to positive economic entitlements in *Gosselin* may prove to be nothing more than a temporary setback.

The judgment of the dissenting members of the Court strongly supported Gosselin's claim, and will no doubt be invoked in support of the argument in future cases. Justice Arbour (L'Heureux-Dube J. concurring) held that s 7 of the *Charter* 'readily accommodated' a positive obligation on government to offer what she described as 'basic protection' for its citizens. She acknowledged that this was an expansive interpretation of the right, but said as follows:

*As s 7 jurisprudence has developed, new kinds of interests, quite apart from those engaged by one's dealings with the justice system and its administration, have been asserted and found to be deserving of s 7 protection. To now continue to insist upon the restrictive significance of the placement of s 7 within the 'Legal Rights' portion of the Charter would be to freeze constitutional interpretation in a manner that is inconsistent with the vision of the Constitution as a 'living tree' which has always been part of the Canadian constitutional landscape.*<sup>63</sup>

<sup>60</sup> A narrower majority (5:4) of the Court also rejected Gosselin's claim of discrimination on the basis of age under s 15 of the *Charter*.

<sup>61</sup> *Gosselin* [2002] 4 SCR 429 [82-3] (emphasis added).

<sup>62</sup> Elsewhere I have argued that this is the flip side of *Lochner*-inspired substantive due process. See Huscroft, 'Work in Progress?', above n 25, 437: 'The essential difference between judicial decisions precluding government action on the basis of economic liberty rights inferred from the "due process" clause in the *U.S. Bill of Rights*, and those requiring government action on the basis of economic and social rights inferred from section 7 of the *Charter*, is the political complexion of the arguments.'

In his comments to me, Wil Waluchow suggested that my criticism of Chief Justice McLachlin's decision essentially begs the question by assuming that s 7 does not include positive rights, such that an interpretation that it includes them would constitute change. The Chief Justice could be read as saying simply that a sufficiently persuasive case to establish that, properly understood, s 7 includes positive rights, might be made. This objection seems to me to beg a different question, in essence assuming that s 7 can mean just about anything.

<sup>63</sup> [2002] 4 SCR 429 [317], dissenting (emphasis added).

The word ‘deserving’ gives things away here; Justice Arbour is not so much interpreting the *Charter* as she is proposing to improve upon it – to change it in a manner that she favours. It is hard to see how this is the sort of growth within the ‘natural limits’ Lord Sankey contemplated in *Edwards*. If anything, Justice Arbour’s decision confirms that the constraints on living tree interpretation are not severe – or at any rate are not necessarily so, if the Court is sympathetic to the claim.<sup>64</sup>

### *Uncertainty increases*

Increased uncertainty is a corollary of living tree interpretation.<sup>65</sup> The Supreme Court of Canada’s decision in the *Marriage Reference*<sup>66</sup> is a good example.

Following a series of lower court decisions declaring the common law definition of marriage (requiring opposite-sex couples) unconstitutional,<sup>67</sup> concerns were raised about the freedom of churches to adhere to the traditional definition. The federal government referred several questions to the Supreme Court of Canada for an advisory opinion,<sup>68</sup> one of which asked as follows:

Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?<sup>69</sup>

<sup>64</sup> Only one member of the Court, Justice Bastarache, was prepared to interpret s 7 in accordance with its intended purpose, and it appears that he has since abandoned this position. Following a review of the case law and s 7, Bastarache J said: ‘some relationship to the judicial system or its administration must be engaged before s 7 may be applied ... at the very least, in order for one to be deprived of a s 7 right, some determinative state action, analogous to a judicial or administrative process, must be shown to exist. Only then may the process of interpreting the principles of fundamental justice or the analysis of government action be undertaken’ at [215-16]. Subsequently, Bastarache J signed on to Chief Justice McLachlin’s opinion in *Chaoulli* [2005] 1 SCR 791, which adopts a more expansive view of s 7, but says nothing of his dissenting opinion in *Gosselin*.

<sup>65</sup> See *Casey*, 505 US 833 (1992), in which the US Supreme Court debates the relevance of settled expectations under contested precedents.

<sup>66</sup> *Reference re Same-Sex Marriage* [2004] 3 SCR 698.

<sup>67</sup> See *Hendricks v Quebec* (Procureur general) [2002] JQ 3816 (Quebec Sup Ct); *EGALE Canada Inc v Canada (Attorney General)* (2003) 13 BCLR (4<sup>th</sup>) 1 (BC CA), declaring the opposite-sex requirement unconstitutional but suspending the rulings in order to allow a government response. *Halpern v Canada (Attorney-General)* (2002) 60 OR (3d) 321, a decision of the Ontario Court of Appeal, brought the issue to a head by authorizing same-sex marriages immediately. These decisions are the culmination of living tree interpretation that began with the Court’s decision to interpret the Charter equality guarantee as prohibiting discrimination based on sexual orientation in *Egan v Canada* [1995] 2 SCR 513. They would have been inconceivable in 1985, when the equality right came into effect, because sexual orientation was deliberately left off the list of prohibited grounds of discrimination in s 15 of the *Charter*, and most would have assumed the definition of marriage either did not discriminate or constituted a reasonable limit on the right in any event.

<sup>68</sup> This procedure is available in Canada pursuant to the *Supreme Court Act*, RSC 1985, c S-26. No such advisory jurisdiction exists in the United States, where Article III s 2 establishes a ‘case or controversy’ requirement, or in Australia.

<sup>69</sup> I discuss the *Marriage Reference* in Huscroft, ‘Thank God We’re Here’ (2004) 25 *Sup Ct L Rev* 241, 255-63 (Huscroft, ‘Thank God We’re Here’) and in Huscroft, ‘Political Litigation and the Court’s Response’ (2006) 34 *Sup Ct L Rev* xxx. Suffice to say here that the same-sex marriage reference is one of the most political references the Court has handled. The Court’s refusal to answer the only real question in dispute – whether opposite-sex marriage was inconsistent with the *Charter* – shows just how politicized *Charter* litigation can be.



Now, imagine if the Court's decision read something like this:

At present, the freedom of religion protects religious officials from being compelled to perform a marriage between two persons of the same sex when that is contrary to their religious beliefs. However, the *Charter* is a living tree and in a future case we may conclude that it does not, or that limits on the exercise of the freedom are justified in view of the importance of equality, our understanding of which continues to evolve.

This is not the sort of answer the Court could give, of course; it acknowledges that the *Charter* is less important than the Court's interpretation of it. Nor was this the sort of answer the government sought; it was attempting to invoke the Court's authority to assuage concerns about the impact of the changed definition of marriage, and wanted a simple yes/no answer (expecting the answer 'yes'). The Court knew this, and advised as follows:

Absent state compulsion on religious officials [to marry same-sex couples], this conjecture does not engage the *Charter*. If a promulgated statute were to enact compulsion, we conclude that such compulsion would *almost certainly* run afoul of the *Charter* guarantee of freedom of religion, given the expansive protection afforded to religion by s 2(a) of the *Charter*.<sup>70</sup>

The Court's discomfort with categorical declarations is evident in the qualifying words it uses throughout the decision. 'Absent exceptional circumstances which we cannot at present foresee', said the Court, 'such an infringement could not be justified under s 1 of the *Charter*?'.<sup>71</sup> The Court reiterates the inherent limits on its interpretation in restating its conclusion:

[T]he Court is of the opinion that, *absent unique circumstances with respect to which we will not speculate*, the guarantee of religious freedom in s 2(a) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.<sup>72</sup>

The meaning of a bill of rights subject to living tree interpretation is subject to change, and as a result some amount of uncertainty is inevitable.

## **DO STATUTORY BILLS OF RIGHTS ANSWER CONCERNS ABOUT JUDICIAL REVIEW?**

It might be thought that the concerns identified above have less relevance in the context of statutory bills of rights, which are designed to preserve parliamentary sovereignty. That is the sort of bill of rights that has been adopted in Victoria, so I want to consider this objection here.

The first point to make is that a legislature's ability to respond to judicial decisions in interpreting statutory bills of rights is not so great as is usually assumed. In theory, of course, problematic decisions can be reversed by ordinary legislation; provided that it operates within constitutional confines a legislature can legislate as it sees fit. It can legislate despite the bill of rights. For that matter, it can amend the bill of rights or even repeal it.

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<sup>70</sup> *Marriage Reference* [2004] 3 SCR 698 [56] (emphasis added).

<sup>71</sup> [2004] 3 SCR 698 [56-8].

<sup>72</sup> [2004] 3 SCR 698 [60] (emphasis added).

So much for theory. In practice things are much different. In practice it is difficult to amend or repeal even ordinary legislation: it can be a costly and time-consuming process at the best of times.<sup>73</sup> This explains why controversial legislation may not be amended or repealed by successor governments, even legislation they opposed strongly while in opposition. Governments have full legislative agendas and limited political capital, and something has to give in order to revisit issues that have been settled. There will often be little political incentive to re-open debate on politically divisive issues, especially if legislation has bedded-in and rights have become vested.

If it is difficult to amend or repeal ordinary legislation, consider how much more difficult it is to do so once a bill of rights enters the picture. Canada is thought by some to have ‘weak’ form judicial review, since the federal Parliament and provincial legislatures have the power pass ordinary legislation ‘notwithstanding’ certain *Charter* rights.<sup>74</sup> The notwithstanding clause was the political compromise that allowed the provincial premiers to agree to passage of the *Charter*.<sup>75</sup> Nevertheless, it has rarely been invoked. It is a dead letter federally, where successive prime ministers have disavowed its use;<sup>76</sup> it has not been used in Ontario, British Columbia, and several other provinces; and such uses that have been made outside Quebec – the lone province that opposed patriation of the *Canadian Constitution* and passage of the *Charter* – are largely irrelevant.<sup>77</sup>

The lesson to be learned from Canada’s experience with the notwithstanding clause is that the decision to legalize rights has impact beyond the strict legal effect of the protected rights. Every decision of the courts interpreting a bill of rights, statutory or constitutional, has intentional and unintentional consequences; every judicial decision changes the political landscape. This is why I find ‘dialogue theory’<sup>78</sup> unsatisfying. It seeks to legitimate judicial review by emphasizing the power of legislatures to respond to judicial decisions, but it exaggerates that power considerably by failing to take proper account of political constraints on the legislative process.

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<sup>73</sup> It is especially difficult to legislate in a genuine bicameral system, as in Australia, where two elected houses must agree.

<sup>74</sup> The extent of the notwithstanding power (s 33 of the *Charter*) is often exaggerated. It does not apply to all *Charter* rights, it cannot be exercised retrospectively (*Ford v Quebec* [1988] 2 SCR 712), and legislation passed ‘notwithstanding’ *Charter* rights lasts only for five-year periods, subject to renewal.

<sup>75</sup> There was agreement across the political spectrum that the power of courts was to be constrained, albeit for very different reasons; the NDP Premier of Saskatchewan and the Conservative Premier of Manitoba were the main opponents to judicial supremacy. See Howard Leeson, ‘Section 33, The Notwithstanding Clause: Paper Tiger?’ in Paul Howe and Peter H Russell (eds), *Judicial Power and Canadian Democracy* (2001) 297; and for recent discussions see Cameron, Hiebert, and Kahana, in *Constitutionalism in the Charter Era*, above n 4, 135, 169, 191.

<sup>76</sup> Former Liberal Prime Minister Paul Martin announced during the 2006 federal election campaign that he would seek to amend the Canadian Constitution to abolish it. Martin’s campaign gambit sought to capitalize on fears that the Leader of the Opposition would use the notwithstanding clause if he were to form a government. Martin lost the election, and the Conservative Opposition formed a minority government.

<sup>77</sup> Hogg, *Constitutional Law*, above n 15, ch 36.8.

<sup>78</sup> See, eg, Hogg and Bushell, ‘The *Charter* Dialogue Between Courts and Legislatures’ (1997) 35 *Osgoode Hall Law Journal* 75; Hogg and Thornton, ‘Reply to “Six Degrees of Dialogue”’ (1999) 37 *Osgoode Hall Law Journal* 529; Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001) (Roach, *Supreme Court on Trial*). Cf Manfredi and Kelly, ‘Six Degrees of Dialogue: A Response to Hogg and Bushell’ (1999) 37 *Osgoode Hall Law Journal* 513 and Manfredi and Kelly, ‘Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures’ (2001) 64 *Saskatchewan Law Review* 323.

Once the idea takes hold that rights are the province of the judiciary – and for some, propagation of this idea is one of the ultimate purposes of a bill of rights, whether statutory or constitutional – it is hardly surprising to find that legislators are unwilling to exercise any power they retain over the courts.<sup>79</sup> It is not a fair fight.<sup>80</sup> Disagreement with judicial decisions is easily characterized as self-serving, and the usual arguments about tyranny of the majority and acting as judge in one's own cause have enormous rhetorical force.<sup>81</sup>

Although they may say otherwise,<sup>82</sup> courts do not believe that they are involved in a 'dialogue' with lawmakers any more than lawmakers do. Jeremy Waldron's observation is apt:

I suspect many who talk about 'dialogue' between courts and legislatures really have in mind a sort of one-sided monologue, in the course of which the legislature would be expected to change its position in the light of the occasional lectures and reprimands it receives from the judiciary, but in which the courts, for their part, would regard any claim there should be learning and modification of positions taken by the judges on the basis of what they hear from the legislature as the height of impudence. The elected legislators are to take lessons from their elders and betters on the bench. But, it is thought, the judges in their wisdom have little to learn and nothing to reconsider in light of the legislature's amateurish observations about how best to understand constitutional structures and restraints.<sup>83</sup>

Waldron's observation is borne out in Canadian case law concerning prisoners' voting rights. In *Sauvé v Canada (Attorney General)*<sup>84</sup> the Supreme Court of Canada struck down a blanket ban on prisoner voting on the basis that it was disproportionate. Following extensive study and debate Parliament responded by passing new legislation establishing a lesser limitation, yet this law, too, was struck down by the Court in an ill-tempered majority decision by Chief Justice McLachlin:

[T]he fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a 'dialogue'. Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of 'if at first you don't succeed, try, try again'.<sup>85</sup>

The relationship of courts and legislators is hierarchical where bills of rights are concerned, and the dialogue metaphor causes great mischief in suggesting otherwise.

<sup>79</sup> The way in which Canada's notwithstanding clause is worded is an important factor in explaining the reluctance of legislatures to invoke it. It speaks in terms of legislating notwithstanding rights, rather than judicial interpretations of rights; in popular parlance the notwithstanding clause has become known as the *Charter override*. See Waldron, 'Some Models', above n 4, 34-9. The *Victoria Charter of Human Rights* specifically characterizes its notwithstanding mechanism as an override of *Charter* rights.

<sup>80</sup> Grant Huscroft, 'Rights, Bills of Rights, and the Role of Courts and Legislatures' in *Litigating Rights*, above n 51, 3, 14-15.

<sup>81</sup> Despite Jeremy Waldron's debunking of both ideas. See Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

<sup>82</sup> See, eg, *Vriend v Alberta* [1998] 1 SCR 493 ('*Vriend*'); *R v Mills* [1999] 3 SCR 668.

<sup>83</sup> Waldron, 'Some Models', above n 4, 7-8.

<sup>84</sup> [1993] 2 SCR 438.

<sup>85</sup> *Sauvé v Canada (Attorney General)* [2002] 3 SCR 519 [17].

Indeed, some rely on the metaphor to justify more expansive judicial interpretations of bills of rights than is warranted.<sup>86</sup>

A striking feature of the *Victoria Charter of Human Rights and Responsibilities* is the extent to which it purports to limit judicial power. Proponents insist that parliamentary sovereignty has been preserved; there will be a real dialogue, and courts will not have the last word. Indeed, proponents of the *Victoria Charter* have asserted that they welcome the disagreement of the elected branch about the meaning of rights.

I wonder. My sense is that proponents of bills of rights are more likely to regard the refusal of the legislature to accept judicial decisions as a demonstration of might rather than of reason. The decision to legalize rights in any form necessarily establishes a privileged position for judges in rights discourse, and it should come as no surprise if judges come to exercise greater *de facto* power under a statutory bill of rights like the *Victoria Charter* than the *de jure* limits on judicial power suggest. Living tree interpretation allows courts to make 'weak' judicial review models stronger if they choose to do so.<sup>87</sup> The real impact of a statutory bill of rights may take some time to become evident.

## CONCLUSION

The decision to codify vague terms like 'equality', 'due process', 'freedom of expression', and so on in a bill of rights, whether statutory or constitutional, renders disagreement about their interpretation by courts inevitable. And yet this is the only form in which bills of rights are likely to pass; to insist on consensus about the interpretation or application of such terms is to insist on the impossible.<sup>88</sup>

The decision to pass a bill of rights in statutory rather than constitutional form reflects concerns about the legitimacy of judicial review and the power of the courts. Yet, it is an imperfect solution; it simply precludes the *de jure* finality of judicial interpretations. As I have suggested, judicial decisions have substantially greater *de facto* authority than is usually acknowledged. All bills of rights are based on the idea that judges have an important role to play in protecting rights, and growth in the importance of the judicial role as a result of living tree interpretation seems to me to be inevitable.

As the importance of the interpreted bill of rights grows, concerns about the politicization of the judiciary are bound to arise. No government can afford to be indifferent to the composition of a court whose decisions will help shape its political agenda – or indeed, might help to advance that agenda. One of the greatest proponents of living constitutionalism to serve on the US Supreme Court, Justice William Brennan, acknowledged as much even as he endorsed strong judicial review bills of rights:

It goes without saying that the way in which judges are chosen becomes increasingly important as their authority grows, particularly when they are charged with interpreting entrenched, broadly characterized guarantees and thus cannot easily be reversed by a disapproving legislative majority. And it would be fatuous to deny that, so long as elected officials select judges and reasonable people disagree over the proper scope of protected rights, politics will play some part in

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<sup>86</sup> See, eg, Kent Roach, *Supreme Court on Trial*, above n 78, 237: 'it is better for judges to err on the side of over-enforcing rather than under-enforcing rights because the legislature is much more likely to counter the former than to make up for the latter.'

<sup>87</sup> The strong-weak terminology is discussed by Mark Tushnet, 'Judicial Review of Legislation' in Cane and Tushnet (eds), *Oxford Handbook of Legal Studies* (2003) 164.

<sup>88</sup> See Randal Graham, above n 39, 126-7.

determining who ascends the bench.<sup>89</sup>

To return to the question posed, there are bound to be disagreements about the impact of living tree interpretation, and in particular whether or to what extent it causes harm. But there should be no doubt that it has the potential to cause considerable change, whether a bill of rights is statutory or constitutional in nature.

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<sup>89</sup> William Brennan, 'Why have a Bill of Rights?' (1989) 9 *Oxford Journal of Legal Studies* 425, 434-5.

