

# Is Originalism Bad for Women? The Curious Case of Canada's "Equal Rights Amendment"<sup>1</sup>

*Kerri A. Froc*<sup>2</sup>

*Originalism is a body of theories about constitutional interpretation that gained popularity in the United States in the 1980s. These theories maintain that the meaning of constitutional provisions is fixed at the time of framing and ratification and that the popularly understood meaning of the words at that time (or the original intentions of the drafters) is authoritative. While originalism purports to have a positivist orientation, some American scholars have argued that it is mere subterfuge for conservative judicial activism and is better understood as a populist rhetorical practice that has invigorated radical, conservative political movements. This article argues that feminist theorists should reconsider their outright dismissal of originalist theories as deleterious for women's rights, and instead conduct a deeper analysis that weighs their as-yet unexplored potential benefits against the well-documented risks, using the example of section 28 of the Canadian Charter of Rights and Freedoms as a case in point. The application of originalist principles, at least for the interpretation of section 28, is a critical step in moving women towards having truly equal access to Charter rights.*

*L'originalisme est un ensemble de théories portant sur l'interprétation constitutionnelle qui gagna en popularité aux États-Unis dans les années 1980. Selon ces théories, la signification des dispositions constitutionnelles est arrêtée au moment de la formulation et de la ratification et la signification communément accordée aux mots à l'époque (ou les intentions initiales des rédacteurs) fait autorité. Bien que l'originalisme prétende avoir une orientation positiviste, certains chercheurs états-uniens ont soutenu qu'il s'agit d'un simple subterfuge pour l'activisme judiciaire conservateur et il est mieux compris comme une pratique de rhétorique populiste ayant revigoré des mouvements politiques conservateurs radicaux. L'auteur de cet article soutient que les théoriciens féministes devraient reconsidérer leur rejet catégorique des théories originalistes comme nuisible aux droits des femmes et mener plutôt une analyse plus approfondie mettant en balance les avantages éventuels jusqu'alors inexplorés et les risques solidement documentés à l'aide de l'article 28 de la Charte canadienne des droits et libertés comme exemple typique. L'application de principes originalistes, du moins pour l'interprétation de l'article 28, est un pas critique pour mener les femmes vers l'obtention d'un accès véritablement égal aux droits garantis par la Charte.*

---

1 This title takes its inspiration from provocative titles of feminist works such as Beverley Baines, "Is Constitutionalism Bad for Intersectional Feminists?" (2010) 28:3 Penn St L Rev 427; Susan Moller Okin, "Is Multiculturalism Bad for Women?" in Joshua Cohen, Matthew Howard, & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999) 7; and some originalist writing, such as James Allen, "The Curious Concept of the 'Living Tree' (or Non-Locked-In) Constitution" in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 179. A version of this paper was presented at a March 2013 conference in Lisbon, Portugal, entitled, "Pluralism, Inclusion and Citizenship: A Diversity and Recognition Project" hosted by Inter-Disciplinary.Net.

2 Ph.D. (Candidate), Faculty of Law, Queen's University, Kingston, Ontario, Canada; Trudeau and Vanier Scholar.

## Introduction

This paper attempts to answer a conundrum: can conservative theory developed to thwart women's rights be used to save them? Originalism represents a strain of theories about constitutional interpretation that gained popularity amongst some prominent members of the United States Supreme Court and conservative scholars in the 1980s.<sup>3</sup> Many trace its emergence from the US Department of Justice's desire during the Reagan era to roll back progressive decisions from the Warren and Burger courts. This included the most famous conservative *bête noire*, the landmark abortion case *Roe v Wade*.<sup>4</sup> Seeking to curb progressive "judicial activism," proponents of these theories argued that the meaning of the US Constitution was fixed at the time of framing and ratification, and that it is discoverable as an empirical fact by way of the original intentions of the drafters or (as later theorized) the popularly understood meaning of the words and phrases at the time (called "original meaning"). Further, originalists believe that original intention/meaning is legally binding (and therefore most claim it is the only "true" method of constitutional interpretation).<sup>5</sup> While originalism purports to have a positivist orientation, some American scholars have argued that, rather than a theory of constitutional interpretation developed by judges and academics, it is better understood as a populist rhetorical practice that has invigorated radical, conservative political movements in the United States.<sup>6</sup> However, there are others who question whether its conservatism is an inevitable consequence of its methodology.<sup>7</sup>

---

3 The usual authority cited as the first use of the term is ironically someone who came not to praise originalism but to bury it: Paul Brest, "The Misconceived Quest for Original Understanding" (1980) 60 BUL Rev 204 [Brest]. However, Supreme Court Justice Antonin Scalia is probably the best known proponent of originalism (see, for instance, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997)).

4 410 US 113 (1973). See e.g. Robert W Bennett, "Originalism and the Living American Constitution" in Robert W Bennett & Lawrence B Solum, *Constitutional Originalism: A Debate* (Ithaca, NY: Cornell University Press, 2011) 78 at 79-30 ["Originalism and the Living American Constitution"].

5 Lawrence B Solum, "We are All Originalists Now," in Robert W Bennett & Lawrence B Solum, *Constitutional Originalism: A Debate* (Ithaca, NY: Cornell University Press, 2011) 1 at 3-5 ["We Are All Originalists Now"]. He indicates that the "fixation thesis" and the idea that the original meaning of the text has legal force (the "textual constraint thesis") "are accepted by almost every originalist thinker."

6 See Robert Post & Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution" (2006) 75 Fordham L Rev 545 [Post and Siegel]; Jared A Goldstein, "The Tea Party Movement and the Perils of Popular Constitutionalism" (2011) 53 Ariz L Rev 827; Mary Ziegler, "Grassroots Originalism: Judicial Activism Arguments, the Abortion Debate, and the Politics of Judicial Philosophy" (2013) 51 U Louisville L Rev 201.

7 For instance, Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House,

Few feminist theorists have engaged critically with originalism, and those who have done so concluded that it would not be advantageous for women to accept its tenets (at least, as conventionally understood).<sup>8</sup> The example of section 28 of the *Canadian Charter of Rights and Freedoms*<sup>9</sup> calls for feminists to take a closer look at originalism as a viable methodology to advance women's equal rights. Similar to the US "Equal Rights Amendment,"<sup>10</sup> section 28 reads: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Section 28 was intended to transform judicial understandings of rights (particularly equality) to ensure that they were accessible to women in practice, and to protect gender equality from being undermined by other provisions of the *Charter* or judges themselves.

Subsequent judicial interpretation, however, has debased section 28's status as a provision promoting the rights of women. Judges have instead deployed section 28 to reinstate male privilege and have marginalized the section within the constitutional landscape. This article will argue that taking another look at originalist interpretive principles is a critical step towards restoring section 28 as a fully functional constitutional provision and ensuring women have equal access to *Charter* rights. First, I provide a brief history of section 28 and subsequent problems in its interpretation. Second, I summarize key components of originalist theories (both older forms and "new originalism") and major criticisms of the theories, including the Supreme Court of Canada's reasons for rejecting originalist methodology early in the *Charter's* history. Last, I consider the feasibility of incorporating "new originalism" into Canadian law and the risks inherent in such a practice. Ultimately, I argue in favour

---

2005); Jack M Balkin, *Living Originalism* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011) [*Living Originalism*]; and James E. Ryan, "Laying Claim to the Constitution: The Promise of New Textualism" (2011) 97:7 Va L Rev 1523. In the Canadian context, see Adam M Dodek, "The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits" (2008) 41 SCLR (2d) 331 ["The Dutiful Conscript"]; and "Where Did (Section) 1 Come From? The Debates Over the Limitations Clause at the Special Joint Committee of the Senate and the House of Commons on the Constitution, 1980-81" (2010) 27 NJCL 77 ["Where Did (Section) 1 Come From?"].

8 Mary Ann Case, "The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism" (2014) 29 Const Commentary 431; Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2008) at 58 [Irving]; and Reva B Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family" (2002) 115:4 Harv L Rev 947 at 1032-1034.

9 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

10 The US "Equal Rights Amendment," which would have provided that, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," failed in 1982 to achieve the requisite level of state ratification for a constitutional amendment.

of adopting a form of originalism in the Canadian context, at least for the interpretation of section 28, which follows Jack Balkin's originalist theory of "text and principle."

## Section 28's feminist framers

Section 28's entrenchment represents an unprecedented moment in Canadian feminist advocacy and mobilization. Women had been troubled by years of narrow interpretations of equality that trivialized sex discrimination claims under the statutory *Canadian Bill of Rights*.<sup>11</sup> For instance, under the interpretation of this statute, the Supreme Court of Canada deemed discrimination against pregnant women in the provision of employment benefits not to be a distinction made on the basis of sex, but rather between pregnant and non-pregnant people: "Any inequality between the sexes in this area is not created by legislation but by nature."<sup>12</sup> It also upheld *Indian Act*<sup>13</sup> provisions stripping status from First Nations women who married non-status men, while First Nations men not only retained their status but were also able to transfer it to non-status wives. This was found to be consistent with "equality before the law" in the *Bill of Rights* because all status Indian women were treated equally poorly.<sup>14</sup>

At the same time, areas of the law critical for women, such as family law, also appeared resistant to principles of gender equality. Infamously, in *Murdoch v Murdoch*,<sup>15</sup> a wife who was sole caretaker of the family farm five months of the year and intensively involved in the cattle operation was denied a share of the farm property (all in the husband's name) upon the couple's separation. While notionally based on the Court's interpretation of common law trust principles, the decision also rested upon its demeaning description of her contribution to the property. It cited with approval the trial decision in which she was described as simply performing work typical of that "done by any ranch wife."<sup>16</sup>

---

11 SC 1960, c 44 [*Bill of Rights*].

12 *Bliss v Attorney General of Canada*, [1979] 1 SCR 183 at 190 [*Bliss*]. After the enactment of the *Charter*, this dicta was overturned by the Court in *Brooks v Canada Safeway*, [1989] 1 SCR 1219.

13 RSC 1970, c 1-6.

14 In the language of the Court, "equality before the law" meant only "equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land" (*Attorney General v Lavell*, [1974] SCR 1349 [*Lavell*]). The Canadian government eventually repealed the most blatantly discriminatory provisions against Indigenous women, although residual inequalities remain for reinstated women's descendants.

15 [1975] 1 SCR 423.

16 *Ibid* at 436.

Therefore, when the Canadian Government announced a new constitutional package in the fall of 1980 and established the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada to hold public hearings, women and the organizations representing them came out in force to express their opinions on the failings of the existing law and how the draft constitutional package did not address them. Twenty women's groups presented briefs to the Joint Committee.<sup>17</sup> Most were particularly concerned that section 15, the proposed provision guaranteeing the right to equality, was not sufficiently strong to overcome the narrow interpretation of the concept under the *Bill of Rights*.<sup>18</sup> They were also concerned about section 1, which permitted the government to restrict rights so long as the limitation was reasonable and "generally accepted in a free and democratic society with a parliamentary system of government." Representatives at the Joint Committee hearings called section 1 the "Mack Truck clause" because "the loophole was so big you could drive a convoy through it."<sup>19</sup> Acknowledging the enhanced powers that an entrenched *Charter* would supply to the courts, they recommended that the judiciary be given "strong and clear guidelines within which to exercise these powers."<sup>20</sup> It was here that the idea of a general "purpose clause" for the *Charter* guaranteeing rights equally to men and women made its national appearance, advocated by several groups but most forcefully by the National Association of Women and the Law (NAWL).<sup>21</sup> Inspired by similar

- 
- 17 Appendix D, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, "Report to Parliament and Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, As Amended by Committee," *Minutes of Proceedings and Evidence* (Ottawa: Supply and Services, 1981) 57:2 at 57:90 (13 February 1981).
- 18 See especially the presentations of the National Action Committee on the Status of Women (NAC) (20 November 1980), Canadian Advisory Council on the Status of Women (CACSW) (20 November 1980), and National Association of Women and the Law (NAWL) (9 December 1980) in Canada, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence* (Hull, QC: Supply and Services, 1980) at 9:59-60, 9:125-127, and 22:56, respectively.
- 19 Penney Kome, *The Taking of Twenty-Eight* (Toronto: Women's Educational Press, 1983) at 33 [Kome]. See also the testimony before the Joint Committee of NAC President Lynn McDonald, *ibid* at 9:58, and NAWL representative Monique Charlebois, *ibid* at 22:52.
- 20 Testimony of NAWL representative, Deborah Acheson, before the Joint Committee, *ibid*. at 22:51.
- 21 National Association of Women and the Law, *Women's Human Right to Equality: A Promise Unfulfilled* (Ottawa: National Association of Women and the Law, 1980) [brief to the Joint Committee]; testimony of NAWL representative Monique Charlebois before the Joint Committee, *ibid* at 22:54. Other groups who supported the call for a specific sex equality guarantee included the Canadian Human Rights Commission, the Canadian Council on Social Development and the Canadian Jewish Congress. NAC and CACSW indicated their support for a purpose clause in their testimony before the Joint Committee, but their focus was primarily upon remedying the problems in section 15 (testimony of NAC President Lynn McDonald before the Joint Committee, *ibid* at 9:64 and 9:70, testimony of CACSW President Doris Anderson and representative Mary Eberts, *ibid* at 9:124 – 9:127).

clauses in international covenants to which Canada is a signatory, the clause was meant to ensure that, regardless of any interpretive room left in the phrasing of the equality and other constitutional guarantees, the judicial parsimony that had so hindered women could not be repeated.<sup>22</sup>

In January 1981, the government announced a number of changes to the *Charter* in response to concerns raised by women's groups and others about the weaknesses of the draft equality provision.<sup>23</sup> At the same time, a new interpretive provision was also introduced in these rounds of amendments. Section 26 (later changed numerically to 27) would direct courts to consider Canada's "multicultural heritage" in interpreting rights, raising the spectre of women's rights being derogated or nullified in the name of protecting cultural practices. Despite modifications also being made to narrow the section 1 justification, requiring "reasonable" rights limitations to be "demonstrably justified in a free and democratic society," concerns remained about the extent to which governments would be able to override women's rights on the basis of political or administrative expediency.

Women's fears about their interests being overlooked in the new *Charter* were exacerbated by the government's interference in a 1981 women's conference on the Constitution being planned by the Canadian Advisory Council on the Status of Women (CACSW), an arm's length but government-funded monitor of women's rights. The conference was cancelled at the last minute at the "suggestion" of then Minister Responsible for the Status of Women, Lloyd Axworthy. Concerned women (including many from the groups that appeared before the Joint Committee) formed the Ad Hoc Committee of Women on the Constitution to consider how to move forward. In a matter of three weeks, "Ad Hockers" organized a national conference of women across Canada to debate resolutions on constitutional changes required in order to ensure women were protected.<sup>24</sup>

---

22 Interview of Tamra Thomson (11 December 2013). Both the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 and the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 contain in article 3 a requirement that state parties "ensure the equal right of men and women to the enjoyment" of the rights contained in the document, as a supplement to more general anti-discrimination guarantees.

23 Section 15 was revised to protect equality "before and under the law and ... equal protection and equal benefit of the law," which was to preclude the kind of narrow interpretations of equality that occurred under the *Bill of Rights*.

24 The following history is condensed from many sources, including my own communications with some of the women involved in the Ad Hoc Committee and some of the key civil servants involved in drafting the provisions of the 1982 Constitution. Primary written sources include Kome, *supra* note 19; Beverley Baines, "Section 28 of the *Canadian Charter of Rights and Freedoms*: A Purposive Interpretation" (2005) 17 CJWL 45 [Baines]; Alexandra Dobrowolsky, *The Politics of Pragmatism*:

On February 14, 1981, 1300 women attended the Conference and passed several resolutions on required amendments to the draft *Charter*, including one stating, “a Statement of Purpose should be added providing that the rights and freedoms under the Charter are guaranteed equally to men and women with no limitations.”<sup>25</sup> This resolution received a (nearly) unanimous vote in favour after being addressed previously by a number of experts on the morning’s legal panel.<sup>26</sup> NAWL representative and Ad Hoc Tamra Thomson recalls the “purpose clause” being addressed by panellists and that the resolution was a “motherhood” matter requiring little debate in the afternoon session.<sup>27</sup>

Particularly influential factors for delegates were lingering concerns over section 15, as well as the impact of US women’s fight over the Equal Rights Amendment, which meant that the need for the amendment proposed by the “purpose clause” resolution was considered self-evident.<sup>28</sup> As Ad Hoc organizer Marilou McPhedran described, the general mood amongst participants was: “We were looking the opportunity [for a Canadian ERA] right in the face, and why would we not grab it?”<sup>29</sup> At its February 20, 1981 biennial meeting, NAWL endorsed the entirety of its Joint Committee submission, specifically the inclusion at the beginning of the *Charter* of a “purpose clause that indicates that the Charter is designed to create a society in which there is real equality, and which specifies as a primary purpose the intention to apply the Charter equally to men and women.”<sup>30</sup> The National Action Committee

---

*Women, Representation and Constitutionalism in Canada* (Toronto: Oxford University Press, 2000) [Dobrowolsky]; Chaviva Hošek, “Women and Constitutional Process” in Keith Banting, Richard Simeon, eds, *And No One Cheered* (Toronto: Methuen, 1983) 280 [Hošek]. Primary interview sources are cited in the footnotes which follow.

- 25 Appendix VII, “Summary of those Resolutions Passed at the Ad Hoc Conference on Women and the Constitution which deal with required amendments to the proposed Charter of Rights and Freedoms, together with commentary on the significance of the amendments for women and the *proposed wording* of the Charter, as amended” in Anne F Bayefsky and Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 634 at 635 [“Summary of the Resolutions”]. The Ad Hoc resolution appears to be derived directly from NAWL’s previous work, through a draft resolution prepared for the Conference, “Proposed Resolution for Discussion” by NAWL members Tamra Thomson & Deborah Acheson in, Toronto, York University Archives and Special Collections (File 7, Box 2007-031-002, Marilou McPhedran Fonds).
- 26 Audio recording of the Ad Hoc Conference (copy on file with the author as “Cassette 6, Track 3”).
- 27 Interview of Tamra Thomson (11 December 2013). This also accords with the perception of key Ad Hoc organizers Marilou McPhedran (interview of Marilou McPhedran (9 November 2013)) and Suzanne Boivin (interview of Suzanne Boivin (19 November 2013)).
- 28 Interview of Marilou McPhedran (9 November 2013). Interview of Tamra Thomson (11 December 2013). Thomson and McPhedran both confirm that the purpose clause was being referred to at the Conference as the “Canadian ERA.”
- 29 Interview of Marilou McPhedran (9 November 2013).
- 30 National Association of Women and the Law, *The Costs of Being a Woman: 4th Biennial Conference*,

on the Status of Women (NAC), a women's advocacy group composed of 160 constituent organizations from across the country, also endorsed the Ad Hoc Conference resolutions at its meeting on March 13-14, 1981.<sup>31</sup>

Armed with this mandate, members of the Ad Hoc Committee went to Parliament Hill to lobby for amendments to the *Charter* based on the Conference resolutions. In the lobbying materials prepared soon after the conference and provided to politicians,<sup>32</sup> Ad Hockers explained the objective of the purpose clause was to "ensure that all of the rights and freedoms set out in the Charter will be interpreted so as to apply equally to men and women," that sex discrimination is taken "equally seriously"<sup>32</sup> as that of race, and that sex-based distinctions undergo a high degree of judicial scrutiny.<sup>33</sup> While they contemplated the potential for the purpose clause to be used by men, it was seen as a temporally distant possibility given the fact of women's present inequality and that women had little under the law that men would want to take. Further, it was hoped that the acknowledgement of systemic discrimination and discrimination as a collective or group phenomenon in section 15(2) would lessen this possibility.<sup>34</sup>

The purpose clause was also intended to influence the application of section 27 to ensure it did not lead to sex discrimination being justified or constitutionally required because of cultural practices or values.<sup>35</sup> The import of Ad Hockers' focus on intra-group discrimination vis-à-vis section 27 has been the subject of academic debate in terms of whether this betrayed a preconception of cultural groups as hyper-patriarchal or an insensitivity to issues of racial subordination.<sup>36</sup> Ad Hockers did not have a developed

---

*Halifax, February 1981* (Ottawa: National Association of Women and the Law, 1981) at 71.

31 Dobrowolsky, *supra* note 24 at 57. There was also a lengthy list of organizations that endorsed the Conference, "Women on the Constitution Conference Endorsement" in Ottawa, University of Ottawa University Archives and Special Collections (Box 683, X-10-24, NAC Fonds).

32 "Summary of the Resolutions," *supra* note 25. Interview of Marilou McPhedran (9 November 2013) and interview of Tamra Thomson (11 December 2013). Both explained the genesis behind the document as being for lobbying purposes and created as a collaboration between core Ad Hoc organizers and NAWL in the immediate aftermath of the Conference.

33 "Summary of the Resolutions," *ibid* at 644.

34 Interviews of Marilou McPhedran (9 November 2013 and 17 December 2013). She reports that in her discussions, there were comments made that perhaps the issue would arise in "seven generations."

35 "Summary of the Resolutions," *supra* note 25 at 645.

36 See e.g. Baines, *supra* note 24 at 60 (that Ad Hockers were addressing the problem of "paradox of multicultural vulnerability" theorized by Ayelet Shachar); Natasha Bakht, "Reinvigorating Section 27: An Intersectional Approach," (2009) 6:2 *JL & Equality* 135 at 148 (that this focus "stemmed from a deeper conviction that cultural groups have a greater propensity to discriminate against women").



understanding of intersectionality; these theories would not gain prominence for another 10 years.<sup>37</sup> However, archival materials show that Ad Hockers and other national women's organizations were also concerned with government complicity in the discrimination of women within and as members of ethnocultural and Indigenous communities, and had some alertness to the confounding treatment of such women in anti-discrimination law (as in *Lavell*).<sup>38</sup> They also expressed the idea that "equalizing women would apply to all of the disadvantaged"; in other words, a focussed sex equality guarantee would also strengthen protections against discrimination on other grounds because women were often the most vulnerable within other subordinated groups.<sup>39</sup>

Ultimately, the distinctive language of section 28 was developed at a March 18, 1981 meeting between federal government Department of Justice (DOJ) lawyers, Fred Jordan and Edythe MacDonald, key members from the Ad Hoc Committee and NAWL (Marilou McPhedran, Suzanne Boivin, and Tamra Thomson, respectively), and Ad Hoc legal advisor, Beverley Baines. DOJ lawyers were active participants in the drafting session and considered textual choices in terms of how they would fit with the rest of the *Charter* but also what was "sellable ... to their political bosses."<sup>40</sup> Nevertheless, the core guarantee of equal rights was virtually unchanged from the wording of NAWL's Joint Committee submission and the resolution from the Ad Hoc Conference.<sup>41</sup> The notwithstanding phrase was added at women's insistence,<sup>42</sup> as was the reference to "male and female persons."<sup>43</sup>

---

37 Beverley Baines remarked upon this chronology in her interview (17 October 2013).

38 Interview of Ad Hocker, Peggy Mason (27 August 2014).

39 Interview of Beverley Baines (15 October 2013). The "Summary of the Resolutions," *supra* note 25 alludes to this when it states that the purpose clause "recognizes that the basis of all 'groups' are men and women." Marilou McPhedran also indicates that this analysis of the "positive ripple effect of section 28" was communicated when Ad Hoc Conference resolutions were debated (and ultimately endorsed) by the NAC AGM in March 1981. This response was to a question from the floor "expressing concerns about inclusiveness and [whether] certain vulnerable groups would be left behind" as a result of entrenching a sex equality provision in the *Charter* (interview of Marilou McPhedran (17 December 2013)).

40 Interview of Tamra Thomson (11 December 2013).

41 As can be seen when comparing section 28 and the "purpose clause" resolution, there were some stylistic modifications, such as the replacement of "under the *Charter*" with "referred to in it" and the removal of "with no limitations" (presumably in light of the inclusion of the "notwithstanding" phrase).

42 Marilou McPhedran referred to "notwithstanding anything" as the "bottom line" for the negotiations, due to advice Ad Hockers received in a prior strategy telephone call held with senior litigator, Morris Manning, about the importance of this phrase in the law (interview of Marilou McPhedran (9 November 2013)).

43 The use of persons was to ensure the inclusion of girls as well as preclude its application to fetuses:

While the women argued for the placement of the guarantee at the front of the *Charter* as section 1,<sup>44</sup> DOJ lawyers argued for its inclusion as section 28, a “stand alone” guarantee. They argued that this would permit women to have the benefit of the interpretive rule that later provisions modify earlier ones, particularly section 27, the multiculturalism clause.<sup>45</sup> Even after this wording was agreed upon, however, it took considerable additional lobbying of various politicians by Ad Hockers to persuade them to propose an amendment inserting this text.<sup>46</sup> By virtue of an NDP motion on April 23, 1981 (passed unanimously), the gender equality guarantee was included in the proposed constitutional resolution as section 28 of the *Charter*.<sup>47</sup>

Ad Hockers specifically understood the wording of “notwithstanding” to preclude use of the section 1 rights limitation mechanism in cases of sex discrimination<sup>48</sup> and therefore clearly viewed section 28 as having independent power (rather than being only an interpretive clause dependent on other rights, such as section 15, for effect). While there is some ambiguity as to whether the import of “notwithstanding” and particularly its effect on section 1 was specifically addressed at the meeting,<sup>49</sup> subsequent correspondence from

---

interview of Beverley Baines (15 October 2013); interview of Tamra Thomson (11 December 2013); interviews of Marilou McPhedran (9 November 2013 and 17 December 2013) [emphasis added]. It also had significance in light of the case in which women were finally recognized as equal “persons” under the law (Baines, *supra* note 24 at 50, referencing the “Persons Case”, *Edwards v AG of Canada*, [1930] AC 124 [Persons Case]).

- 44 Interview of Suzanne Boivin (19 November 2013); interview of Marilou McPhedran (17 December 2013). See also the Statement of Deborah Acheson, (19 February 1981) in Toronto, York University Archives and Special Collections (File 9, Box 2007 – 020/002, Marilou McPhedran Fonds).
- 45 Interview of Tamra Thomson (11 December 2013); interview of Marilou McPhedran (9 November 2013); interview of Suzanne Boivin (19 November 2013).
- 46 Kome, *supra*, note 19 at 76-77; interview of Marilou McPhedran (17 December 2013). See also an article by a Department of Justice lawyer tasked with drafting constitutional amendments at the time of the patriation of the Constitution, Mary Dawson, “From the Backroom to the Front Line: Making Constitutional History” or “Encounters with the Constitution: Patriation, Meech Lake and Charlottetown” (2012) 57:4 McGill LJ 955 at 968 (referring to section 28 as first being proposed to the Special Joint Committee and that she was “surprised that the politicians agreed to it”).
- 47 Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol 2 (Toronto: McGraw-Hill Ryerson, 1981) at 814 (excerpting House of Commons and Senate Debates February-May 1981) [Bayefsky].
- 48 Baines, *supra* note 24 at 51; interview of Beverley Baines (15 October 2013); interview of Tamra Thomson (11 December 2013); interview of Suzanne Boivin (19 November 2013); interview of Marilou McPhedran (9 November 2013) and her notes of the negotiations on 18 March 1981 indicating that “notwithstanding” meant “[n]otwithstanding (s. 1, s. 7, s. 27) ...” (Personal notes of Marilou McPhedran, “Notebook 2 (March 5-March 22, 1981),” Toronto, York University Archives and Special Collections, Marilou McPhedran Fonds (2007-020/005 (4)) at 77 [“Notebook 2”]).
- 49 Marilou McPhedran’s notes indicate that Justice officials were resistant to inclusion of this clause as “not necessary” because the section 1 justification would otherwise apply equally to men and

DOJ indicating that section 28 was a “significant provision” that ensured the *Charter* was “fully protective of [women’s] rights and equality,”<sup>50</sup> and later events concerning the institution of the section 33 override, in my view, constitute an acknowledgement of this interpretation.

After the Supreme Court ruling in *Reference Re: Resolution to amend the Constitution*,<sup>51</sup> finding that the federal government had the legal but not normative authority to seek amendment and patriation of the Constitution unilaterally, its threat to do so was rendered politically untenable. The Court found that a convention existed that required a “substantial degree of provincial consent,”<sup>52</sup> for the proposed amendments to the Canadian Constitution. To that end, the Federal Government convened a Federal-Provincial First Ministers Conference on November 2 to 5, 1981. On November, 5, 1981, the Prime Minister tabled the “Kitchen Accord,” which outlined the agreement that Canada and the provinces (notably, excluding Quebec) were prepared to accept for the *Charter* to be entrenched. One term of the Accord was the introduction of a(nother) “notwithstanding clause,” which a government could invoke to permit legislation to remain valid for a period of five years despite violating any of a number of *Charter* rights, “covering sections dealing with Fundamental Freedoms, Legal Rights, and Equality Rights.”<sup>53</sup> Section 28 was not specifically addressed in the Accord, falling under the heading, “General” in the *Charter*. At best, there was “uncertainty” about what the First Ministers had intended in relation to section 28;<sup>54</sup> at worst, there was no specific intention to include it but attempts were made after the fact to have the new section 33 override in the Accord apply to section 28 due to “misdirected negotiations at the officials’ level.”<sup>55</sup>

---

women (per her handwritten notes from that date in “Notebook 2,” *ibid* at 75). Fred Jordan does not recall a specific discussion regarding the interaction of the new, agreed-upon notwithstanding clause and section 1, however, he allows that precluding the operation of section 1, “may have been the reason for doing the notwithstanding” (interview of Fred Jordan [4 June 2014]).

50 Letter from Special Advisor Jacques Demers, writing on behalf of Minister of Justice, Jean Chrétien, to NAC President Jean Wood (22 May 1981) and President Lynn MacDonald (13 May 1981) in Ottawa, University of Ottawa University Archives and Special Collections (Box 808, X-10-24, NAC Fonds).

51 [1981] 1 SCR 753.

52 *Ibid* at 904-905.

53 Bayefsky, *supra* note 47 at 904 (excerpting the First Ministers’ Agreement on the Constitution, 5 November 1981).

54 Barry Strayer, *Canada’s Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 201 [Strayer].

55 12 November 1981 Cabinet Minutes (Cabinet Document 40-81CBM) at 5 (quotation attributed to Minister of Justice Jean Chrétien). See also Howard Leeson, *The Patriation Minutes* (Edmonton: Centre for Constitutional Studies, 2011) (containing no references to women’s rights or section 28 in the author’s written notes documenting discussions during the November 1981 First Ministers

Prime Minister Trudeau first prevaricated by saying it was his “impression that the clause [section 28] would continue”<sup>56</sup> but later joined provincial officials in taking the position that the Kitchen Accord was premised upon section 28 being subject to section 33.<sup>57</sup> The amended version of the *Charter* purporting to reflect the agreement and published in the *House of Commons Journals* shows a revision to section 28, in which the first phrase would have read, “Notwithstanding anything in this *Charter* except section 33 ...” and would have included a phrase in section 33 that would allow legislation to operate “notwithstanding ... section 28 of this *Charter* in its application to discrimination based on sex referred to in section 15.”<sup>58</sup> To Ad Hockers, the addition of a second “notwithstanding” clause in the Charter that purported to override section 28 “seemed absurd and treacherous,” and women across the country quickly mobilized to eliminate this latest menace to women’s equality.<sup>59</sup> The bar was set impossibly high: unanimous agreement of the provinces that signed the Accord would be required to restore section 28.<sup>60</sup> Women politicians (including, covertly, the Minister Responsible for the Status of Women, Judy Erola), Ad Hockers, and affiliated women’s groups across the country were therefore required to wage yet another high-stakes public relations and lobbying exercise under severe time constraints, including organizing a public telephone and telegram campaign, tracking down individual premiers using personal contacts to obtain their consent, and ultimately holding a protest at the steps of the Saskatchewan legislature so that the lone remaining, recalcitrant premier, Allan Blakeney, would finally agree to remove section 28 from the override.<sup>61</sup>

---

Conference, which he attended as advisor to the Saskatchewan delegation as the Deputy Minister for Intergovernmental Affairs, nor in description of the negotiations surrounding the Kitchen Accord).

56 *House of Commons Debates*, 32nd Parl, 1st Sess, vol 11 (6 November 1981) at 12594 (responding to a question by NDP MP Pauline Jewett as to whether the section 33 override applied to section 28).

57 In response to a question from the Leader of the Opposition, Joe Clark, as to whether Canada was going to “change the Accord” by including section 28 in the override, the Prime Minister indicated, “I am not saying that ... I did say that the officials of the federal and provincial governments did meet on Thursday and Friday, and my understanding of that meeting is that this particular section would be subject to the ‘notwithstanding’ clause” (*House of Commons Debates*, 32nd Parliament, 1st Session, No. 11 (9 November 1981) at 12635).

58 Bayefsky, *supra* note 47 at 911 (excerpting the *Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, as Altered by the 5 November 1981, First Ministers’ Agreement on the Constitution*, from the *House of Commons Journals*, Issue 260, 20 November 1981).

59 Marilou McPhedran, Judith Erola & Loren Braul, “28 — Helluva Lot to Lose in 27 days,” in Lois Harder and Steve Patten, eds, *Patriation and Its Aftermath: Law, Politics and the Constitution in Canada* (Vancouver: UBC Press, forthcoming 2014) at 5 [McPhedran, Erola & Braul].

60 Dobrowolsky, *supra* note 24 at 60.

61 McPhedran, Erola & Braul, *supra* note 59 at 11; Dobrowolsky, *ibid* at 60-62; Kome, *supra* note 19 at 89-95. Blakeney later reported in his autobiography receiving “several hundred telegrams” as a

More than simply a colourful postscript to the section 28 story, the attempt to capture section 28 within the override arguably evinces collective understandings of its meaning amongst the political actors involved with patriation. Most notably, Blakeney's legal argument against removing section 28 from the ambit of section 33 was to prevent the former from being "interpreted to make unconstitutional all affirmative action programs for women."<sup>62</sup> While the argument in relation to affirmative action programs specifically was not terribly convincing to the other players,<sup>63</sup> it demonstrates the power that politicians ascribed to section 28. There would be no reason for the initial insistence upon its explicit inclusion in the override unless they accepted that section 28 could operate independently — in this case, to block discriminatory government action after the override was invoked in relation to a section 15 sex equality violation.<sup>64</sup> Interestingly, the proposed amendment also reflected an understanding of section 28 as having multiple uses within the *Charter*, by specifying that only one use would be subject to the override (its "application to discrimination based on sex referred to in section 15").

Ad Hockers viewed section 28 not simply as an interpretive mechanism, but also as a powerful influence over other rights. They had an understanding of section 28 as an overarching fundamental principle of gender equality for the entire *Charter*.<sup>65</sup> It was meant to ensure rights were viewed through a

---

result of this campaign (*An Honourable Calling: Political Memoirs* (Toronto: University of Toronto Press, 2008) at 194).

62 Telegram from (then) Saskatchewan Justice Minister Roy Romanow to Jean Chretien (18 November 1981) in Toronto, York University Archives and Special Collections (2007-03/002, File 6, Marilou McPhedran Fonds).

63 Strayer, *supra* note 54 at 203. As women themselves pointed out, section 15(2) expressly permitted affirmative action programs and "section 28 does not preclude [its] effective operation": Telex to Allan Blakeney from the Ad Hoc Committee of Women and the Constitution and National Association of Women and the Law (undated, copy on file with the author from Tamra Thomson's personal file).

64 This is not to say that these collective understandings were unanimously held: for instance, see "Changes in Women's Rights in Bill Puzzles Lougheed" *The Calgary Herald* (19 November 1981) A15 (indicating that he did not consider it necessary to include section 28 in the override because it was "a general statement in principle"); "[w]omen's rights could be curbed by legislation, justice officials say," *Globe and Mail* (25 November 1981) 3 (speaking about the fact that section 15 was still subject to the section 33 override). As well, early into the controversy, Leader of the NDP, Ed Broadbent, expressed "surprise" to Ad Hocker, Marilou McPhedran, that section 28 "could be considered overriding," and indicated a need to consult with his legal advisors, but later "changed his mind" about the clause and helped lobby Blakeney to restore it to the original (personal notes of Marilou McPhedran (10 and 13 November 1981), in notebook entitled, "Constitution Round III from Nov 4/81," Toronto, York University Archives and Special Collections, Marilou McPhedran Fonds (2007-020/005 (4)) at pages 9 and 20). See also Bill Fox and David Venneau, "Blakeney Offers Rights Deal" *Toronto Star* (20 November 1981) A1 and A16.

65 In Marilou McPhedran's words, it was meant to "infuse the entire *Charter* with sex equality"

gendered lens and to be used as a means to conduct a gender-based analysis of constitutional provisions.<sup>66</sup> Feminist scholars writing in the aftermath of patriation reflected this understanding, namely that not only would section 28 prevent other *Charter* provisions from directly impinging upon gender equality, but it would also ensure that “definitions and understandings of all the Charter rights and freedoms are derived from women’s perspective as well as men’s perspective.”<sup>67</sup> Thus, section 28 ought to be read as if it is the “‘last paragraph’ of each section . . . [it] thus becomes a substantive element of each right and freedom referred to in the *Charter*.”<sup>68</sup> However, despite the hopes for section 28, it has not assisted in securing women’s equality.

## Use and abuse of section 28 by Canadian courts

Section 28 has been before the Canadian courts in approximately sixty cases. It soon became apparent after the Constitution’s patriation that the new constitutional commitment to defending and advancing women’s rights was being met by an indifferent and sometimes hostile judiciary. Some early judicial responses were to turn the objective for section 28 on its head, and apply it in favour of men seeking to undermine protections for women. One of the first cases, *Boudreau v Family Benefits Appeal Board*,<sup>69</sup> concerned a challenge to legislation providing benefits to single parents, but restricting the eligibility of fathers to those with a disability. The Nova Scotia Supreme Court, Appeal Division’s ultimate finding was that section 28 was inapplicable, and could not be asserted in order to evade the three-year delay in the application of section 15. Nevertheless, the Court in obiter made strong statements that section 28’s purpose was to “prevent any continuation of sexual discrimination by

---

(interview of Marilou McPhedran (9 November 2013)). Similarly, Suzanne Boivin refers to section 28 as being “included” in other rights (interview of Suzanne Boivin (19 November 2013)).

- 66 Tamra Thomson uses the imagery of a “film” of gender equality over the entirety of the other *Charter* rights or a gender equality “lens” to describe the intended operation of the “purpose clause”/section 28 (interview of Tamra Thomson (11 December 2013)). Irving, *supra* note 8 at 64 similarly discusses “constitutional gender audits” but does not appear to contemplate that the terms of a domestic constitution may empower or mandate such a process.
- 67 Donna Greschner, “Aboriginal Women, the Constitution and Criminal Justice” (1992) 26 UBC L Rev 338 at 352. See also Donna Greschner, “How Not to Drown in Meech Lake: Rules, Principles and Women’s Equality Rights” in KE Swinton & CJ Rogerson, eds, *Competing Constitutional Visions: The Meech Lake Accord* (Agincourt, Ontario: Carswell, 1988) 55 at 62.
- 68 Katherine De Jong, “Sexual Equality: Interpreting Section 28” in Anne F Bayefsky and Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 493 at 522. See also N Colleen Sheppard, “Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms” (1987) 10 Dal LJ 195 at 222. *Contra* Hošek, *supra* note 24 at 280 (calling the “legal force” of section 28 “unclear”).
- 69 (1984) 16 DLR (4th) 610 (NSSC (AD)).

affirmative legislative action,” full-stop, and that it took “away from legislative bodies the right to perpetrate it in the future.”<sup>70</sup>

Perhaps not surprisingly then, in *Reference re S 5 Family Benefits Act (NS)*<sup>71</sup> and *Phillips v Nova Scotia (Social Assistance Appeal Board)*,<sup>72</sup> a later incarnation of the same legislation was successfully challenged by men using section 15 and declared unconstitutional (though section 28, strictly speaking, was still confined to obiter remarks). In these decisions, the Nova Scotia Court of Appeal indicated that section 28 stood for the proposition that any distinctions based on sex were *prima facie* discriminatory, an explicit nod to the US system of tiered levels of scrutiny for discrimination that vary based on the ground. It found there was an intention by the drafters to deviate from the inconsistent and low levels of scrutiny afforded to sex discrimination by requiring the highest level (“strict scrutiny”) be applied.<sup>73</sup>

While the Court of Appeal correctly pointed out the rigor feminist framers meant to be applied to the sex discrimination analysis, what the Court applied instead was dogmatism. Ad Hockers publicly debated whether sex-based distinctions should be outlawed completely (as CACSW advocated), but settled instead upon requiring a “compelling reason” for such distinctions, a principle they maintained in their lobbying documents was incorporated into section 28 even without explicit reference to such a test in section 15.<sup>74</sup> Disregarding the strong association of gender (and specifically single motherhood) with poverty,<sup>75</sup> the Court found that “the distinction does not fulfill any meaningful purpose in providing assistance to those in need,”<sup>76</sup> that the large numbers of women who required long-term assistance compared to men had no bearing, and that the targeted program could not be considered an affirmative action program under section 15(2). It did not account for the objectives behind section 28, that formalism and women’s devalued status

---

70 *Ibid.*

71 (1986), 75 NSR (2d) 338 (CA).

72 (1986), 34 DLR (4th) 633 (NSCA).

73 *Supra* note 71 at paras 23, 27; *supra* note 72 at para 8.

74 Bev Baines, personal notes of presentation to the Ad Hoc Conference, (14 February 1981) [copy on file with the author]; audio recording of the Conference (copy on file with the author as Cassette #7, Tracks 1 and 2); “Summary of the Resolutions” *supra* note 25 at 635 and 640.

75 See the following publicly available, contemporary authorities on this point: Royal Commission on the Status of Women in Canada, *Report* (Ottawa: Information Canada, 28 September 1970); Ian Adams et al, *The Real Poverty Report* (Edmonton: MG Hurtig, 1971); National Council on Welfare, *Women and Poverty* (Ottawa: National Council on Welfare, 1979); and National Council on Welfare, *Poverty Profile, 1985* (Ottawa: Ministry of Supply and Services Canada, 1985).

76 *Supra* note 71 at para 29.

were not reinscribed in the new *Charter*.<sup>77</sup> A substantive analysis *could* consider whether such provisions were discriminatory in this broader sense of perpetuating gender hierarchy (such as reinforcing a gendered notion of parenting where women provide care and men provide financially). Instead, the Court of Appeal found that gender difference equates to sex discrimination and struck down the legislation providing the benefits (rather than “reading in” an inclusion of all single fathers which might have followed this more nuanced understanding).

Other cases followed suit in declaring unconstitutional accommodations in the law that could benefit women. Legislation that dispensed with paternal consent for the adoption of children of unmarried mothers was similarly struck down, in part, on the basis of section 28.<sup>78</sup> The case left unexamined how dispensation of consent may have enhanced women’s equality and section 7 rights to security of the person<sup>79</sup>, particularly in cases of abuse or where a child is the product of rape or incest. Subsequently, in *Weatherall v Canada (Attorney General)*,<sup>80</sup> Strayer found that cross-gender, non-emergent strip-searching of male inmates and their observation in cells by female guards without prior warning violated their section 8 rights to be free from unreasonable searches (due to the fact that they offended “public decency”). These practices were also found to offend the section 15 right to sex equality, given regulations that prohibited female inmates from being searched by male guards. The Court found that the argument that males were more likely to exploit cross-gender searches was:

... exactly the kind of stereotyping which s. 15(1) of the Charter was designed to preclude. No court would long entertain an argument for example that black persons, or Baptists or Scotsmen are, by an allegedly typical defect of character, more likely as a class to exploit their fellow man, thus justifying laws which discriminate against such classes of persons. I see no reason why I should entertain such an argument when directed against the male “gender” ...<sup>81</sup>

---

77 Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 37.

78 *M (N) v British Columbia (Superintendent of Family & Child Services)* (1986), 34 DLR (4th) 488 (BCSC). See, however, *Hosinger v Kilmer* (1984), 12 CRR 276 (Ont Ct J (Prov Div)) (requirement of blood tests by putative fathers to establish paternity did not violate s 28, although the *Charter* arguments did not appear to be strenuously pressed).

79 Section 7 of the *Charter* guarantees “life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

80 [1988] 1 FC 369 (TD) [*Weatherall*].

81 *Ibid* at para 60.



He concluded that section 28 “has no significant effect in the present case,” given that, in his view, ensuring women’s equal employment opportunities did not constitute sufficient justification for such searches under section 1. However, Justice Strayer did recognize that section 28 could have been used to preclude a section 1 limitation that was “imposed on the s. 8 or s. 15 rights of men alone.”<sup>82</sup>

Thus, section 28 was employed by the trial judge in *Weatherall* to assist in the construction of masculinity within the constitutional framework as beleaguered and in need of defending from invidious “stereotyping” about abuses of male power and, again, to equate the recognition of gender difference in the law with sex discrimination even in the face of the very different vulnerabilities of female inmates.<sup>83</sup> Ironically, the decision goes on in some detail regarding the “framers intent” as to the meaning of section 7, but no such attention is given to section 28. While the Federal Court’s decision in *Weatherall* was overturned by the Federal Court of Appeal and ultimately at the Supreme Court of Canada,<sup>84</sup> neither appellate court addressed the use of section 28. Echoes of the formalism in the above cases would haunt the sex equality jurisprudence in the years to come, even as it became less common to cite section 28 in support of men’s rights.<sup>85</sup>

However, in the main, the targets of judges employing section 28 were *Criminal Code* prohibitions against sexual exploitation of girls and young women: section 146, prohibiting men from having sexual intercourse with underage girls<sup>86</sup> and section 153(1)(a), prohibiting men from committing “illicit

---

82 *Ibid* at paras 62-63.

83 These would later be extensively canvassed in the report of Madam Justice Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Toronto: Public Works and Government Services Canada, 1996) at 51.

84 [1993] 2 SCR 872.

85 I am thinking specifically here of *Trociuk v British Columbia (Attorney General)*, [2003] 1 SCR 835, finding the province’s *Vital Statistics Act*, RSBC 1996, c 479 violated s 15 by not providing fathers the same rights as mothers in giving their children their surnames and being recognized on birth certificates, without consideration of mothers’ equality rights. See Hester Lessard, “Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v British Columbia (Attorney General)*” (2004) 16:1 CJWL 165.

86 Section 146 prohibited any male person from having sexual intercourse with a female person who was not his wife and was under the age of fourteen years (subsection (1)), or with a female person of previous chaste character, who was not his wife and was between the ages of 14 and 16 (subsection (2)). See *R v L(DI)* (1985), 46 CR (3d) 172 (Ont Dist Ct), rev’d (1986), 27 CCC (3d) 229 (CA); *R v Neely*, 22 CCC (3d) 73 (Ont Dist Ct), rev’d (1986), 27 CCC (3d) 229 (CA) (on the basis of non-applicability of s 15 of the *Charter* to pre-1985 offence; s 28 dependent on s 15 for effect); *R v Kroetsch* (1988), 44 CRR 212 (BC Co Ct); *R v Brooks*, 85 AR 25, rev’d 93 AR 1 (CA); *R v Randell* (1989), 77 Nfld & PEIR 195 (TD). Contra *R v Bearhead* (1986), 22 CRR 211 at para 21 (Alta QB)

sexual intercourse with [their] stepdaughter, foster daughter or female ward.”<sup>87</sup> These provisions were found to discriminate against men contrary to *Charter* sections 15 and 28, but perhaps even of greater concern, in two of these cases, the courts found that section 28 precluded the government from making arguments about the reasonableness of the rights limitations under section 1.<sup>88</sup> There is no doubt that the provisions incorporated antiquated understandings of the harms of sexual exploitation.<sup>89</sup> Yet, they were an important acknowledgement of the reality of sexual abuse as a gendered crime that unequally affects young women and girls.<sup>90</sup> In decisions upholding the provisions, this was usually done on the basis that the distinction in the legislation reflected girls’ capacity for pregnancy. Accordingly, these judges “grasped the sex-differential reality at the cost of attributing it to biology.”<sup>91</sup>

When the Supreme Court of Canada finally ruled on the constitutionality of s 146, in *R v Hess*,<sup>92</sup> it found no discrimination. Rather than acknowledging girls’ vulnerability to sexual predation, it made its finding instead on the basis that criminal offenses that “as a matter of biological fact can only be committed by one sex”<sup>93</sup> do not violate section 28 or section 15. However, Justice Wilson, for the majority, went on to pronounce that section 28 had no real use in the case. In her view, what section 28 meant was simply to bespeak the obvious, namely that overt discrimination in the recognition of rights is prohibited. In other words “the government will not be able to justify

---

(s 146 discriminates on the basis of sex contrary to s 15; justified under section 1 to “protect young females from becoming pregnant”; no finding of s 28 violation). See also *R v S (M)*, [1994] BCWLD 1333 at para 64 (SC), concerning a later incest provision, *Criminal Code* s 155 (“I hold that even if the freedoms guaranteed by ss 15(1) and 28 are in some way impaired, they likewise are justifiably limited”). A number of other decisions found either that the provision violated s 15 or did not without reference to s 28: see e.g. *R v Poirier* (1985), 69 NBR (2d) 1 (Prov Ct); *R v Drybones* (1985), 23 CCC (3d) 457 (NWTSC); *R v Thorburn* (1986), 26 CCC (3d) 154 (BCCA); *R v Barrons* (1985), 70 AR 107 (QB); and *R v Perkins* (1987), 59 CR (3d) 56 (NWTSC).

87 *R v S (BR)* (1989), 91 NSR (2d) 350 (SCTD) at para 2; *R v D (F)*, 3 OR (3d) 733 (Ont Gen Div), rev’d (1992), 77 CCC (3d) 575 (CA).

88 *R v Howell* (1986), 57 Nfld & PEIR 198 at 109 (Dist Ct); *R v Paquette* (1988), 40 CRR 137, 1988 CarswellBC 1330 at para 8 (BCSC) (by implication, citing the reasoning from *R v Howell* on the interaction of section 28 and section 1), both concerning section 153(1).

89 For instance, as mentioned above, section 146(2), concerning sex with a girl 14-16 years old, required proof of the complainant’s previous “chaste character.”

90 82% of child victims of sexual assault are girls, and girls under 18 report rates of sexual violence five times higher than boys: Canada, *Child and Youth Victims of Police-reported Violent Crime, 2008*, by Lucie Ogrodnik (Ottawa, Statistics Canada, 2010) at 12.

91 Catherine A MacKinnon, *Women’s Lives, Men’s Laws* (Cambridge, Mass: Belknap Press of Harvard University Press, 2005) at 132 (there discussing the plurality opinion in *Michael M v Superior Court of Sonoma County*, 450 US 464 (1981), which upheld a “statutory rape” law).

92 *R v Hess*, [1990] 2 SCR 906 [*Hess*].

93 *Ibid* at para 47.

an infringement of section 7 under section 1 of the Charter on the basis that because of an individual's sex he or she is not entitled to the same degree of Charter protection as persons of the other sex or that because of his or her sex the Charter violation is less serious."<sup>94</sup>

In *Hess*, the accused men also made an argument that the provision violated their section 7<sup>95</sup> rights because it was an absolute liability offence, punishable by a maximum of life imprisonment. As such, Justice Wilson struck down the provision as inconsistent with the fundamental justice principle that those who are "mentally innocent" cannot be convicted. Further, the impugned law could not be justified on the basis of protecting young girls from "premature sexual intercourse" section 1 because of a lack of a "reasonable steps to ascertain age" defence. Despite the highly gendered context of a sexual assault trial, no thought was given to how "fundamental justice" ought to consider *equally* the section 7 interests of women and girls to security of the person, as might be required under section 28. Specifically, no legal significance was accorded to the conditions of inequality under which girls live that render them vulnerable to sexual abuse and the substantial interference with girls' psychological integrity if exposed to sexual relations at a young age. Whether or not the legislation would have been ultimately upheld using an analysis that paid greater attention to section 28, the implications of the Court's failure to pay serious attention to girls' equal right to security of the person were made manifest in a sexual assault case several years later involving a 12-year-old girl. There, the malleability of the "reasonable steps" defence (now section 150.1(4) of the *Criminal Code*) permitted judicial prejudice to run rampant.<sup>96</sup>

After this spate of early activity, courts in the rest of the "section 28 cases" mainly consigned the provision to irrelevance. In most other cases, section 28 is completely ignored even when it is raised by the parties or is pertinent on the facts. While in a handful of cases the courts may have believed that section 28 would not add anything because the claimants ultimately prevailed,<sup>97</sup>

---

94 *Ibid* at para 48. The dissenting decision by Justice McLachlin, much like the lower court decisions, instead attempted to employ section 28 in service of finding a violation of men's rights (at para 79).

95 Section 7 includes fair trial rights, as well as other requirements seen as fundamental to criminal justice, such as ensuring no one is convicted without the requisite *mens rea* (guilty mind).

96 *R v Brown*; *R v Kindrat*, 2005 SKCA 7; *R v Edmondson*, 2005 SKCA 51. The complainant was an Indigenous girl and the three accused men were white; gendered racism played a role in the offence and rape mythology was pervasive in the trials. See Lucinda Vandervort, "Legal Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson*, *Kindrat*, and *Brown*" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 111.

97 *Re Blainey and Ontario Hockey Association* (1986), 54 OR (2d) 513 (CA); *R v Morgentaler*, [1988] 1 SCR 30; *SEIU, Local 204 v Ontario (Attorney General)* (1997), 151 DLR (4th) 273 (Ont Ct Gen

in other cases the failure to consider section 28 is more perplexing.<sup>98</sup> Of most significance is the Supreme Court of Canada decision, *Newfoundland (Treasury Board) v NAPE*,<sup>99</sup> finding that legislation renegeing on pay equity agreements violated women's equality rights. However, the Court went on to find that the violation was justified under section 1 due to the Newfoundland and Labrador Government's assertion that it was in the midst of a fiscal crisis. The Government provided little supporting evidence of the crisis and no evidence that the province could not consider alternatives (such as delaying rather than extinguishing pay equity arrears).<sup>100</sup> Such use of section 1 would have been anathema to section 28's feminist framers.

In other cases addressing women's rights, dissenting judges have indicated that section 28 *could* be considered in the section 1 analysis if rights were asserted by others in a manner that was harmful to their equality,<sup>101</sup> as an interpretive "prism" in statutory interpretation,<sup>102</sup> to interpret the sexual assault defence of "honest but mistaken belief in consent,"<sup>103</sup> or to determine a woman's entitlement to social assistance benefits.<sup>104</sup> In one concurring decision at the Supreme Court, section 28 was posited, hypothetically, as being

---

Div); *T(M) v C(B)*, 2000 BCPC 119; and *Scrimbitt v Sakimay Indian Band Council*, [2000] 1 FC 513 (TD).

- 98 For example, *Canadian Bar Assn v British Columbia*, 2008 BCCA 92 (court striking plaintiff's statement of claim without addressing section 28 claim relating to the disproportionate lack of funds for family law matters); *Vilardell v Dunham*, 2012 BCSC 748, rev'd 2013 BCCA 65, aff'd 2014 SCC 59 (plaintiff alleging court fees in family law trials violate women's right to equal protection of section 7, no adjudication of *Charter* issues by any level of court).
- 99 2004 SCC 66 [*NAPE*]. Section 28 appears not to have been raised by any of the parties or the interveners in the case. However, Baines argues that this does not absolve the Court in failing to consider it as "judges are presumed to know the law": *Baines*, *supra* note 24 at 57.
- 100 Patricia Hughes, "Newfoundland Treasury Board v. N.A.P.E.: Women as Sacrificial Lambs" (2004) 11 CLEJ 383. I argue elsewhere that this reasoning in itself constitutes a gendered devaluation of women's work: Kerri A Froc, "Immutability Hauntings: Socioeconomic Status and Women's Right to Just Conditions of Work under section 15 of the Charter," in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 187.
- 101 *R v Butler*, 73 Man R (2d) 197 (CA), Helper JA, dissenting at para 188; rev'd, [1992] 1 SCR 452 (upholding obscenity provisions under section 1 on the basis of pornography's harm to women, but not addressing section 28). See also *R v Red Hot Video Ltd* (1985), 18 CCC (3d) 1 (BCCA), leave to appeal to SCC refused (1985), 4 CR (3d) xxv (citing section 28 as a factor to be considered under section 1, in assessing whether the *Charter* s 2(b) freedom of expression violation caused by the obscenity prohibition in *Criminal Code* was justified). Similar comments regarding section 28 were made in obiter in *R v O'Sullivan*, [1992] 1 FC 522 (concerning non-payment of taxes to protest abortion, decided under *Charter* s. 2(a) freedom of religion).
- 102 *Symes v Canada*, [1993] 4 SCR 695 at para 248, L'Heureux-Dubé J, dissenting.
- 103 *R v Esau*, [1997] 2 SCR 777, L'Heureux-Dubé J, dissenting.
- 104 *Szuts v Commissioner of Social Services* (1986), 13 OAC 200, Sutherland J, dissenting). As Brodsky and Day state, however, "the case is not decided on *Charter* grounds, and it is not even clear from the decision that *Charter* arguments were raised by counsel" (*supra* note 77 at 82).

able to constrain section 25 (protecting Aboriginal, treaty, and other rights from derogation through the operation of other provisions of the *Charter*).<sup>105</sup> In another, section 28 is paired with (and therefore rendered indistinguishable from) section 15 in deeming “principles of equality ... a significant influence on interpreting the scope of protection offered by s. 7” in relation to the right to legal aid in child protection proceedings.<sup>106</sup>

Section 28 received more thorough treatment vis-à-vis women’s rights in L’Heureux-Dubé dissenting opinion in *R v Seaboyer*.<sup>107</sup> There, a man successfully challenged an early incarnation of the “rape shield” law on the basis that it interfered with his right to a fair trial under *Charter* sections 7 and 11(d) by preventing the introduction of “relevant” evidence of the complainant’s past sexual conduct.<sup>108</sup> Justice L’Heureux-Dubé theorized that section 28 “would appear to mandate a constitutional inquiry that recognizes and accounts for the impact upon women of the narrow construction of sections 7 and 11(d)” advocated by the accused.<sup>109</sup> Instead of taking into account his rights only, Justice L’Heureux-Dubé advocated that the right to a fair trial incorporates the interests that “the complainant, and indeed the community at large [have] ... in the reporting and prosecution of sexual offences” and ensures that that the integrity of the trial process is not subverted.<sup>110</sup> However, (then) Justice McLachlin, for the majority, specifically rejected this reasoning. She stated that while the recognition of a complainant’s rights under sections 15 and 28 “is consistent with the view that section 7 reflects a variety of societal and individual interests,” the accused’s rights to full answer and defence was sacrosanct.<sup>111</sup>

---

105 *R v Kapp*, 2008 SCC 41 at para 97 (per Bastarache J.). Similarly, in *Reference re Electoral Boundaries Commission Act (Alberta)*, 120 AR 70 at paras 15-17 (ABCA) section 28 is mentioned as part of the court’s speculation on *Charter* sections that could be used to challenge electoral boundaries.

106 *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at paras 112, 115, L’Heureux-Dubé J., concurring. The claimant was ultimately successful based on the majority’s gender-neutral analysis concerning the impact of child protection proceedings on “parents” right to security of the person.

107 [1991] 2 SCR 577.

108 See Diana Majury, “*Seaboyer and Gayme: A Study In Equality*” in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 268 at 281 (critiquing the majority’s employment of “relevance” in relation to complainants’ past sexual history, as itself “riddled at every level with assumptions that flow from gender inequality”).

109 *Supra* note 106 at para 254.

110 *Ibid* at para 256.

111 In her words: “However, all proponents in this case concede that a measure which denies the accused the right to present a full and fair defence would violate s. 7 in any event”, *ibid* at para 26. The subsequent case of *R v Mills*, [1999] 3 SCR 668 incorporated women’s equality into the section 7 analysis. The Court upheld restrictions on third party production of sexual assault complainants

This reasoning foreshadowed the result in *R v Osolin*, in which Justice Cory for the majority stated that sections 15 and 28, “although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a [sexual assault] complainant.”<sup>112</sup> Despite these words, the majority made a decision that perpetuated rape mythology by permitting cross-examination of a rape survivor on a statement she made to a psychiatrist that she “may have influenced the man to some extent.”<sup>113</sup> Justice Cory found the cross-examination ought to be allowed, even though the circumstances of the case made it extremely implausible that mistaken belief in consent would have been available to the accused. In addition to the fact the complainant was abducted and held against her will, “Osolin himself testified that he ‘overrode’ [the victim’s] complaints.”<sup>114</sup> Without a real sense of what section 28 is to accomplish in any analysis of women’s rights, it risks being employed as rhetoric to rationalize inequality. Justice Cory’s decision “gave the green light to defence lawyers to weave specific accounts of women’s sexual history [based on rape myths] and to judges to affirm these stories as ‘relevant.’”<sup>115</sup>

Finally, in a number of the remaining cases, courts refer to section 28 only to discount its importance or relevance either to the case or in general. On rare occasions, neutralizing section 28 seems to have been done to save protective measures for women, due to the judge’s perception that section 28 requires identical treatment under the law with men. In one early case, *Shewchuk v Ricard*,<sup>116</sup> the British Columbia Court of Appeal upheld legislation assisting single mothers in establishing paternity of their children and seeking child support. It found the provisions discriminated on the basis of sex, but were justified under section 1.<sup>117</sup> It rejected that section 28 had any independent

---

personal records, but remained stuck in the framework of seeing the accused’s rights of paramount (Lise Gotell, “The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the *Charter* for Sexual Assault Law” (2002) 40:3 Osgoode Hall LJ 251).

112 [1993] 4 SCR 595 at para 34.

113 *Ibid* at para 115.

114 John McInnes & Christine Boyle, “Judging Sexual Law Against a Standard of Equality” (1995) 29:2 UBC L Rev 341 at 352.

115 Elizabeth Sheehy, “Legalising Justice for All Women: Canadian Women’s Struggle for Democratic Rape Law Reforms” (1996) 6 Australian Feminist Law Journal 87 at 102. See also Elizabeth Sheehy, “Equality and Supreme Court Criminal Jurisprudence: Never the Twain Shall Meet” in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) 329.

116 2 BCLR (2d) 324 (CA), leave to appeal to SCC refused, (1987), 10 BCLR (2d) xxxvi.

117 Similar reasoning was employed more recently to reject the application of section 28 in *Jackson v Zaruba*, 2013 BCCA 81 at para 7 (family property laws applying only to married spouses), and

power or applicability to the case in the face of a coalition of interveners relying upon the section to argue the legislation's sex-based distinctions were unconstitutional.<sup>118</sup>

However, other cases explicitly disregarding section 28 convey a discomfort with the section in any way directing judicial decision-making. Courts have said that it is obvious that rights apply to men and women equally and therefore section 28 is of no importance to the case,<sup>119</sup> it does not create a separate right or have any distinct power,<sup>120</sup> or it has no relevance to the case because other rights do the work.<sup>121</sup> In one case, the court strenuously insisted it was only present in the *Charter* for emphasis, or else would jeopardize affirmative action programs or laws to "prohibit matters contrary to public decency."<sup>122</sup>

The most serious and egregious discounting of section 28 occurred in *Native Women's Association of Canada v Canada (NWAC)*.<sup>123</sup> The Native Women's Association of Canada challenged the decision of the Federal Government to exclude it from constitutional consultations surrounding the Charlottetown Accord, and fund only the participation of four national Aboriginal groups that NWAC alleged were male dominated. NWAC was also denied a "seat at the table" and had to advance its issues through these groups exclusively. This exclusion occurred despite the fact that in negotiating self-government, the funded groups had a long history of hostility to NWAC's demand that the *Charter* apply to First Nations governments and of opposing reinstatement of women who lost status under the "marrying out" rules under section 12(1)(b) of the *Indian Act* (abetted and encouraged at times by the

---

*Green v Millar*, 2002 BCSC 1727 (WL) at para 28 ("best interest of the child" test in custody legislation).

118 For a criticism of the formalist position taken by the coalition (which included some women's organizations), see Andrew Petter, "Legitimizing Sexual Inequality: Three Early Charter Cases" (1989) 34 McGill LJ 358 at 362.

119 See *McIvor v Canada (Registrar of Indian & Northern Affairs)*, 2007 BCSC 827 at para 64, varied 2009 BCCA 153; leave to appeal to SCC denied, (2009), 402 NR 398.

120 *EGALE Canada Inc v Canada (Attorney General)*, 2001 BCSC 1365, rev'd 2003 BCCA at para 180. See also *R v Campbell*, 2004 TCC 460 at para 80, rev'd on other grounds 2005 FCA 420.

121 See *Native Women's Association of Canada v Canada (NWAC)*, [1994] 3 SCR 627 [NWAC].

122 *Blainey v Ontario Hockey Association* (1985), 52 OR (2d) 225 (WL) at para 37 (Ont Sup Ct – H Ct J), rev'd on appeal but not on this issue, *supra* note 97.

123 *Supra* note 121. My discussion of *NWAC* below is a distillation of my previous work on this case, including my Masters' paper, *Will "Watertight Compartments" Sink Women's Charter Rights? The Need for a New Theoretical Approach to Women's Multiple Rights Claims under the Canadian Charter of Rights and Freedoms* (LLM Thesis, University of Ottawa Faculty of Law, 2008) [unpublished]; and Kerri A Froc, "Multidimensionality and the Matrix: Identifying Charter Violations in Cases of Complex Subordination" (2010) 25:1 CJLS 21 ["Multidimensionality and the Matrix"].

Federal Government).<sup>124</sup> These marrying out rules were eventually found to have violated an international convention to which Canada was a signatory,<sup>125</sup> and were changed after section 15 of the *Charter* came into effect. These reinstated women, living off reserve, were a core constituency of NWAC at the time of the negotiation of the Charlottetown Accord.

NWAC claimed that by failing to provide it with equal funding and standing, the Federal Government violated Indigenous women's right to equality. It also claimed a violation of freedom of expression in section 2(b) and section 28 in that "the Government of Canada failed to equally guarantee the right to communicate their constitutional views to the governments at the conferences."<sup>126</sup> However, Justice Sopinka, for the majority, refused to address section 28 directly. In relation to NWAC's freedom of expression claim, the Court merely insisted that different *Charter* rights needed to be kept separate and therefore it could not consider gender equality within the section 2(b) framework.<sup>127</sup> Justice Sopinka went on to state, after rejecting this portion of the challenge, "It seems that the respondents' contentions regarding sections 2(b) and 28 of the *Charter* are better characterized as a section 15 *Charter* argument."<sup>128</sup> By excising consideration of section 28 from the section 2(b) freedom of expression analysis in this way, the majority did not have to engage critically with the fact that the Government was providing expressional resources already, but unequally as between male and female Indigenous groups. By contrast, under section 28's counterpart in the European context, Article 14 of the *European Convention on Human Rights*, it is settled law that unequal provision of a benefit falling within the "ambit" of a general right constitutes a violation of the "equal rights" guarantee. This would be so even if, for example, it could not be argued that there is a general government obligation under freedom of expression to provide resources for a group to express itself.<sup>129</sup>

---

124 I examine this history, the Federal Government's complicity in the subordination of Indigenous women within their communities through its historical and contemporary practices of patriarchal colonization, and its significance to NWAC's claims in, "Multidimensionality and the Matrix," *ibid.*

125 *Lovelace v Canada, Report of the Human Rights Committee*, UN GAOR, 36th Sess, Supp No 40, Annex 18, 16, UN Doc AQ/36/40 (1977).

126 *Supra* note 121 at para 43.

127 *Ibid* at para 48.

128 *Ibid* at para 79.

129 Rory O'Connell, "Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination within the ECHR" (2009) 29:2 *Legal Studies: The Journal of the Society of Legal Scholars* 211 at 215-216. Article 14 of the ECHR states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national



Forcing all of the gender equality arguments onto the shoulders of section 15 exclusively permitted the Court to narrow and decontextualize NWAC's *Charter* claim even further. The Court found that the section 15 claim hinged exclusively on whether NWAC could prove that the groups were "male dominated" and that NWAC was more representative of women,<sup>130</sup> completely removing any consideration of colonization and state complicity in Indigenous women's patriarchal subordination. Technically, NWAC failed on an evidentiary basis, but the above demonstrates that its failure was based, at least in part, on a fundamental misunderstanding of section 28. In the aftermath of this judicial interpretation, the integrity of section 28 as a constitutional provision is in serious question, with little sense of its role within the *Charter*. It may be the only constitutional provision so profoundly debased and marginalized.

## Originalism and its detractors (including the Supreme Court of Canada)

Originalism is not a single theory, but a strain of constitutional theories with common understandings about the methodology for interpreting the constitution and common normative reasons for its adoption: neutralizing the effects of politics on constitutional adjudication by making interpretation a matter of empirical discovery; better adherence to rule of law by tethering interpretation more closely to the written constitutional text; and elevating democracy by constraining judicial discretion to values expressed through the democratic process of constitution-making, thus preventing the constitution from being amended by judicial fiat.<sup>131</sup> Most originalists contrast their approach to the vagaries of so-called "living constitutionalism" in which principles expressed in constitutional text are considered to grow and evolve as society's understanding of fundamental principles and rights evolves and as new constitutional problems present themselves.

---

minority, property, birth or other status." Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221.

- 130 In "Multidimensionality and the Matrix," *supra* note 123, I further explain how this focus stunted the equality analysis, eliminated critical aspects of the context regarding NWAC's marginalization and representation of a "largely disenfranchised community" of women (Joyce Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Self-Government" (1993) 4:4 Constitutional Forum 110 at 114). In fact, it required NWAC to prove an impossibility, namely that it differed in terms of a fixed, essentialized "viewpoint" of Indigenous women that it possessed but the funded groups did not.
- 131 "We are All Originalists Now," *supra* note 5 at 62-63. See also Jeffrey Goldsworthy, "The Case for Originalism," in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 42 at 48-55 [Goldsworthy] (regarding rule of law and democracy as normative arguments for originalism).

Early originalist methodology relied upon the notion of “original intent,” that the interpretation of the constitution should be derived exclusively from the intent of the framers.<sup>132</sup> The problems critics pointed out with original intent were primarily evidentiary rather than epistemological: “when there are multiple authors of a text that must function across decades and centuries, it is not clear that there is such a thing as the intention of the framers that could guide the application of text to future cases.”<sup>133</sup> Furthermore, in many cases evidence suggested that the framers and ratifiers<sup>134</sup> intended future generations be unconstrained by any particular vision they held of how the provision should be used.<sup>135</sup> Some have maintained this was generally the case in relation to Canadian framers of the Constitution, who accepted that courts would rely on “non-originalist sources” and that “some degree of judicial originality was inevitable.”<sup>136</sup>

However, aside from questions of evidence, these older theories of originalism were also critiqued for assuming that original intentions could provide all the answers when courts are called upon to apply often vague and indeterminate constitutional provisions to contemporary legal problems. The interpretation of “freedom,” “speech,” “equal,” or “protection” based on what the framers intended these terms to mean in the abstract would not advance the analysis very far in deciding whether a government provision creating “bubble zones” around abortion clinics is constitutional, for example. There was also the normative problem of legitimacy: how can the “dead hand” of the framers constrain contemporary constitutional interpretation, given that societal mores may have drastically changed and that constitutional problems may present to the courts with no “original equivalent”? Further, the American constitution-making process forecloses arguments based on the greater democratic legitimacy of originalism: in addition to the fact that no one alive can

---

132 That is not to say that original intent has been completely abandoned by contemporary theorists: see Stanley Fish, “The Intentionalist Thesis Once More” in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 99 and Steven D Smith, “That Old-Time Originalism” in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 223 [“That Old-Time Originalism”].

133 “We are All Originalists Now”, *supra* note 5 at 8.

134 Another more theoretical problem was the question of why one should focus on the intent of the framers, and not the “original understanding” of the ratifiers, who made the Constitution law (*Living Originalism, supra* note 7 at 102). This is discussed below in relation to Canadian critiques of originalism.

135 See Brest, *supra* note 3 and H Jefferson Powell, “The Original Understanding of Original Intent” (1985) 98:5 Harv L Rev 885.

136 Patrick Monahan, *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 78-79.

be considered to have assented to the US Constitution (even through elected representatives), there were many segments of society explicitly prohibited from participating in framing or ratification. This included most women and African-Americans.

The Supreme Court of Canada, in two cases, rejected originalism as an interpretive schema for similar reasons. In a case early in the *Charter's* history, *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*,<sup>137</sup> the question was whether "original intent," as expressed through the testimony of two DOJ drafters before the Joint Committee, should be considered as constraining the interpretation of section 7's "principles of fundamental justice." The Supreme Court of Canada found that original intent would be "nearly impossible of proof" given the "multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter." Considering intention as determinative raised the spectre of "rights, freedoms and values embodied in the *Charter* in effect [becoming] frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs," contrary to the accepted view from the *Persons Case* that the Canadian Constitution is "a living tree capable of growth and expansion within its natural limits."<sup>138</sup> The "living tree" doctrine of evolving rights has been considered instrumental in the recognition of the rights of women and other groups seeking equality (such as sexual minorities) under Canadian constitutional law. Its application resulted in women being recognized as "persons" under the *British North America Act* (now the *Constitution Act, 1867*),<sup>139</sup> and the recognition of marriage as expressed in the Constitution extending to the unions of same sex couples. This approach, not originalism, is therefore seen as assuring the Canadian Constitution's continued relevance and legitimacy.<sup>140</sup>

New originalists sought to address these problems in a number of ways. They discarded original intent in favour of original meaning. Instead of an investigation into the subjective state of framers' minds (a borderline psychological inquiry), original meaning calls for inquiry into how the framers anticipated their words would be understood. Original meaning is thus to be ascertained through writings of the framers but also any available public documents written at the time (such as newspapers or dictionaries) that

---

137 [1985] 2 SCR 486 (WL) at paras 51 and 52 [*Re BC Motor Vehicles Reference*].

138 *Ibid* at paras 58-60; *Persons Case*, *supra* note 43 at 136.

139 *Persons Case*, *ibid*.

140 *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 22-23.

would show common usage of constitutional words and phrases.<sup>141</sup> Original meaning thus places more emphasis than original intent on the text.<sup>142</sup> New originalists also make an analytic distinction between intended application of a constitutional provision to a particular problem and its abstract, linguistic meaning (often referred to as semantic meaning), with the former only providing evidence about the latter (but is not binding).<sup>143</sup>

To blunt the “dead hand” argument, most new originalists make a distinction between interpretation (ascertaining the semantic meaning of a term) and construction (legal tests or default rules to give provisions effect). They concede that where interpretation is “exhausted” and the provision still does not render an applicable rule, other principles may be deployed to decide a case, particularly where the provision is “vague and indeterminate.” In this case, the decision-maker moves to “construction,” which can result in “other forms of constitutional argumentation [being] given relatively free reign,” and adaptations to the contemporary context so long as they are not inconsistent with the provision’s original meaning.<sup>144</sup> For instance, Bradley Miller argues that concept of equality could be used in construction of constitutional provisions to avoid “injustice.”<sup>145</sup>

Issues much debated among new originalists include: when the interpretation of a provision can be considered “exhausted” and construction be employed; whether judges or legislators are entitled to engage in construction;<sup>146</sup>

---

141 In their co-authored book, Solum and Bennett debate whether original meaning truly avoids the evidentiary problems of original intent, with Bennett believing that it in fact exacerbates the problem of finding commonality of meaning within an even larger collectivity (“meaning is always meaning to a person or persons”): “Originalism and the Living American Constitution”, *supra* note 4 at 98. Expressing the contrary perspective, Solum believes that original meaning does not depend on the individual states of mind of those in society but rather patterns of linguistic usage (at 56).

142 Keith E Whittington, “On Pluralism within Originalism,” in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 70 at 80 [Whittington].

143 Goldsworthy, *supra* note 131 at 51 (“The objective is to reveal and clarify the meaning of the norms that the founders enacted, and not to discover their beliefs about how those norms ought to be applied ... They are not infallible authorities when it comes to interpreting and applying their own laws”).

144 Whittington, *supra* note 142 at 82.

145 Bradley W Miller, “Origin Myth: The Persons Case, the Living Tree, and the New Originalism” in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 120 at 141 [“Origin Myth”].

146 For some originalists, where interpretation is exhausted, judges ought to defer to the construction of constitutional provisions employed by elected officials and decline to find laws unconstitutional where the interpretation does not clearly justify it: see Brian H Bix, “Constitutions, Originalism, and Meaning,” in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 285 at 287.

and the coherence of the distinction between original meaning and original intended application.<sup>147</sup> Most new originalists agree that originalist interpretations should be bypassed where non-originalist precedents are needed for stability and consistency in the law,<sup>148</sup> but these theorists have not developed a principled framework for when a judge should follow or discard precedent.<sup>149</sup> Other originalists readily agree that originalist interpretations should be rejected when they are fundamentally unjust, with some going so far as to say that in such cases judges should “lie” about original meaning in these circumstances rather than “openly flouting” the Constitution.<sup>150</sup>

The degree of ambiguity embedded in the theories suggests that they cannot legitimately be considered as empirical and constraining, or even depoliticizing and “neutral.”<sup>151</sup> Critics maintain that originalism simply structures discretion and constitutional disputes to conform to contemporary right-wing values using historical rhetoric. Thus, as Reva Siegel argues, originalism in practice does not exert the will of the dead over the living: “the past and present are no longer so sharply differentiated . . . Claims about the past express contemporary identities, relationships, and concerns, and express deep normative convictions.”<sup>152</sup> Therefore, both the dead hand argument against originalism and the arguments in its favour relying on its neutrality and objectivity are a distraction. What remains persuasive about originalism is its utility in fulfilling a societal commitment to certain values and rules democratically made at a particular moment in history, as expressed through the constitutional text.<sup>153</sup>

---

147 For instance, both Jack Balkin (*Living Originalism*, *supra* note 7 at 7) and Jamal Greene (“On the Origins of Originalism” (2010) 88:1 *Tex L Rev* 1 at 10 [Greene]) maintain that Justice Scalia repeatedly confuses original intended application with original meaning in his interpretation of constitutional provisions purportedly based on the latter. See “That Old-Time Originalism,” *supra* note 132 at 226, categorizing the main divergences between originalist theorists as including these and others.

148 An oft-cited quote from one of new originalism’s cheerleaders, US Supreme Court Justice Antonin Scalia (in reaction to the statement of fellow originalist on the bench, Clarence Thomas, that he would be willing to overturn any precedent not in keeping with original meaning): “I am an originalist, but I am not a nut” (Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007) at 103).

149 “Originalism and the Living American Constitution,” *supra* note 4 at 116.

150 Goldsworthy, *supra* note 131 at 66.

151 See e.g. Post and Siegel, *supra* note 6, and Andrew Koppelman, “Originalism, Abortion, and the Thirteenth Amendment” (2012) 112 *Colum L Rev* 1917 at 1919. See also Thomas B Colby & Peter J Smith, “Living Originalism” (2010) 59 *Duke LJ* 239 (referring to the discretion inherent in selecting between the various strands of new originalism).

152 “Heller and Originalism’s Dead Hand – In Theory and Practice” (2009) 56 *UCLA Law Rev* 1399 at 1419-1420.

153 This is essentially Jack Balkin’s argument in *Living Originalism*, *supra* note 7.

## What would a Canadian originalism look like?

Some authors have made the argument that the US acceptance of originalism (albeit still as a minority viewpoint) arose from the particularities of the American cultural context, including its tendency to valorize historical political figures and the prominence of evangelical religion whose literal biblical interpretations display a conspicuous similarity to some originalist narratives.<sup>154</sup> The argument is that originalism has not and simply will not take hold in Canada. However, this argument appears to be premised, at least in some cases, on an uncomplicated perspective of Canadian jurisprudence as being completely innocent of originalist influences.

First, while it is true that the Supreme Court of Canada has expressed a distaste for originalism, it has considered framers' intent as part of its approved, "purposive interpretation" of the *Charter*. The purposive approach incorporates the "historical origins of the concepts enshrined" in the *Charter* and requires placement of a right in its proper "linguistic, philosophic and historical contexts."<sup>155</sup> The recent Supreme Court of Canada decision concerning Senate elections, which employs an originalist methodology in all but name, signals that it will likely have to confront this state of unacknowledged ambivalence sooner rather than later.<sup>156</sup> Much of the Court's professed difficulty with accepting original meaning as authoritative seems to be based to some extent on older versions of originalism and concerns about accepting original intended applications as authoritative.<sup>157</sup>

---

154 Greene, *supra* note 147 at 7. For a similar perspective, see also former Supreme Court of Canada Justice, Ian Binnie, "Constitutional Interpretation and Original Intent," in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Markham, Ont: LexisNexis, 2004) 345 at 348.

155 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 (WL) at para 118. See "The Dutiful Conscript", *supra* 7 at 335 for Dodek's recitation of *Charter* cases referencing framers' intent, albeit that he categorizes these references as "episodic, inconsistent and unpredictable." Decisions to be added to his list include, in my view: *Quebec Assn of Protestant School Boards v Quebec (Attorney General) (No.2)*, [1984] 2 SCR 66 at 79; *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at para 6, Wilson J; *Ontario v 974649 Ontario Inc*, 2001 SCC 81 at paras 23, 40; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 11; *R v Hape*, 2007 SCC 26 at para 33 (in relation to the choice to be silent in the text); *Health Services & Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 40, 78; *R v Ferguson*, 2008 SCC 6 at paras 63-66; *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37 at para 180; and *Reference re Senate Reform*, 2014 SCC 32 (throughout, and in particular, paras 13-17, 26, 55-58, 67, 90).

156 *Reference re Senate Reform*, *ibid.* See Carissima Mathen, "Living Originalism: Why the Senate Reference is About Much More than Senate Reform," *National Magazine* (9 December 2013), online: National Magazine <<http://nationalmagazine.ca/Articles/November/Living-originalism.aspx>>.

157 Bradley W Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22 Can JL & Jur 331 (arguing that Supreme Court's rejection

Second, characterizing the Canadian context as inhospitable to originalism ignores the role of legislative intent and original meaning in its tradition of statutory interpretation.<sup>158</sup> In that realm, Canadian courts have accepted the principle that legislative intent governs interpretation. Under the current purposive approach to interpretation, legislative intent may be contextualized and articulated at a higher level of generality (the intended object of the legislation taking pride of place over the intent behind particular words),<sup>159</sup> but not displaced. Even Driedger's oft-cited articulation of the "modern" principle encouraging the "words of an Act . . . to be read in their entire context, with the scheme of the Act, the object of the Act, and the intention of Parliament" has been characterized fundamentally as an intentionalist approach.<sup>160</sup> The intention that governs is that present at the time of the statute's enactment. To depart from this original meaning would be usurping the powers of the legislative branch, allowing judges to substitute their own beliefs for Parliament's.<sup>161</sup>

The Supreme Court now accepts a wide range of materials under the rubric of legislative history as evidence of general legislative purpose *and* specific legislative intent regarding the meaning of particular words, so long as it is relevant and not inherently unreliable.<sup>162</sup> This includes information used in the legislative process, though the weight provided depends on how authoritative the legislature regards the materials brought to its attention. As Ruth Sullivan states, "An explanation of the meaning or purpose of a text or its intended application is normally considered authoritative when it issues from the person who made the text as opposed to some third party."<sup>163</sup>

However, the focus on legislative intent in statutory interpretation generally, and the original meaning rule in particular, has come under trenchant criticism from some Canadian scholars who have pejoratively called it,

---

of originalism is based on the older understanding of originalism and that rejection of "new originalism" does not inexorably follow).

158 I thank one of the anonymous reviewers of this article for suggesting the debate over these concepts in Canadian statutory interpretation as a fruitful site of inquiry and his detailed remarks that were extremely helpful in guiding this portion of the article.

159 This is akin to the point made by Robert Bennett: "In that context [of statutory interpretation], though usage is not as settled as one might wish, legislative *purpose* is often used to express legislative aims at a high degree of generality, while legislative intention is used to characterize more concrete aims." "Originalism and the Living American Constitution", *supra* note 4 at 110.

160 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008) at 1.

161 *Ibid* at 145-146.

162 *Ibid* at 575, 609-610.

163 *Ibid* at 614.

"statutory archaeology"<sup>164</sup> that wrongly asserts an ability to "explain the entire phenomenon of legislative interpretation" by way of a fictional state of mind possessed by an amorphous collective.<sup>165</sup> It is probably more apt to claim, therefore, that rather than originalism failing to "take root" in Canada, the greater concern may be that whatever originalism exists in Canadian interpretation is already under sustained attack and any attempt to further develop originalism into the Canadian constitutional context would result in its being "rooted out" completely.<sup>166</sup>

Canadian critics of legislative intent attack the "what" (the existence of a collective intent), the "who," (ambivalence about whether interpreters are concerned with the intent of drafters, ratifiers, or both), and the why (the justification for intent as authoritative). In relation to the "what," anti-intentionalists say that collective intent is a fiction that cannot be cobbled out of varied motivations of individual legislators<sup>167</sup>; even if there is good evidence of individual legislators' specific intentions regarding a particular provision, their professed reasons for supporting legislation are not necessarily reliable indicators of

---

164 Randal N Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Edmond Montgomery Publications, 2001) [*Statutory Interpretation*] at 4 citing Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed (Cowansville, QC: Yvon Blais, 1991) at 7 [Côté]. See also William N Eskridge, Jr, *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994) at 13-14 [*Dynamic Statutory Interpretation*]. Eskridge's theory of dynamic statutory interpretation that is unbound from any original legislative intent is relied upon by some of these Canadian critics.

165 Stéphane Beaulac, *Handbook on Statutory Interpretation: General Methodology, Canadian Charter and International Law* (Markham, ON: LexisNexis Canada, 2008) at 13, citing Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed (Cowansville, QC: Yvon Blais, 2000). See also Graham, *ibid*, and Randal NM Graham, "The Myth of Originalism," in *Interpretatio non cessat : Mélanges en l'honneur de Pierre-André Côté / Essays in Honour of Pierre-André Côté*, Stéphane Beaulac & Mathieu Devinat, eds, (Cowansville, QC: Yvon Blais, 2011) 261 ["The Myth of Originalism"].

166 It should be noted, however, that even Eskridge, with whom some of these Canadian critics of originalism align, regards constitutional interpretation as distinctive from statutory interpretation (*Dynamic Statutory Interpretation*, *supra* note 164 at 6-7), and indicates that the "open-textured Constitution cries out for more context" (William N Eskridge, Jr, "Should the Supreme Court Read *The Federalist* But Not Statutory Legislative History?" (1998) 66 *Geo Wash L Rev* 1301 at 1323) ["Should the Supreme Court Read *The Federalist*?"].

167 *Statutory Interpretation*, *supra* note 164 at 18-19. But see fellow traveller, Stéphane Beaulac, rejecting similar arguments for exclusion of parliamentary debates as admissible evidence in statutory interpretation:

To deny that the intention of Parliament can be discerned with the help of members' statements may be compared to denying the existence of Cambridge University because there are only colleges! As an aggregate body, while it may be true that the legislature can express itself only through legislation, it can hear, read and respond to numerous statements and materials put before it." ["Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998) 43 *McGill LJ* 287 at 316].



intent due to strategic, partisan behaviour.<sup>168</sup> They argue that the “who” in relation to legislative intent is nebulous (particularly given the bicameral nature of Parliament) and existing admissible evidence is scanty.<sup>169</sup> In terms of the “why,” some have argued that viewing original intent as authoritative is deceptive because its methodology is capable of manipulation and thus “foster[s] interpretative freedom coupled with the illusion of constraint.”<sup>170</sup> Given that intention is a fiction, some advocate for a wider scope of “dynamic interpretation” that would determine meaning based on “needs which are identified at the time the rule is being applied”<sup>171</sup> or the use of intent only in limited circumstances.<sup>172</sup>

Perhaps understandably given the greater focus on intent within ordinary statutory interpretation, most of these Canadian critiques align closely with older, nonoriginalist critiques of original intent.<sup>173</sup> Originalists in the US have addressed these criticisms by pointing out that shared intentions in a multi-member group are a common phenomenon, “the product of mutual communication” of such intentions when executing a collective plan, for example.<sup>174</sup> As Richard S. Kay notes, while the notion of shared intention is complicated with increasing numbers of actors (framers, ratifiers, bicameral legislatures), what is required is only that there be a “core of identical meaning shared by all those agreeing.”<sup>175</sup> It may be the case that framers and ratifiers leave text deliberately vague in order to leave a larger role for construction; however, that

---

168 *Dynamic Statutory Interpretation*, *supra* note 164 at 16, cited in *Statutory Interpretation*, *supra* note 164 at 18.

169 *Statutory Interpretation*, *supra* note 164 at 18-19.

170 “The Myth of Originalism,” *supra* note 165 at 274, citing Ruth Sullivan, “The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation,” in E Mackaay, ed, *Les Certitudes du droit — Certainty and the Law* (Montreal: Éditions Themis, 1999) 151 [“The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation”].

171 Côté, *supra* note 164 at 10.

172 Graham accepts that in cases of ambiguity with a limited number of potential meanings, legislative intent may be employed to choose between them: “Obviously, the legislature has turned its collective mind to a particular problem and proposed a particular solution, despite the drafter’s inability to express the proposed solution with precision” (*Statutory Interpretation*, *supra* note 164 at 141). He regards the task of the judge in such circumstances “to sift through the statute’s language in search of clues as to the drafter’s intended meaning.” However, presumably if the scheme of the statute could provide the answer, the provision could not be said to be genuinely ambiguous in meaning: *Kazemi (Estate) v Islamic Republic of Iran*, 2014 SCC 62. A truly ambiguous statute likely requires extrinsic sources to ascertain legislative intent, which does not avoid what Graham sees as the difficulties with that concept.

173 The exception is Randal Graham, who briefly comments on new originalism in “The Myth of Originalism,” *supra* note 165 at 269.

174 Richard S Kay, “Original Intention and Public Meaning in Constitutional Interpretation” (2009) 103:2 Nw UL Rev 703 at 707 [Kay].

175 *Ibid* at 708.

does not mean that their intent is fictive or without substance. Alternatively, they can employ a "division of labour" in authoring, but even in this case, "the multiplicity of participants (and diversity of mental states) [is not] an obstacle to the development of content that is intended by all," as with other types of planning in which not all the details of each element are known by every member.<sup>176</sup>

Moreover, intent that matters is relatively narrow in scope. It is the "semantic intentions" of the legislators (intent to communicate successfully the meaning of a text) and not a wide-ranging inquiry into the multiplicity of "mental states associated with the purposes or expectations" for the text.<sup>177</sup> Put another way, "[A]n utterance or a text is a 'speech act' undertaken to communicate the intention of an utterer or author. Absent the concept of intent, there is no communication."<sup>178</sup> For communication to be successful, the audience must understand the words in the way that the utterer or author intended them to be understood.

Nevertheless, the focus on intention has shifted as most originalists moved from original intent to the search for original meaning. This is not to disavow that intent still figures in original meaning. Legislators or constitutional drafters want to be understood by their audience. They know that interpreters will be physically and temporally distant and may not have access to information about idiosyncratic meanings they intend to employ.<sup>179</sup> Accordingly, they ordinarily convey their intention through textual choices that impart contemporary, commonly understood semantic meanings, within what Randy Barnett calls the "publicly available communicative context."<sup>180</sup>

For that reason, original meaning and original intent will "almost always mirror" each other, barring unusual circumstances mainly in the realm of

---

176 Lawrence B Solum, "A Response by Lawrence B Solum" in Robert W Bennett & Lawrence B Solum, *Constitutional Originalism: A Debate* (Ithaca, NY: Cornell University Press, 2011) 143 at 163 [Solum].

177 Solum, *ibid* at 161. See also Lawrence B Solum, "Semantic Originalism" (Illinois Public Law and Legal Theory Research Paper Series, Research Paper No 07-24, 2008), online: <<http://papers.ssrn.com/sol3/papers.cfm?abstractid=1120244>> ["Semantic Originalism"] (providing additional details as to how and why semantic intentions can be ascertained in a collectivity, even if there is no explicit agreement by each individual member on the meaning of a particular term).

178 Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore: Johns Hopkins University Press, 2005) at 195 (summarizing the arguments of originalists in the 1990s countering interpretative indeterminacy).

179 "Semantic Originalism," *supra* note 176 at 48.

180 "The Gravitational Force of Originalism" (2014) 82 *Fordham L Rev* 411 at 414.

mistake.<sup>181</sup> What framers and ratifiers thought they were conveying through their textual choices is therefore important evidence of original meaning, particularly “informative of how those familiar and careful with language understood the content of the rule that was being debated and adopted.”<sup>182</sup> Thus, original meaning eliminates the concern about the indeterminacy of collective, subjective mental states, as the endeavour becomes instead an empirical exercise to ascertain the meaning of terms as understood and employed by the founding generation.<sup>183</sup> This is so even if one still considers available evidence of the framers and ratifiers’ communicative intentions.<sup>184</sup> William Eskridge remarks that public statements by “key supporters” of constitutional provisions are “potentially quite reliable for figuring out original constitutional understanding or meaning” because of their motivation to seek “common ground” to garner support while not alienating supporters, and because opponents would be ready to contest any deviation of their statements from the “plain meaning of the proposed measure.”<sup>185</sup>

Consequently, original public meaning also removed the sting of the anti-intentionalist criticism about shifting notions of “whose intention counts.” The anti-intentionalist critique regarding fictional intent had the most “critical bite” in relation to attempts to bring into the analysis imaginative speculation about how legislators “would have” decided certain issues before the court. However, this criticism is rather beside the point in relation to newer versions of originalism.<sup>186</sup> Again, what original meaning methodology seeks is the semantic meaning of the words; how framers, ratifiers, or anyone else thought the text would be applied in favour of particular outcomes is not authoritative.<sup>187</sup>

---

181 Kay, *supra* note 174 at 714.

182 Keith E Whittington, “Originalism: A Critical Introduction” (2013) 82 Fordham L Rev 375 at 382.

183 As mentioned previously, this has also been attacked by nonoriginalists as in fact exacerbating the problem with determinacy by expanding exponentially the number of people involved with the inquiry into meaning; however, these arguments seem to lack the same vigor given that originalists are not now (if they ever were) investigating the psychological states of framers and ratifiers but rather linguistic practices (see e.g. Solum, *supra* note 176 at 147).

184 Steven G Calabresi, “The Political Question of Presidential Succession” (1995) 48 Stan L Rev 155 at 161 (indicating these may be “essential” to show what “legally trained readers” would have thought about a particular interpretation, especially for legal terms of art).

185 “Should the Supreme Court Read *The Federalist*?” *supra* note 166 at 1318.

186 Keith E Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, KS: University Press of Kansas, 1999) at 163. For Canadian anti-intentionalists employing this critique, see e.g. *Statutory Interpretation*, *supra* note 164 at 13.

187 Statutory interpretation critics of legislative intent also question the separation of interpretation and application, stating that meaning is not prior to application, but rather is created through application (Côté, *supra* note 164 at 16). While space does not permit an extensive analysis of these

With respect to the “why” of originalism being suspect, anti-intentionalists pointed out the malleability of intent and that it therefore is a weak constraint on judicial discretion. Ruth Sullivan has described the “cheats” that interpreters can employ to give the flexibility needed to argue that a preferred interpretation is supported by legislative intent.<sup>188</sup> However, many of these tactics have no real application to original intent or meaning in the constitutional context.<sup>189</sup> Sullivan acknowledges that there is often inconsistency in how courts understand the original meaning rule, whether it means that the words of a statute “must retain their original sense or definition” or whether the “words of an Act must receive the interpretation they would have been given when the Act was first passed,”<sup>190</sup> had legislators been confronted with the technological, social, environmental, or institutional changes represented in the case.

Sullivan is properly concerned with the malleability of the concept of original intent employed by the courts in statutory interpretation. Even so, she is hardly in favour of an approach that discards it in favour of judicial creativity:

In my view, the notion of legislative intent is meaningful and has an important role in statutory interpretation. The courts are not free to decide cases on the basis of the state of their digestion or their personal preference. *It is sometimes possible to draw compelling inferences about the intended purpose or meaning of a legislative provision and when this happens the court must ordinarily follow the direction of the legislature.* The problem with legislative intent is *not that it fails to give direction*, but that it only goes so far. It is an important consideration but it is not the only consideration. And it often stops short of providing the court with the answers it needs ... The doctrine of fidelity to legislative intent becomes a hindrance rather than a help when the court refuses to acknowledge these limitations.<sup>191</sup>

---

claims, originalists dispute that meaning is created exclusively from application, noting “people could not use language to disagree if the meaning of a word were the same as the things to which it is applied” (Mark D Greenberg & Harry Litman, “The Meaning of Original Meaning” (1998) 86 Geo LJ 569 at 589). Further, application of existing rules determining which instances fall inside or outside categories can change over time without changing the meaning of the rules themselves (Kay, *supra* note 174 at 710-711).

188 “The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation”, *supra* note 170.

189 Two of these Sullivan mentions in her article are “distinguishing ‘sloppy drafting’ from ‘legislative error’” and invoking the doctrine of presumed intent. She discusses another, to “presume nothing worth mentioning has changed,” which relates to a desire impose a *contemporary meaning* upon a legislative text in substitution for doing the work of ascertaining original meaning (or being unable to do the work given the paucity of evidence).

190 *Supra* note 160 at 148.

191 “The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation”, *supra* note 170, at 186-187, emphasis added.

Again, this is entirely consistent with an originalist methodology of exhausting interpretation before engagement with construction. Given the recognition of the role of construction and the non-binding nature of original expected applications, the *raison d'être* of original meaning is no longer constraint per se; rather, it is to channel judicial discretion in a way that conforms to society's legislative and constitutional commitments, as democratically expressed.<sup>192</sup> No persuasive argument has been made that the heightened judicial creativity within "dynamic interpretation" (and its "living tree" constitutional counterpart) manages to do this better.<sup>193</sup>

## What would a progressive, feminist originalism look like

Are conservative interpretations of rights inevitable under originalism? One cannot simply equate judicial discretion with progressive interpretations of rights. Initial advances in women's rights with the advent of the *Charter* have often been followed by later retrenchment through formalist understandings of equality,<sup>194</sup> all through relatively unbridled exercises of judicial discretion under "living tree" constitutionalism. In relation to *Charter* section 28 in particular, the framers made linguistic choices in the text that were to direct judicial decision-makers toward much more transformative and progressive meanings of equality. They were unanimously supported in this endeavour by the *Charter's* ratifiers. However, if an originalist interpretation of the *Charter*, and particularly section 28, is to avoid lapsing into conservatism, courts need to adopt a practical stance about those who are entitled to be considered framers and drafters, beyond the usual, formal political actors.<sup>195</sup>

I do not intend to minimize the risk posed by originalism, even with this revised understanding of who constitutes "the framers." Some Canadian

---

192 This point is made similarly by Balkin (as discussed below) and Keith E Whittington, "The New Originalism" (2004) 2 *Georgetown Journal of Law & Public Policy* 599 at 608-609.

193 For an interesting argument on a similar point, see Peter Martin Jaworski, "Originalism All the Way Down. Or: The Explosion of Progressivism" (2013) 26 *Can JL & Jur* 313 (arguing that pursuing anti-originalist criticisms to their logical conclusion would mean permitting the texts of decades-old judgments to be read in accordance with contemporary values and meanings, undermining *stare decisis* and judicial supremacy).

194 Diana Majury, "The Charter, Equality Rights and Women: Equivocation and Celebration" (2002) 40 *Osgoode Hall LJ* 297; Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" in Sheila McIntyre & Sanda Rodgers, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment, or Retreat* (Markham, ON: LexisNexis, 2010) 183; and Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16:1 *Rev Const Stud* 31.

195 "The Dutiful Conscript," *supra* note 7 at 340; Irving, *supra* note 8 at 58, 60 (in relation to *Charter* section 28 in particular).

originalists have attacked progressive *Charter* decisions for making small interpretive inroads towards protecting the rights of the most vulnerable and disadvantaged populations.<sup>196</sup> Moreover, women and other equality-seeking groups would not necessarily want to confine conceptions of equality under *Charter* section 15 to what was contemplated in 1982. Is advancing originalism a case of women needing to be careful what they wish for?

This risk may be attenuated by an insistence on a principled and consistent employment of new originalism's distinction between original intended application and original meaning. For instance, the legislative record demonstrates that the text of section 7 was crafted to exclude property rights. However, one cannot extrapolate (as have some judges) an intention to exclude *any* section 7 claims with an economic component, such as those based on a denial of government benefits necessary to sustain life. No historical evidence exists to support the notion that framers and ratifiers thought that by ensuring the text was silent on property rights, all such claims would be blocked.<sup>197</sup> Furthermore, even if such evidence existed, it would be evidence of original intended application (which is not authoritative), not original meaning.

As well, an argument for an originalist interpretation of section 28 does not necessarily translate to an argument that originalism should be used exclusively to interpret *all Charter* rights. Rather, the persuasiveness of appeals to originalism should be considered on a case-by-case basis.<sup>198</sup> There are several reasons why one of these cases should be section 28. One reason is that we are able to ascertain the original meaning of its terms as an empirical matter with reliable evidence. As discussed, section 28's text was created primarily by a relatively small group of women, albeit endorsed by much larger groups. It

---

196 "Origin Myth," *supra* note 145 and Grant Huscroft, "Vagueness, Finiteness, and the Limits of Interpretation and Construction" in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 203. In late 2014, Miller and Huscroft were appointed to the Ontario Superior Court of Justice and the Ontario Court of Appeal, respectively.

197 Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 *Queen's LJ* 65; and Martha Jackman, "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees through *Charter of Rights* Review" (1999) 14 *J L & Soc Pol'y* 69. For a contrary perspective, in relation to the import of the historical record regarding social and economic rights within the *Charter* more generally, see Barry Strayer, "In the beginning ... The Origins of Section 15 of the *Charter*," (2006) 5 *JL & Equal* 13 at 18.

198 Robert C Post & Reva Siegel, "Democratic Constitutionalism" in Jack M Balkin & Reva B Siegel, eds, *The Constitution in 2020* (New York: Oxford University Press, 2009) 25 at 32 (arguing that progressives should not "credit originalism's claim to methodological exclusivity" given the use of other modalities of constitutional argument by its judicial practitioners). See also Whittington, *supra* note 142 at 71, 75 ("originalism does not imply the irrelevance of other forms of constitutional interpretation").

was entrenched with very few modifications to their drafting. Their “semantic intentions” are the best evidence of original meaning. They drafted the text and were intensely interested in ensuring their textual choices communicated accurately how they were meant to guide subsequent judicial discretion and interpretation. They explained the meaning of the “purpose clause” at the Special Joint Committee, the well-attended Ad Hoc Conference, the NAWL and NAC conferences, in their lobbying materials for politicians prior to section 28’s adoption, and in public statements to the popular press.<sup>199</sup>

Ad Hockers spoke widely to politicians across the political spectrum about the “purpose clause” and section 28 as part of their effort to strengthen the *Charter* for women. As the provision’s “key supporters,” they were motivated to articulate its semantic meaning accurately, seeking common ground while not alienating the supporters to whom they were accountable. Their evidence does not conflict with the ratifiers who, in essence, delegated authority to them, and there is little evidence to support a multiplicity of semantic intentions. Ratifiers unanimously voted in favour of the common plan to ensure that the entire *Charter* supported women’s equality. To the extent that evidence exists of a collective understanding of section 28’s meaning by the ratifiers, it generally supports the meaning attributed by the feminist framers..

Second, there would be less concern with precedential inconsistency in relation to an originalist approach to section 28. The dearth of legal meaning given to the section means there are very few interpretive precedents with which a new interpretation of section 28 would conflict. While it has been *applied* in the past, this was done with very little interpretation. With respect to whether the courts’ acceptance of the “living tree” approach would constitute an impenetrable barrier, the case law discussing framer’s intent would indicate otherwise. In addition, the Supreme Court seems to accept that original intention or meaning is of more significance when the right at issue is the result of a “political compromise,”<sup>200</sup> which very much describes

---

199 See e.g., Ad Hoc Conference of Canadian Women on the Constitution, Press Release, “Constitutional Equality Yet to Come, Women Say” (22 April 1981) in Toronto, York University Archives and Special Collections (File 9, Box 2007-020-002, Marilou McPhedran Fonds); Andrew Szende, “Canadian Women Win Fight for Equality”, *Toronto Star* (22 April 1981) A18; “Women’s Charter-of-Rights Campaign May be Close to Success”, *The Globe and Mail* (17 March 1981) 14; Liane Heller, “Feminists Lobby for Amendments”, *Toronto Star* (19 February 1981) A14; and [Ad Hocker] Laura Sabia, Op-Ed, *Toronto Sun* (17 February 1981) 11.

200 *Reference re Bill 30, An Act to Amend the Education Act (Ontario)*, [1987] 1 SCR 1148 at 1173-74, Wilson J (WL) at para 29; *Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 SCR 549 (WL) at paras 23-24, 28, per Beetz J.

the circumstances of section 28's entrenchment.<sup>201</sup> In these cases, the Court is much more concerned with fulfilling the intent of the parties regarding that compact. Ascertaining intent in this context would not be about mental states but rather aimed at investigating the framers' "expectations and intentions ... about their choice of linguistic technologies of freedom and constraint ... the economy of trust and distrust they created through their choice of publicly available language."<sup>202</sup> Thus, such an originalist analysis of section 28 would remain consistent with original meaning and avoid the pitfalls of earlier approaches.

Third, to the extent that non-originalist interpretive intent should be considered authoritative, the evidence of such intent is weak to non-existent in relation to section 28.<sup>203</sup> There was no evident intent to leave the interpretation of gender equality to the caprices of "judicial originality" — quite the opposite. The purpose behind the creation of section 28 was to channel judicial discretion in a particular way: to prevent judges from going back to narrow (patriarchal) conceptions of rights under the *Canadian Bill of Rights*, thus perpetuating women's continued disparate access. The interpretive intent behind section 28 was not to tether its interpretation to 1982 understandings of gender equality, but rather to foreclose the reversion to pre-1982 interpretations; to ensure that other *Charter* provisions (notably, sections 1, 27, and 33) did not become a new source of women's unequal access to rights; and to ensure a rigorous standard be applied when evaluating compliance with gender equality.

Fourth, the normative argument for an originalist interpretation of section 28 does not rely on judicial constraint for constraint's sake, but rather on "preserving the constitutional choices that have been deliberately made by specified and democratic procedures."<sup>204</sup> It supports preventing judicial

---

201 Marilou McPhedran refers to MPs' receptivity to section 28 primarily as a "matter of political muscle" on the part of Ad Hockers (interview of Marilou McPhedran (17 December 2013)). Jean Chrétien describes this political muscle in his biography, in which he predicted of dire consequences that would follow from provincial insistence on an "incomplete guarantee of rights for women" and the removal of Aboriginal rights in the Accord, saying to Ontario Premier Bill Davis after the First Ministers Conference, "Wait till the women and the natives go after those guys" (*Straight from the Heart* (Toronto: McClelland and Stewart-Bantam, 1986) at 188).

202 *Living Originalism*, *supra* note 7 at 46-47.

203 Whittington argues that interpretive intent should be considered irrelevant for a number of reasons, including that it can be considered a "form of expected application," with framers/ratifiers' notions of how constitutional adjudication ought to be practiced lacking authority; further these interpretive intentions are not embodied in a contextual constitutional rule despite the opportunity to do so (*supra* note 182 at 395-396). This reasoning is particularly salient in the Canadian context, given that other interpretive rules (particularly, sections 25 and 27) were included in the *Charter*.

204 Whittington, *supra* note 142 at 73 (explaining that his case for originalism rests on this principle



distortion and subsequent nullification of a constitutional provision created through extraordinary public involvement in constitution-making. Lawrence Solum's comments are a propos:

Would a Supreme Court opinion that purported to overrule or amend a provision of the Constitution be legally valid? Originalists believe that the answer is no. If living constitutionalists believe that the Supreme Court does have this power, they surely owe us an explanation for that belief. What is the evidence for the legal validity of amendment by judicial fiat?<sup>205</sup>

This strongly suggests that we should go back to first principles to guide section 28's interpretation. Contrary to "dead hand" concerns of originalist critics, originalism would *enhance* the democratic legitimacy of judicial review in this context.

Does a feminist originalism lapse into the same reliance on a reified narrative of history "the way it really was,"<sup>206</sup> detached from contemporary ideologies? Jack Balkin's originalist theory of "text and principle" suggests an alternative use of history that does not fall into this quagmire. He argues that a constitution sets out both precise rules and general standards or principles. History plays a different role with respect to interpreting the rules than the standards and principles. Since rules are meant to constrain, original semantic meaning will be authoritative. With respect to standards and principles, however, semantic meaning is unlikely to be determinative because framers use abstract language with "the goal [of channelling] politics, by articulating a collection of key values and commitments that set the terms of political discourse and that future generations must attempt to keep faith with."<sup>207</sup>

In Balkin's framework, section 28 sets out both a rule ("Notwithstanding anything in this *Charter*") and a standard ("rights and freedoms ... guaranteed equally to male and female persons"). With respect to the rule, the original semantic meaning of the text is explicit and ought to be determinative: "notwithstanding anything" is as absolute today as it was in 1982. History merely bolsters this interpretation by demonstrating that there is no special

---

and not "judicial restraint" per se).

205 "We are All Originalists Now", *supra* note 5 at 20.

206 See David Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham: Duke University Press, 2010) at 63, 65, for his use of this phrase and also the notion of "history of the present," which is the recognition that history is always and insistently re-presented to us, mobilized for present political purposes" (citing Walter Benjamin, "Theses on the Philosophy of History" in Hannah Arendt, ed, *Illuminations* (New York: Schocken Books, 1969) 253).

207 *Living Originalism*, *supra* note 7 at 25.

semantic meaning that was commonly understood to apply.<sup>208</sup> With respect to the open-ended standard, history is important to uncover the principles to guide, not determine, its construction. It shows that the framers of section 28 were keenly interested in the future of constitutional interpretation and ensuring that the *Charter* would be capable of innovation to make rights practically accessible to women.<sup>209</sup> The "principle" governing the gender equality standard in section 28 was openness and inclusion, requiring conceptual space for different understandings of equality and other rights that would be inclusive of both the feminine and the masculine and consciously incorporate relations of power. These are the principles that ought to govern its construction, and ones the text reasonably can bear.<sup>210</sup>

## Conclusion

Those interested in women's equality may say to accept originalism in any form gives up too much. Originalism, no matter the particular incarnation, relies on the precept that interpretations of constitutional provisions must be derived from their original semantic meanings and cannot be construed in a manner inconsistent with these core understandings. How could such original meanings better protect gender equality than those that have evolved to incorporate new insights? As I have discussed above, the unique circumstances of section 28 of the *Canadian Charter of Rights and Freedoms* belie the notion that gender equality is always best protected by permitting wide judicial discretion not grounded in the textual choices the framers made to direct the interpretation of the relevant constitutional provisions. Insights from new originalism, in particular the distinction between original meanings and original intended applications, demonstrate further that originalism does not mean that equality rights are "frozen" in time or that we must turn away from

---

208 To the extent that there is textual ambiguity as a result of the interaction of different provisions — such as the government's ability to subject all "rights" to limitation under section 1, history assists us in demonstrating that the ambiguity is more apparent than real given that section 28 was in large part a response to the risk to women's rights posed by section 1.

209 Similarly, Balkin's explained the principles he believes should govern the construction of the Fourteenth Amendment providing "equal protection of laws," as including a prohibition against class legislation, "special" or "partial" legislation, and arbitrary or unreasonable distinctions: "My evidence for these principles comes from the public explanations that people who drafted the Fourteenth Amendment gave for what they were trying to do" (*supra* note 7 at 265). He maintains that the principles must be provided at the same level of generality of the text, which I believe my principles of openness and inclusion satisfy.

210 See *Living Originalism*, *supra* note 7 at 267 citing Mitchell N Berman, "Originalism and Its Discontents (Plus a Thought or Two About Abortion)" (2007) 24 *Const Comment* 383 at 393 (employing this criteria for principles of construction).

contemporary understandings of how the evils of inequality manifest themselves. Wholesale discounting of originalist doctrine potentially ignores a rich source of authority for feminist arguments. It also abandons an entire theoretical field to those who are developing doctrine without women's best interests at heart. Perhaps by engaging with originalism, inserting counter-narratives of constitutional history, and demanding a more rigorous theoretical analysis that blunts originalism's political excesses, we can ensure an originalism that is best for women.

