The Charter of Rights and American Theories of Interpretation

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THE CHARTER OF RIGHTS AND AMERICAN THEORIES OF INTERPRETATION

BY PETER W. HOGG

I. INTRODUCTION ........................................ 88
   A. Purpose of Article .............................. 88
   B. Legitimacy of Judicial Review ............... 88
   C. Natural Rights .................................. 89

II. INTERPRETIVISM AND NONINTERPRETIVISM .... 90
   A. Definitions ..................................... 90
   B. Noninterpretivism Criticized ................. 92
   D. Legislative History in Canada ............... 97
   E. Progressive Interpretation in Canada ....... 97
   F. Scope of Interpretation ....................... 100

III. PURPOSIVE INTERPRETATION ...................... 102

IV. PROCESS-BASED INTERPRETATION ............... 104
   A. Ely's Thesis .................................... 104
   B. Expressly Substantive Rights ................. 106
   C. Legal Rights .................................. 108
   D. Equal Protection ............................... 108

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I acknowledge the help of my colleague Patrick Monahan who read an earlier version of this article and made suggestions for its improvement. I also benefitted greatly from discussion at and following a faculty seminar at which an earlier version of this paper was presented.
I. INTRODUCTION

A. Purpose of Article

This article examines some of the American literature on the interpretation of constitutionally guaranteed rights, and considers the application of the ideas to the Canadian Charter of Rights and Freedoms.\(^1\) The conclusions are enumerated at the end of the article. I fear that they may appear rather banal to those who have not been following the American literature on rights. The reader may wish to consult the conclusions before deciding finally to embark on the journey through the intervening text.

B. Legitimacy of Judicial Review

The problem of the legitimacy of judicial review is inescapably central to the discussion. It should be noticed at the outset, however, that it is a much less serious problem in Canada than it is in the United States. First of all, Canada adopted the Charter in full knowledge that the application of the Charter by non-elected, non-accountable judges would nullify the acts of elected legislative bodies and accountable officials, and would occasionally do so in unpredictable ways; this issue was a major theme of the political debate that preceded the adoption of the Charter. Secondly, the override clause of section 33, which was inserted to placate the provinces who feared the power of judicial review,

enables judicial decisions under most of the provisions of the Charter to be overridden by the competent legislative body. For these two reasons, a judicial decision striking down a law or act for breach of the Charter does not seriously disturb basic democratic principles, and Canadians need not agonize over the issue of legitimacy in the way that the Americans have done.\footnote{Any decision by a non-elected judge that has political consequences (which occur in other fields as well as constitutional law) raises an issue of legitimacy.}

These points are more fully explored later in the article.

C. Natural Rights

I should make clear an underlying assumption of the article that will render some of the discussion unsatisfying to some readers. I do not believe in "natural rights." If that makes me a positivist, so be it. I do not know how to identify natural rights, from whence they derive their authority, or what the legal effect of their breach could be.\footnote{An excellent critique of natural rights theories is J.A. Griffith, Public Rights and Provided Interests (Trivandrum: Academy of Legal Publications, 1981) at 5-19.} I do not trust any judge to reach conclusions on these matters. My scepticism is reinforced by the widely differing accounts of rights that are given by legal philosophers such as Dworkin,\footnote{R. Dworkin, Taking Rights Seriously (Cambridge: Harvard University Press, 1978).} Rawls,\footnote{J. Rawls, A Theory of Justice (Mass.: Belknap Press of Harvard University Press, 1971).} Nozick,\footnote{R. Nozick, Anarchy, State and Utopia (Oxford: Blackwell, 1975).} and Finnis,\footnote{J. Finnis, Natural Law and Natural Rights (New York: Oxford University Press, 1980).} who do believe in natural rights.\footnote{All I mean by "natural rights" are rights derived from sources other than positive law. The viewpoints of Dworkin, Rawls, and Nozick and others (but not Finnis) are conveniently collected in a set of essays: D. Lyons, ed., Rights (California: Wadsworth Publishing Co., 1979). For a brief secondary account, see J.W. Harris, Legal Philosophies (London: Butterworths, 1980).} To me, rights are creatures of law. The rights guaranteed by the
Charter of Rights are legally enforceable because they are contained in a supreme constitutional instrument, not because they reflect the natural rights of man (or woman).

The rights guaranteed in the Charter are worthy of respect as sound moral ideals, but many other ideals that are also morally sound are not enshrined in the Charter. One of the dangers of the Charter is that it elevates its precepts over others that, in my view, are just as worthy of respect. The Charter says nothing (nor do the rights theorists) about rights to a decent income, housing, health care, or education; yet liberty and equality are not achieved when some of our fellow citizens do not enjoy these things. Indeed, it is important to be on guard against the perverse effect of the Charter actually impeding the achievement of better social and economic justice.9 That is not the topic of this article. My only points here are that the Charter was made in Canada, not in heaven; that the Charter's precepts reflect a set of values that have been selected by imperfect human beings, not by God or reason or natural law; that the Charter's precepts do not include all of the values upon which Canadian society sets store, and not even all of the values necessary for the achievement of individual liberty and equality; and, finally, that extravagant claims for the Charter's moral authority, or deep-seated opposition to the use of section 1 or section 33, are entirely inappropriate.

II. INTERPRETIVISM AND NONINTERPRETIVISM10

A. Definitions

Only in America could such neologisms as "interpretivism" and "noninterpretivism" have gained currency. Indeed these two terms have become the banners under which two schools of

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10 An earlier version of this section of the article, entitled "Interpretivism and Noninterpretivism," was delivered as a lecture on July 19, 1986 at the Stanford Lectures 1986, a conference held at Stanford University by the Canadian Institute for Advanced Legal Studies.
American Theories of Interpretation

1987

American Theories of Interpretation

91

constitutional theory contend. At issue is the proper role of the courts in reviewing legislation that is attacked as contrary to the Bill of Rights. In this section of the article I will argue that noninterpretivism is nonsense; that interpretivism is a concept that is useful only in contrast to noninterpretivism; and that both terms can safely be banished from Canadian constitutional theory. Nevertheless, the American controversy raises issues that are relevant in Canada (or in any other country with a judicially-enforced constitution). Some of these issues are addressed in later sections of this article.

Interpretivism is the theory that holds that judicial review of legislation must be based on the language of the constitution.\(^{11}\) According to this theory, the role of the courts in reviewing legislation should not go beyond the interpretation of the text. Noninterpretivism is the theory that holds that the text is so vague and indeterminate that the courts are inevitably driven to apply standards that are not to be found in the text.\(^{12}\) Once having rejected the text as the source of the standards of judicial review, the noninterpreters have to explain where the standards do come from, and a variety of sources have been suggested: for example, the moral values of the judge, the moral values of society, or some variant of natural law, usually in the form of a theory of justice, democracy, or morality.\(^{13}\)

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\(^{13}\)The various suggestions are catalogued and discussed in J.H. Ely, Democracy and Distrust (Cambridge: Harvard University Press, 1982) c. 3.
B. Noninterpretivism Criticized

The noninterpretivist theory, even if it accurately reflects what some judges have sometimes done, cannot provide a satisfactory theoretical basis for judicial review. Judicial review in the United States dates from the decision in *Marbury v. Madison*,\(^{14}\) in which Marshall C.J. decided that a conflict between the constitution and an ordinary statute had to be resolved in favour of the constitution, because the constitution was the more fundamental of the two competing laws. Judicial review in Canada stemmed from similar reasoning. Where there was a conflict between the *British North America Act*\(^{15}\) and an ordinary statute, the *British North America Act* had to prevail, because it was an imperial statute which took precedence over the acts of colonial legislatures.\(^{16}\) In each country, therefore, judicial review was premised on a simple idea: the duty of the courts was to apply the law, and where two laws were in conflict, the more fundamental constitutional law was selected as the governing rule.

If it were the case that the courts were empowered to hold statutes invalid by recourse to standards that are not in the constitutional text, then we would expect to find the institution of judicial review in the United Kingdom and New Zealand, two countries in which the constitution has been held not to be a fundamental law. Although the constitutions of the United Kingdom and New Zealand are freely amendable by ordinary legislation, on a noninterpretivist view a judge could be expected to hold a statute invalid whenever it conflicted with the standards that justify judicial review, whether they be the moral values of the judge, the moral values of society, or natural law.

In England, a power of judicial review was indeed asserted by Coke C.J. in 1610, in his famous statement that "when an Act of Parliament is against the common right and reason, or repugnant, or

\(^{14}\) U.S. (1 Cranch) 137 (1803).

\(^{15}\) *British North America Act, 1867*, U.K. 30 & 31 Victoria, c. 3.

impossible to be performed, the common law [that is, the courts] will control it, and adjudge such Act to be void.\textsuperscript{17} But it seems likely that Coke C.J.'s view was never more than an "empty phrase."\textsuperscript{18} Certainly, the asserted power to hold an Act of Parliament void was never actually exercised by an English court. According to de Smith, at least by the time of the Revolution of 1688, "the judges had tacitly accepted a rule of obligation to give effect to every Act of Parliament, no matter how preposterous its content."\textsuperscript{19} The safeguards against preposterous legislation were "political and conventional, not strictly legal."\textsuperscript{20}

In seventeenth-century England, Parliament became accepted as superior to the other two branches of government, namely, the King and the courts. All conflicts between Parliament and the other branches were settled in Parliament's favour. This development was an inevitable outcome of the growth of ideas of democracy. Even the judges could see that Parliament's view of "common right and reason" should be preferred to that of the courts. As the franchise has extended and corrupt election practices have disappeared, it seems even more obvious that the solemnly legislated decisions of an elected Parliament should prevail over the policy preferences of non-elected judges.

It is plain that noninterpretivism permits judges to impose their views of sound policy or morality upon the accountable branches of government, to the point of actually declaring legislation to be void. Noninterpretivism grants to non-elected judges "a veto over the politics of the nation,"\textsuperscript{21} forbidding its legislatures to reach decisions that the judges believe are wrong. Such a veto is as unacceptable, and for the same reasons, as a veto by the Queen or

\textsuperscript{17}Dr. Bonham's Case (1610), 8 Co. Rep. 113, 118; 77 E.R. 646, 652 (K.B.).


\textsuperscript{19}Ibid. at 81.

\textsuperscript{20}Ibid. at 82.

the Governor-General — a veto that existed in colonial times but has now been discarded as incompatible with democracy.

C. Interpretivism Criticized

If noninterpretivism is such a bad idea, why does it enjoy so much support among constitutional lawyers in the United States? The answer seems to lie in the general acceptance of theories of interpretation that are much narrower than those accepted by Canadian lawyers. Thus, Raoul Berger, the leading modern exponent of interpretivism, claims that the Constitution of the United States is frozen in the sense intended at the time of its adoption. That sense may be derived from the plain words of the text, or, where the text is ambiguous, from evidence of the intention of the framers. In his book, *Government by Judiciary*, Berger examines the legislative history of the Fourteenth Amendment. Having satisfied himself that the majority of the framers did not intend to end the racial segregation of schools or the malapportionment of state legislatures, he concludes that *Brown v. Board of Education* (which held that racial segregation of public schools violated the equal protection clause of the Fourteenth Amendment) and *Baker v. Carr* (which held that the equal

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22 Berger, *supra*, note 11.

23 Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.


protection clause required that each vote be of equal value) were wrongly decided.  

Interpretivism, as expounded by Berger, is a difficult pill to swallow. To modern eyes, the Fourteenth Amendment, which guarantees "equal protection of the laws," seems rather clearly apt to condemn racial segregation in schools and other public facilities. The amendment will also bear the meaning of condemning the gross underrepresentation of urban dwellers in state legislatures. Further, as Berger agrees, such distinctions plainly ought to be condemned. It seems a hard rule to have to say that the elimination of racial segregation cannot be administered by the courts because the group of men who framed the Fourteenth Amendment after the Civil War — more than 100 years ago — did not contemplate its use for that purpose. This is certainly not a rule to fire the imagination. It is little wonder that (as Berger concedes) American courts have preferred the rule of "progressive interpretation," under which a constitutional text is not frozen in the sense in which it would have been understood at the time of its framing, but is open to new interpretations in response to changing conditions and ideas.

The case for interpretivism (or "originalism" as it is sometimes described) as expounded by Berger, is related to the legitimacy of judicial review. He argues that it is inappropriate in a democracy for non-elected judges to substitute their policy preferences for those of the elected legislators. If the interpretation of the constitution could not go beyond the "original understanding," the judges' policy preferences would be excluded from constitutional adjudication. If constitutional adjudication were based solely on the values of the framers, then judicial review would be a legitimate enterprise. Once extrinsic values are introduced into constitutional adjudication by non-elected judges, the problem of legitimacy cannot be resolved. Noninterpretivism is illegitimate, Berger argues, because it grants to the Supreme Court a power to amend the constitution without recourse to the amending procedure provided for in the constitution. Interpretivism confines the Court to its proper role and is therefore essential to the legitimacy of judicial review.

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26 Berger, supra, note 11 at 348-50.
The trouble with interpretivism, is that the concept of the "original understanding" or "framers' intention" is far too vague and elusive to control the process of interpretation. Consider the difficulties. It is difficult to identify the framers — the persons whose intentions count — out of the numerous individuals in the various legislative bodies that adopted the Fourteenth Amendment (or any other constitutional text). It is difficult in any event to attribute a single intention to a deliberative body, or several deliberative bodies, if they did not pass a resolution on the point in issue. It is difficult to ascertain historical facts: even historians dispute basic questions about the making of the American constitution, and apparently settled ideas are capable of being overturned by the discovery of new material or the reinterpretation of existing sources.

Even if all these difficulties could be overcome (which I deny), the original understanding is still a fundamentally ambiguous idea. The originalist's assumption is that the framers had clear views about the meaning of the words they were adopting and intended that these meanings should be forever conclusive. However, it is at least equally plausible to attribute a quite different "interpretive intent" to the framers. They undoubtedly intended their handiwork to last for a long time. They knew that there would be great changes in society in the succeeding decades and centuries. They knew that amendment would be difficult. It is at least possible, therefore, that the framers did not desire that their text be frozen in the sense that it bore at its origin; that they were content to leave the detailed application of the constitution to the courts of the future; and that they were content that the process of adjudication would apply the text in ways that could not be anticipated at the time of the drafting. In other words, the principle of "progressive interpretation" is not necessarily antagonistic to the "original understanding" or the intention of the framers.


For discussion, see Hogg, supra, note 16 at 340-41.
D. Legislative History in Canada

There has always been a difference between the United States and Canada in the judicial attitude towards the legislative history (the drafting process) of constitutional and statutory texts. In the United States, legislative history is routinely admissible as an aid to interpretation. This is undoubtedly one of the reasons why Berger can argue that the original intention of the framers is "as good as written into the text" and is "binding" on the court. Such an argument would be utterly implausible in Canada and other Commonwealth jurisdictions where legislative history has generally been held to be inadmissible as an aid to the construction of constitutional or statutory texts. In the last ten years the Supreme Court of Canada has become more receptive to the use of legislative history but has never really deviated from its longstanding attitude that it is the language of the text that is authoritative, not the unexpressed intention of its framers. Legislative history, although now admissible, is to be used with great caution and given little weight.

E. Progressive Interpretation in Canada

The principle of progressive interpretation of the constitution is as firmly established in Canada as is the principle of minimal reliance on legislative history. The Supreme Court has repeatedly asserted that the language of the constitution is not to be frozen in the sense in which it would have been understood in 1867. Rather,

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29 Berger, supra, note 11 at 368.
30 Ibid. at 3.
31 Hogg, supra, note 16 at c. 6.
the constitution is to be regarded as "a living tree capable of growth and expansion within its natural limits."\textsuperscript{33}

In Canada, progressive interpretation has been an essential tool in allocating legislative jurisdiction over technological developments that did not exist in 1867 and could not have been provided for by the framers. For example, no one expected the courts to wait for a constitutional amendment before allocating legislative authority over the telephone,\textsuperscript{34} radio,\textsuperscript{35} television,\textsuperscript{36} or aviation.\textsuperscript{37} Much modern regulation of labour relations, the professions, marketing, and business generally, pursues purposes and employs means that could not have been anticipated in 1867;\textsuperscript{38} nor could the rise of the welfare state, with its elaborate systems for the public provision of education, health, and welfare have been anticipated.\textsuperscript{39} Yet all these developments have been litigated through the courts, and decisions have been given as to the legislative body with responsibility for each new measure.\textsuperscript{40}

\begin{enumerate}
\item \textit{Toronto v. Bell Telephone Co.} (1904), [1905] A.C. 52.
\item With rare exceptions (aviation, \textit{supra}, note 37, above, is one), the courts did not allocate these new matters to the federal residuary power (peace, order and good government) or the provincial residuary power (local and private matters). They allocated the new matters to particular enumerated heads of power, interpreting the language of the head of power as apt to encompass the new matter.
\end{enumerate}
case the court has assumed that the language of the constitutional
text is capable of application to laws that could not possibly have
been within the contemplation of anyone in 1867.

The principle of progressive interpretation has also been
applied to the minority language guarantee in section 133 of the
Constitution Act, 1867.\textsuperscript{41} This section is one of the few bill-of-rights
provisions in Canada's pre-1982 constitution. In \textit{A.-G. Que. v. Blaikie},\textsuperscript{42} the Supreme Court of Canada held that section 133's
requirement that "Acts" of the Quebec Legislature be in both
English and French applied to delegated legislation as well,
reasoning that account should be taken of "the growth of delegated
legislation."\textsuperscript{43} In the same case, the Court held that section 133's
requirement that both languages could be used in "the Courts of
Quebec" extended to administrative tribunals, reasoning that "it
would be overly technical to ignore the modern development of
noncurial adjudicative agencies which play so important a role in our
society."\textsuperscript{44}

Since the \textit{Charter of Rights} dates only from 1982, the
Supreme Court of Canada has not yet been called upon to apply its
provisions to facts that could not have been within the
contemplation of the framers. But the Court has clearly stated that
the principle of progressive interpretation applies to the \textit{Charter} no
less than to the rest of the constitution.\textsuperscript{45}

\begin{footnotes}
\item[41] U.K. 30 & 31 Victoria, c. 3.
\item[42] [1979] 2 S.C.R. 1016, 101 D.L.R. (3d) 394.
\item[43] \textit{Ibid.} at 1027. The Court later exempted local by-laws and some other kinds of
15.
\item[44] \textit{Ibid.} at 1029.
\end{footnotes}
F. Scope of Interpretation

Although Canadian (and American) courts have accepted the principle of progressive interpretation, it is still necessary to investigate the question whether judicial review that depends upon the progressive interpretation of a constitutional text can be justified in a democratic society. In the United States, constitutional commentators have tended to accept Berger's conception of interpretation as rooted in the "original understanding" of the framers. Once that narrow conception of interpretation is accepted, it is necessary to explain, and natural to want to justify, the constitutional decisions of American courts by reference to standards of justice or morality that are independent of the constitutional text.

The noninterpretivist explanation of judicial review, which invokes standards of justice or morality that are independent of the constitutional text, does not answer Berger's objections to the legitimacy of judicial review. On the contrary, it confirms them. Since there is no agreement on the content of these extrinsic standards, or on the source of their authority, it is plainly illegitimate for a non-elected court to use such standards to strike down legislation. Moreover, the appeal to standards extrinsic to the constitution fails to explain why there is no judicial review at all in the United Kingdom and New Zealand, and very little bill-of-rights review in Australia and (before 1982) in Canada, despite the shared common-law tradition and acceptance of similar civil libertarian values. The noninterpretivist position seems deficient both in theory and in practice. In theory, judicial review must be derived from a constitutional text in order to be legitimate. In practice, judicial review does not exist in those countries that lack a constitutional text like the American Bill of Rights.

If the interpretivist explanation of judicial review is defective for its failure to explain the decisions and for its reliance on the nonjusticiable conception of an "original understanding," and if the noninterpretivist explanation is defective for its failure to legitimate the decisions and for its reliance on nonjusticiable standards of justice or morality, what is the correct explanation? The answer, it seems to me, is to deny that the interpretation of a constitutional text is limited in the way that Berger insists. That narrow
conception of interpretation is the premise from which both contending theories proceed. The common ground is that, once a Court departs from the original understanding (whatever that is), it is no longer engaged in interpretation, but is doing something else. The interpretivist concludes that the "something else" is not part of the judicial function and is accordingly an illegitimate political function. The noninterpretivist looks for standards outside the constitutional text that could explain the decisions in terms that still enable the judicial function to be distinguished from the political function.

It seems to me that judicial review must be derived from the constitution and from no other source. A Court is justified in holding a law to be void only if the law is inconsistent with the constitution. Any other justification cannot answer the objection that non-elected officials should not be able to veto the actions of elected officials. But judicial review can be derived from the constitution while departing from or ignoring the original understanding. The doctrine of progressive interpretation is no less faithful to the constitutional text than interpretivism. Like interpretivism, it is based on the words of the constitution, read in the context of the document as a whole. It differs from interpretivism only in that the doctrine of progressive interpretation assumes that the words of the constitution need not be frozen in the sense in which they were understood by the framers, but are to be read in a sense that is appropriate to current conditions. If general language is apt to apply to a set of modern-day facts, then the doctrine stipulates that the language should be so applied, regardless of whether the framers contemplated its application to those facts.

Indeed, if the framers had the *interpretive intent* that would permit progressive interpretation of the text, the doctrine of progressive interpretation is arguably more faithful to the intent of the drafters than is interpretivism. Interpretivism requires that an artificially narrow interpretation be placed upon the words of the constitution in deference to historical evidence of the unexpressed original understanding. In view of the many difficulties associated with the ascertainment of the original understanding, it is surely preferable to move the emphasis of the interpretive inquiry away from the unexpressed views of the framers and back to the actual words that the framers put into the text. Under the doctrine of
progressive interpretation the words of the text are given a meaning that seems natural to contemporary eyes, not a meaning that has been distilled from historical records extrinsic to the actual text.

Once the narrow perspective of interpretivism has been rejected, it is plain that much of what is offered as noninterpretivism is really nothing more than the interpretation of the constitutional text. The clearest case is that of Ely, who has a process-based theory of judicial review\(^4\) that is discussed later in this article. Ely seems to regard himself as a noninterpretivist,\(^4\) but when you examine how his theory is derived, you find that he relies upon the structure of government established by the constitution as applying a process-based context which, he argues, should colour those parts of the Bill of Rights that are not unambiguously process-based. It seems clear that Ely is engaged in interpretation. He is not advocating that the judges apply values drawn from some source outside the constitution: he finds the governing values in the structure of the constitution itself. A similar point can undoubtedly be made about some other noninterpretivist theory. As Dworkin has pointed out, "any recognizable theory of judicial review is interpretive in the sense that it aims to provide an interpretation of the Constitution as an original, foundational legal document, and also aims to integrate the Constitution into our constitutional and legal practice as a whole."\(^4\)

III. PURPOSIVE INTERPRETATION

Thus far, I have argued that judicial review of legislation must be based exclusively on the words of the constitution, and that the words of the constitution should receive a progressive interpretation. There is no doubt that both these principles


\(^4\)\textit{Ibid.} at 41. Ely criticizes the interpretivist position and the non-interpretivist position, but says that "the dominant mode [of noninterpretivism] can be improved upon, or at least that is the burden of the rest of this book."

American Theories of Interpretation.

constitute orthodox Canadian constitutional law. A third proposition, equally orthodox, is that the words of the constitution should receive a "purposive" interpretation.

This last proposition is so trite that it may seem hardly worth stating. After all, a similar principle applies to the interpretation of statutes, contracts, wills, or, indeed, any form of written (or oral) communication. Although trite, the principle is important. There is a natural tendency for a reader to focus on individual words or phrases to extract the desired meaning, forgetting that those words or phrases take their colour from their context. In *Law Society of Upper Canada v. Skapinker,*\(^{49}\) for example, it was argued that section 6(2)(b) of the *Charter,* which guarantees the right "to pursue the gaining of a livelihood in any province," conferred a right to work that was inconsistent with the requirement of citizenship for admission to the legal profession in Ontario. Read literally, in isolation from the rest of the section, the language of section 6(2)(b) could certainly bear this meaning. However, the Supreme Court of Canada held that the purpose of section 6, as evidenced by its heading (Mobility Rights) as well as its general purport, was to protect mobility between provinces. Qualified in this way, section 6(2)(b) was not a bar to a citizenship requirement for entry to a profession or trade.

A purposive approach is also useful in elaborating those words in the *Charter* that are especially vague or ambiguous. In *Hunter v. Southam,*\(^{50}\) the question was what constitutes an "unreasonable" search under section 8 of the *Charter.* The Supreme Court of Canada held that the purpose of section 8 was "to protect individuals from unjustified state intrusions upon their privacy," and this purpose could be adequately fulfilled only by "preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place."\(^{51}\) The Court held, therefore, that a search was reasonable

\(^{49}\) *Supra,* note 45.

\(^{50}\) *Supra,* note 45.

\(^{51}\) *Ibid.* at 160.
only if authorized by a statute which required a prior warrant issued by an impartial tribunal on a sworn showing of probable cause. All this was drawn from the single word "unreasonable" in section 8, but, in light of the purpose of the section, the ruling does not seem to go beyond the realm of interpretation.

The undoubted usefulness of a purposive interpretation invites the question whether the Charter has a single over-arching purpose which would illuminate each provision. In the United States, Ely has argued that the purpose of reinforcing the democratic political process can be derived from the particular provisions of the Bill of Rights and by inference from the nature of the constitution as a whole.\(^\text{52}\) In principle, his argument could easily be adapted to fit Canada's Charter, and Fairley and Monahan have both taken that step.\(^\text{53}\) This process-based view of the Bill of Rights and the Charter is not in my view a satisfactory general theory.\(^\text{54}\) It is the topic of the next section of the article.

IV. PROCESS-BASED INTERPRETATION

A. Ely's Thesis

Ely's argument is that the purpose of the Bill of Rights is to protect the process of decision-making. The Bill of Rights, he argues, leaves the selection of substantive values to the political process; the Bill of Rights "is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes

\(^{52}\) Ely, supra, note 13.


\(^{54}\) Fairley, ibid. at 233, makes a more modest claim for his theory, claiming that it has no application to the more specific provisions of the Charter, where the text alone yields a clear answer. But the vague provisions are so distributed through the Charter that he needs to be able to sustain a general theory. Monahan, ibid. at 158, acknowledges that there are other purposes embodied in the Charter as well, and that the language rights are "the major exception" to his analysis.
American Theories of Interpretation

(process writ small), and, on the other, with what might capaciously be designated process writ large — with ensuring broad participation in the processes and distributions of government." Fairley and Monahan have made a similar argument with respect to the Charter of Rights. In Monahan's words, the Charter does not require the courts "to test the substantive outcomes of the political process against some theory of the right or the good;" rather, the Charter guarantees the integrity of the political process itself by enhancing "the opportunities for public debate and collective deliberation." This process-based theory of judicial review offers two important advantages. The first advantage is that it supplies a helpful context for interpreting particular guarantees. The guarantees of free speech or expression, for example, should be seen not as constitutive of personal autonomy (a substantive value), but as an instrument of democratic government (a process-based value). The guarantees of due process or fundamental justice should be seen not as requiring substantively just (or good) outcomes, but as requiring a fair procedure.

The second advantage of the process-based theory of judicial review is that it offers a solution to the problem of the legitimacy of judicial review. Under this theory, the judges need never take positions on controversial substantive issues, because the constitution does not address such issues. All that the judges are concerned with is the fairness of the process by which legislative bodies or other agencies or officials reach their decisions. It is not the wisdom, justice, or rightness of the outcomes of the political process, but the integrity of the process itself, that is the proper subject of judicial review. When a bench of non-elected judges strikes down a statute enacted by an elected legislative body, it is doing so either because the process of enacting the statute was flawed or because the statute itself places impediments in the way of a fair political process. Such decisions may be controversial, but they involve judgments only on matters of process or procedure; they do not trespass on the exclusive power of elected officials to determine the substantive

55Ely, supra, note 13 at 87.
56Monahan, supra, note 53 at 89. Compare Fairley, supra, note 53 at 234.
values by which society is to be governed. Viewed in this light, the power of judicial review is not incompatible with democracy; indeed, process-based judicial review casts the judges in the role of "servants of democracy even as they strike down the actions of supposedly democratic governments."\textsuperscript{57}

At first glance, the process-based theory is attractive. Even if the crucial distinction between process and substance is hard to draw, this theory provides a means of limiting the scope of some of the broader Charter guarantees and thereby reduces the political element of judicial decision-making. I have no doubt that judicial review is best addressed to process rather than substance, but I do not think that process provides a satisfactory general or comprehensive theory of judicial review, either under the American Bill of Rights or under the Charter of Rights. With respect to the American Bill of Rights, Tribe\textsuperscript{58} and Dworkin\textsuperscript{59} have effectively criticized Ely's thesis. With respect to the Charter of Rights, Fairley\textsuperscript{60} and Monahan,\textsuperscript{61} writing with the benefit of Ely's critiques, adopt modified versions of Ely's thesis. They also fail to resolve the difficulties with the thesis. With great reluctance, I have rejected the process-based theory of judicial review for the reasons that follow.

B. \textit{Expressly Substantive Rights}

The first difficulty with a process-based theory of judicial review is that some of the constitutional guarantees are expressly substantive. Tribe has made this point with respect to the American


\textsuperscript{58}\textit{Ibid.}

\textsuperscript{59}Dworkin, \textit{supra}, note 21.

\textsuperscript{60}Fairley, \textit{supra}, note 53 at 234-38.

\textsuperscript{61}Monahan, \textit{supra}, note 53 at 88-94.
Bill of Rights, pointing to the guarantee of religious liberty, the prohibition of religious establishment, the abolition of slavery, the just compensation clause of the Fifth Amendment, and other property-protecting measures. A similar point may be made about the Canadian Charter, although the list would be different. Freedom of conscience and religion (section 2(a)) seems to be a substantive restraint on the activities of legislative bodies, as evidenced by the recent invalidation of Sunday closing legislation. Even freedom of expression (section 2(b)) is not easy to fit into the process-based mould. Although the guarantee will obviously protect political speech, the choice of the word "expression" in preference to the narrower word "speech" (which is used in the First Amendment) strongly suggests a much broader function for the guarantee, extending to forms of expression such as art, music, or dance that have little or no impact on the political process. The mobility rights of section 6 protect an individual's freedom of movement, mainly in the service of personal autonomy, partly in the service of economic efficiency, but surely only minimally in the service of an improved political process. The guarantee of "life, liberty and security of the person" in section 7 might fit the process argument if "fundamental justice" were construed as a procedural guarantee only, but the Supreme Court of Canada has decided that it is substantive. None of these provisions can be wholly explained by a process-based theory.

62 Tribe, supra, note 57 at 1065.
64 Hogg, supra, note 16 at 714.
65 But see my discussion of the legal rights guarantees in the next section of this article.
66 Re B.C. Motor Vehicle Act, supra, note 32.
C. Legal Rights

Secondly, the legal rights guarantees, which assure fairness in the investigation, apprehension, trial, and punishment of persons accused of crime, fit the process argument in only a superficial way. Ely describes each guarantee as "process writ small." Of course, the legal rights are predominantly (but not entirely) procedural, but they are quite unlike the political rights to speak, assemble, associate, and vote. A main purpose of the political rights is undoubtedly to protect the integrity of the political process, as Ely, Fairley, and Monahan maintain. But the purpose of according due process to those accused of crimes has nothing to do with the political process, and everything to do with respect for individual liberty, dignity, and privacy. The reason why a legislative body cannot impose more expeditious and efficient methods of law enforcement is because the constitution insists that the liberty, dignity, and privacy of those accused of crime must be given priority over the exigencies of law enforcement. I agree with Tribe, who concludes that "a right to individual dignity, or some similarly substantive norm, [is] the base upon which conceptions of procedural fairness are constructed." In other words, the legal rights, although procedural in form, are substantive in purpose. They cannot be justified by an exclusively process-based theory.

D. Equal Protection

Thirdly, the right to equal protection or equality does not easily fit the process argument. The argument that it does fit is

67 See quotation accompanying note 55. Fairley, supra, note 53, does not explain how the legal rights fit into the thesis. Monahan, supra, note 53 at 158, characterizes the legal rights as "an attempt to moderate and equalize the power relationship between state and individual." It is certainly true that persons accused of crimes are powerless. The question is whether the legal rights are conferred on accused persons because they are powerless or because of respect for their individual dignity. Probably, the answer is: for both reasons; but, if so, I suggest that the latter is the more fundamental.

68 Re B.C. Motor Vehicle Act, supra, note 32.

69 Tribe, supra, note 57 at 1070.
usually derived from the famous Carolene Products\textsuperscript{70} footnote, in which Stone J. of the Supreme Court of the United States pointed out that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."\textsuperscript{71} The point is that discrimination against groups such as blacks may reflect a flawed political process from which blacks are effectively excluded. Judicial review of discriminatory laws can be justified as the correction of a failure of the political process — the failure to represent adequately a "discrete and insular minority." This is the position taken by Ely,\textsuperscript{72} Fairley,\textsuperscript{73} and Monahan.\textsuperscript{74} Viewed from this perspective, judicial review of discriminatory laws reflects a concern with unequal access to the political process rather than a concern with the substantive value of equality.

The process-based rationale of equal protection undoubtedly contains an important insight into why discrimination on the basis of race (for example) is objectionable. As a general theory of equality, however, it is surely contrived. A legislative classification is generally thought to be bad when it is inappropriate to the legislative purpose that it purports to serve.\textsuperscript{75} For most legitimate legislative purposes, a person's race (for example) is irrelevant; therefore, such a classification is usually unconstitutional. No one has ever attempted to ask the further question, namely, whether the disadvantaged race enjoyed insufficient access to the political process. That is an empirical question that is probably

\textsuperscript{70}United States v. Carolene Products Co., 304 U.S. 144 (1938).

\textsuperscript{71}Ibid. at 153, note 4.

\textsuperscript{72}Ely, supra, note 13 at c. 6.

\textsuperscript{73}Fairley, supra, note 53 at 243, 249-50.

\textsuperscript{74}Monahan, supra, note 53 at 89-97.

\textsuperscript{75}The seminal article on equality is J. Tussman & J. TenBroek, "The Equal Protection of the Laws" (1949) 37 Calif. L. Rev. 341.
unanswerable, at least in the context of a lawsuit.\textsuperscript{76} The question is not answered simply by pointing to the discriminatory law,\textsuperscript{77} since the disadvantaged group could have been well represented in the political process and simply failed to persuade the government of the rightness of its case.\textsuperscript{78} In a democracy it must be expected that a majority will often overrule a minority; rule by the majority is after all the governing principle of democratic politics. Not every group that loses a political battle is on that account a "discrete and insular minority."\textsuperscript{79}

It seems to me that equality review both begins and ends with a judicial judgment about the appropriateness of the legislative classification. Where the classification seems to have no rational basis it will be held to be unjust discrimination, regardless of the access to the political process that is possessed by the disadvantaged group. The value that the equality clause protects is not the integrity of the political process, but the value of equality: the equal worth of each individual dictates that no-one should be denied opportunities by reason of irrational prejudice towards their race,

\textsuperscript{76}Fairley, \textit{supra}, note 53 at 249-50, regards this issue as justiciable, because he argues that a law regarding abortion could be attacked if it could be "demonstrated" that "women were systematically prejudiced as a result of either male-dominated legislative representation and repressive societal stereotypes or \textit{undue} legislative deference to pro-life pressure groups" [my emphasis].

\textsuperscript{77}Fairley, \textit{ibid.} at 243, says that the enactment of repressive laws (against Jehovah's Witnesses in Quebec) "proves" that the disadvantaged group is a "discrete and insular minority."

\textsuperscript{78}Suppose, for example, that the federal Parliament banned the sale of alcohol to persons over 65 on the ground of a higher incidence of alcoholism among older people. Suppose further that it could be established that the government and Parliament listened attentively to effective and persistent submissions of the views of older people, but decided in the end not to accept their submissions. Would the latter fact save a law that so plainly uses an inappropriate classification to combat alcohol abuse? Surely the answer must be no.

\textsuperscript{79}For criticism of the phrase "discrete and insular minority," on the basis that discrete and insular minorities are relatively effective in the American political process, in comparison with anonymous and diffuse minorities (or majorities), see B.A. Ackerman, "Beyond Carolene Products" (1985) 98 Harv. L. Rev. 713 at 713.
sex, status, or any other characteristic. Equality is thus a substantive value protecting the liberty of the individual.  

E. Conclusion Regarding Process-based Interpretation

The view of the Charter of Rights as ultimately supportive of the democratic political process is not accurate. There is no single principle that explains judicial review and reconciles it with democracy. The process-based theory of judicial review does not fit the guarantees that are expressly substantive; the theory does not fit the guarantees of legal rights which, although procedural in form, protect the substantive value of the dignity of the individual; and the theory does not fit the guarantee of equality, which is also a substantive value. The more accurate view is that all of the Charter guarantees respect some aspect of individual liberty, dignity, or privacy, and only a few of the guarantees are truly supportive of the democratic political process. There is no escaping the fact that judicial review enables the judges to strike down those products of the democratic political process that fail to respect those aspects of individual autonomy that are guaranteed by the Charter.

For those who believe that the outcomes of the political process should always prevail over the views of non-elected judges, judicial review is always objectionable. But the extent of the interference with the accountable branches of government is mitigated by three considerations. First, judicial review can occur only when a law (or official act) is inconsistent with a Charter right. The judges do not have carte blanche to strike down laws that are unpalatable to them: they are constrained by the language of the Charter. Secondly, even if a law (or official act) is held to violate a guaranteed right, the law will still survive by virtue of section 1 of the Charter if the government can establish that the law is a 

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80 See Tribe, supra, note 57 at 1077-79; Dworkin, supra, note 21 at 500-10. Tribe and Dworkin even take issue with Ely's process-based rationale for those rights that are integral to the political process: speech, assembly and voting. They point out that the characterization of even these rights as process-based depends upon controversial assumptions about the nature of democracy, and about the value of equal participation of individuals in the democratic process. Fairley, supra, note 53 at 238 and Monahan, supra, note 53 at 75 acknowledge the validity of this point, but they both take the view that the essence of a process-based theory can survive the acknowledgement.
reasonable limit on the right and that the law can be demonstrably justified in a free and democratic society. Thirdly, after a law has been held to be invalid as contrary to the Charter, if the violated right was a provision included in section 2 or sections 7 to 15, Parliament or a Legislature can re-enact the law with the addition of a notwithstanding clause: under section 33, such a law is effective to override the terms of the Charter.

V. CONCLUSION

This article has advanced the following propositions:

1. There are no "natural rights," or at least none that a court may take notice of. The only rights that are legally effective are those recognized by positive law. The only rights that prevail over inconsistent legislation are those that are contained in the Charter of Rights (or elsewhere in the constitution).

2. The only legitimate justification for a judicial decision that a law is invalid (judicial review of legislation) is that the law is inconsistent with the constitution. Faced with an inconsistency of this kind, a court may, indeed must, hold that the more fundamental constitutional provision prevails.

3. It is not a legitimate justification for judicial review that a law is abhorrent to the judges, or is contrary to community morality or justice or natural law or any other standard that is extrinsic to the constitution. Because there is no agreement on the content of such extrinsic standards, and no agreement on the source of their authority, they are not satisfactory bases for judicial decision. Since judges are not elected or otherwise politically accountable, it is wrong in a democracy that they should possess a power to annul the acts of elective legislative bodies, except where there is an inconsistency with the constitution. The American "noninterpretivist" theories of judicial review, which deny these propositions, should be rejected in Canada.

4. Because the constitution is expressed in general terms, there is often a question as to whether or not a particular law is inconsistent with the constitution. When that question is properly before a court, the question must be resolved by interpreting the constitution. The court is not, however, obliged to interpret the constitution in accordance with the "original understanding" of the
framers as to its meaning. The court must give the constitution a "progressive" interpretation so that it applies to contemporary conditions that could not have been foreseen by the framers. The American "interpretivist" theory of judicial review, which insists on the primacy of the original understanding, should be rejected in Canada.

5. While judicial review is only legitimate if it is based on the text of the constitution, this does not entail a narrow clause-bound approach to the text. On the contrary, use should be made of everything that helps to shed light on the text. This will include the legislative history of the text (to be treated with great caution), the judicial precedents interpreting the text, the purpose of the text, its relationship to other parts of the constitution, and implications drawn from the governmental institutions and structures established by the constitution. Reasoning based on these kinds of premises is sufficiently constrained by the terms of the constitution to qualify as interpretation.

6. The constitution should receive a purposive interpretation, meaning that its provisions should be interpreted in such a way as to give effect to their purposes. However, there is no single purpose that underlies all of the provisions of the Charter of Rights. They pursue a range of purposes. The American theory that judicial review can be confined to the single purpose of facilitating the democratic political process must be rejected in Canada, because it is not compatible with the terms of the Charter of Rights.