*The Coxford Lecture**

Of Living Trees and Dead Hands:
The Interpretation of Constitutions and Constitutional Rights

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I. To begin with, I would like to thank Stephen Coxford, whose great generosity has made this lecture series possible. It is a truly wonderful thing you are doing for the law school. I would also like to thank the president of the university, Paul Davenport, and the dean of the Faculty of Law, Ian Holloway, for their roles in putting on this lecture. And I would especially like to thank my host, Professor Grant Huscroft, and his colleagues in public law and philosophy, Brad Miller, Margaret Martin, and Andrew Botterell. I have been here twice before at their behest. They are a great group—bright, energetic, ambitious, and entrepreneurial. They hold great promise for the public law component of the law school's educational and scholarly mission. And they have been very gracious hosts.

II. Tonight I am going to say some things that are critical of the Canadian Supreme Court, or at least the publicly stated positions of some of the justices. In particular, I shall criticize the so-called "living tree" approach to constitutional interpretation with which the Court has become identified. Indeed, I shall argue that "living tree" interpretation is an oxymoron. Interpretation is always "dead hand" interpretation, to conjure up the usual opposing metaphor. Anything else is not interpretation at all but is some other enterprise masquerading as interpretation.

Now in criticizing the Canadian Supreme Court's statements on this matter, I do not want to come across as an ungrateful guest, biting the hand that is feeding me on this occasion. And indeed, the Canadian Supreme Court is no worse on this topic than most justices on the U.S. Supreme Court, who espouse or at least practice some version of "living constitution" interpretation—which, I repeat, is not interpretation at all.

III. But I am getting ahead of myself. So let me do some modest stage-setting. What is the principal function of law—all law? I would argue—and have argued—that law's principal function is to settle what we are obligated to do. Even if we were all motivated to fulfill our moral obligations, our disagreements about what those obligations are and what they entail in particular situations would produce huge moral costs. Because of our moral disagreements, we could not predict with any certainty what others were going to do; and because what is the morally correct conduct for me often depends upon what others are doing, my inability to predict and coordinate with others will lead me to do what is morally wrong even if I am

* November 26, 2008. This is the inaugural lecture in an annual series at the University of Western Ontario Law School enabled by the generosity of Stephen Coxford.

https://doi.org/10.1017/S0841820900004677 Published online by Cambridge University Press

trying to do what is morally right. Legal settlement of what I and others are obligated to do allows me to coordinate my acts with others' acts and avert the moral costs of colliding good intentions.

Legal settlement also can improve moral decision making by means of giving decision makers the benefits of others' expertise. I may know that polluting is wrong, but I may not know whether the substance I am about to dump in the river is a pollutant. I may know that I should not operate equipment that endangers others, but I may be ignorant of the fact that this particular piece of equipment is dangerous. Good intentions without factual expertise can be as problematic in terms of consequences as bad intentions. Legal settlement can improve our moral decision making if the law makes use of expertise.

Legal settlement also makes moral decision making more efficient in terms of time and other resources. Even if I could eventually acquire expertise and the ability to predict how others will act, unaided by law, my decisions regarding what I am morally obligated to do may require a great deal of time and energy that could be put to better moral use if the legal settlement of the issue were clear and easily accessible.

Thinking of law in terms of settlement of what we are morally obligated to do explains how law and morality co-exist on the same terrain. Both purport to tell us what we are obligated, forbidden, or permitted to do. So the question might be asked, "Why do we need law, given that we already have morality?" Why do we have many volumes chocked full of laws rather than only the one, Spike Lee law: "Do the right thing"? The answer is that although the Spike Lee law is in one sense perfect and would be appropriate for a society of omniscient gods, in another sense, in our world of less than omniscient humans, "Do the right thing" is not "the right thing." Law is a response to the fact that we are not gods, not to the fact that we are not angels. If we were gods, but some of us were not angels, "Do the right thing" would suffice. If one of us did the wrong thing, others would know the right thing to do in response. But if we were angels but not gods—always motivated to do the right thing but uncertain of and disagreeing about the right thing to do—specific laws settling what we should do would effect a moral improvement over the Spike Lee law. Paradoxical perhaps, but true nonetheless, the perfect Spike Lee law is morally inferior to a regime of quite specific and likely imperfect laws.

Of course, to fulfill its settlement function and improve upon Spike Lee, law will have to consist of determinate rules. It is determinateness that produces the moral benefits of coordination, expertise, and efficiency. Standards—those legal norms that are not determinate rules—leave matters unsettled. They in effect tell subjects to "do the right thing" within the region of decision making subject to them. They fail to fulfill the settlement function. Rather, they defer settlement.

IV. If law's function is to settle what ought to be done through determinate rules, constitutional law's function is to settle the most basic matters regarding how we ought to organize society and government. One can think of a constitution's being basic law through different prisms. Looked at in terms of legal validity, constitutional law is the law that is highest in the validity chain. It validates lower level

law. Just as an administrative law may be valid only if it is authorized by a statute, a statute may be valid only if it is authorized by the constitution. The constitution is the highest law there is and is neither valid nor invalid but just accepted.

The second way to think of a constitution's being basic law is to think of it in terms of relative entrenchment against change. Typically, a constitution is more entrenched against change than a statute, administrative rule, or common law court decision.

Now usually the law that is highest in the validity chain is also the most entrenched. The reason for this is obvious. If lower level laws like statutes were more entrenched than the higher level constitutional laws that authorized statutory entrenchments, one could repeal the entrenched statutes by the easier route of repealing the less entrenched constitution's authorization of the statutory entrenchment. So it makes sense to have higher level law be more entrenched than lower level law.

Constitutions, as I said, lay down the ground rules for governance. They "constitute" the government. They set up structures, offices, and law-making procedures.

Constitutions such as the *U.S. Constitution* and the *Canadian Charter* also entrench "rights," and it is the constitutionalizing of rights and its implications for judicial interpretation that will be my principal focus for the remainder of the lecture.

V. When the constitution promulgates the structures, offices, and procedures for governance—the rules about how laws are to be made, how offices are to be filled, and which level of government and which officials within government are to have jurisdiction over which matters—the constitutional provisions in question are similar to assembly instructions that accompany gadgets or toys that we buy. They are instructions for "how to assemble a government." But if this is how we should conceptualize the structural provisions of the constitution, how should we conceptualize those provisions constitutionalizing certain rights?

As I see it, there are three, and only three, possibilities here. First, the constitutional authors might be creating rights or making certain rights more determinate by means of specific determinate rules granting various specific liberties and immunities. Second, the constitutional authors might be incorporating real moral rights—that is, making certain real moral rights legally as well as morally binding on the government and enforceable by the judiciary. Third, the constitutional authors might be inventing or creating rights but without translating them into determinate rules. I shall take up the implications of these three possibilities in turn.

VI. The first possibility—creating a right, or making an existing right determinate, through a determinate rule—is unproblematic and unremarkable. In the *U.S. Constitution*, the so-called right against self-incrimination was most likely meant by the *Constitution*'s authors to be no more than a rule granting defendants an immunity from being compelled, on pain of contempt, to testify in court. It was an invented right, as there probably is no corresponding moral right against self-incrimination, and the scope of this invented right was coterminous with the rule that embodied it.

https://doi.org/10.1017/S0841820900004677 Published online by Cambridge University Press

Likewise, some scholars believe that the "freedom of speech" referred to in the First Amendment was meant to be a determinate rule forbidding Congress from requiring licensing of speakers and publishers—that is, a determinate rule against prior restraints. If there is a general right of free expression, on this view, the First Amendment was making determinate and constitutionalizing only a portion of the more general right.

Other rights, such as the right in the First Amendment to petition the government, might be seen as rules that are corollaries of the type of governmental structure created by the Constitution—a representative democracy—and not as moral rights that pre-exist that structure.

VII. Let me now turn to the second possibility for constitutionalizing rights, namely, incorporating by reference real moral rights. There are three aspects of such an enterprise worth careful consideration.

First, if one is going to incorporate real moral rights into a constitution, then one is going to have to subordinate those rights to the rules setting up the structure of the government and also to decisions regarding the content of those rights that are supposed to be legally authoritative—that is, that are supposed to settle the question of what the content of those moral rights is for purposes of the legal system.

Let me elaborate briefly on this point about subordinating moral rights. Within morality, moral rights are not subordinate to human institutions and human decisions. Rather, the contrary is the case. Human institutions and decisions are subordinate to moral rights. Were moral rights incorporated into a constitution without making them subordinate to other aspects of the constitutional regime, then they might completely overturn that regime. For there is never any guarantee that a constitutional structure is consistent with moral rights as they really are. After all, the constitutional structure is an artifact produced by human beings possessing fallible moral beliefs.

Moreover, because the content of real moral rights is controversial, incorporating real moral rights into a constitution would make the content of constitutional law—and thus all law—incapable of being authoritatively determined. For the content of real moral rights cannot be settled by any institution's decision about that content, whether it's the decision of the legislature or the decision of the Supreme Court. Therefore, incorporation of real moral rights into a constitution will undermine the settlement function of law unless it is understood that those rights are subordinate to some institution's determination of their content. Were that not true, decisions of the legislature and the Supreme Court regarding moral rights would fail to be *law* in the eyes of those who disagreed with the decisions because they would see those decisions as inconsistent with real moral rights.

So, the first point about incorporating real moral rights is that they must be subordinated to constitutional structures and to authoritative determinations of their content. The second point about incorporation of real moral rights is related: A decision must be made regarding which institution's *view* of real moral rights should be treated as authoritative for purposes of the legal system. To narrow the focus to the usual suspects, should the legislature's view of real moral rights be authoritative, or should the authoritative view be that of the courts?

https://doi.org/10.1017/S0841820900004677 Published online by Cambridge University Press

Keep in mind that everyone—the legislature, the courts, and the people themselves—is subject to the requirements imposed by real moral rights. So the question is never whether the legislature is free to disregard real moral rights, or whether the courts are free to do so. The question is whose view of what those rights require should be the authoritative view within the legal system.

Some democrats believe that the legislature's view should be authoritative. However, because the legislature is always subject to the constraints of real moral rights, whether or not they are incorporated into the constitution, it is pointless to incorporate them unless one plans to make them judicially enforceable against the legislature (whether or not the legislature is able thereafter to override that determination). I repeat—constitutionalizing real moral rights only makes sense alongside judicial authority to determine their content and enforce them against the legislature. That is not because courts are superior to legislatures when it comes to determining the content of moral rights; rather, it is because legislatures are already supposed to make their legislation consistent with real moral rights, whether or not constitutionalized. Incorporating those moral rights as legal rights but then making the legislature's view of their content legally supreme over the view of the courts thus accomplishes nothing. (I take no view here on whether courts *are* superior to legislatures in determining the content of real moral rights. I tend to be skeptical of either institution's ability in this regard, though no more skeptical than I am of law faculties' ability.) But, as I said, if courts are *not* superior to legislatures in determining the content of real moral rights, either epistemically or motivationally, it makes no sense to constitutionalize those rights. They apply to the legislature whether or not they are constitutionalized.

So if real moral rights are to be incorporated into a constitution, they must be subordinated to the constitutional structures and to some institution's determination of their content. And therefore an institution must be chosen that will have the authoritative say regarding that content, though incorporation of real moral rights strongly implies that the chosen authoritative institution will be the courts. The third thing to note about incorporating real moral rights is that there is no guarantee that moral reality will contain the moral rights referred to in the constitutional text. There may be no moral right of equality, or of freedom of expression, or of freedom of religion. Or those rights may just be aspects of some moral right that is not named in the constitution. Or the correct moral theory might be a consequentialist one, like utilitarianism or egalitarianism, on which the only moral right is that all actions conform to the consequentialist norm. If constitutional authors wish to constitutionalize real moral rights, they had better be certain that the rights they name *are* real moral rights; but, of course, they cannot be certain. They would be better off just telling the courts to enforce against the legislature whatever moral rights there actually are without attempting to name them.

VIII. I have now discussed two of the three possibilities constitutional authors might have in mind in constitutionalizing rights. They might be creating specific rights in the form of determinate rules that define the rights, such as a rule forbidding judicially compelled incriminating testimony or a rule forbidding requiring

https://doi.org/10.1017/S0841820900004677 Published online by Cambridge University Press

a license to speak. Or they might be attempting to incorporate by reference real moral rights. The third and final possibility is that in constitutionalizing a right, the constitutional authors are inventing or creating the right but without giving it any determinate form—that is, without embodying it in a rule or set of rules. Rather, the right is supposed to function as a value, with weight, not as a specific rule such as the rule against requiring a license to speak.

There is only one problem with this third possibility, but it is a doozy. This possibility is in truth an impossibility. One cannot, however hard one tries, invent a right that is not coterminous with a determinate rule. If there is nothing in the world pre-existing the constitution to which this right refers—if this right comes into being only by virtue of its being mentioned in the constitution—then its contours and weight cannot be assessed non-arbitrarily, as there is nothing in the world that would make any such assessment true. The courts would be making it up were they to declare that such a constitutional right applied or did not apply, outweighed the government's interest in its legislation or did not outweigh it.

I shall give one illustration of the problem that will stand in for every possible illustration. Suppose that we wish to create a right that does not exist in the moral realm—say, a right to fine art. We do not, however, specify through determinate rules just what the right entails: Does it entail government funding of art, and if so, how much, and how balanced against other governmental resource needs? Does it entail a legally enforceable obligation of talented artists to produce such art, and if so, how is this obligation to be balanced against artists' right to liberty? And may government suppress fine art that threatens public order, and if so, of what magnitude must the threat be? Suppose instead of resolving these questions through detailed rules, we simply say that we will let the courts resolve these questions. Well, how will the courts resolve them other than according to judicial preference? There is no right to fine art in the moral realm which they can consult. When they resolve these questions, then, there will be no criteria available to determine if their resolutions are correct or incorrect. We were making up the right, and they will be making up its contours in deciding cases rather than looking to independently existing contours that could render their decisions right or wrong. They will be in the position of one who is told that a nonexistent creature—say, a unicorn—has a horse-like body and a single horn on top of its head, but is then asked to give its height, weight, color, and speed. One would protest, "This is an invented creature, and its inventor hasn't given me this information—so how would I know?" The same applies to invented rights not embodied in determinate rules.

Well, you might ask, what about legal standards—legal norms that are not determinate rules? Do standards not require judges to fill in their requirements? I would answer that standards do require judges to fill in their requirements but to fill them in by consulting reasons that pre-exist the legal system, most notably, moral reasons. A standard essentially instructs the judge to do what is morally best within the space left open by legal rules. Standards do *not* create the reasons on which judges are to rely in fleshing them out.

IX. I have said that the destination of this lecture's journey is constitutional interpretation, and at long last, that is where we have arrived. We have traveled slowly

https://doi.org/10.1017/S0841820900004677 Published online by Cambridge University Press

over land rather than jetted to the destination because it is important to survey the constitutional terrain in some detail. I have argued that constitutional provisions creating governmental structures are like assembly instructions for toys and gadgets. They are assembly instructions for creating a government. Constitutional rights provisions, I have argued, can be of two types: determinate rules creating the rights or incorporation by reference of real moral rights. Finally, I have argued that creating rights other than through determinate rules is an impossibility.

X. So what do these points suggest is the proper way to interpret constitutions? Let us consider first the interpretation of structural provisions. Consider what the constitutional enterprise *is* in this regard. We have asked the constitutional authors to tell us how we should construct our government. How should the legislative branch be structured and chosen? How should the other branches be structured and chosen? What should be the respective powers of the federal and provincial governments? And so on. And the constitutional authors have communicated their resolutions of these issues to us through symbols—marks on pages in the case of written constitutions. It would make sense, would it not, to interpret those symbols as meaning what the constitutional authors intended them to mean—that is, by reference to the constitutional authors' intended meaning. After all, we charged them with the task of producing governmental assembly instructions, and these symbols were meant by them to convey what they had produced. It would be decidedly odd to have one group write assembly instructions but then to take the symbols it used and "interpret" those symbols as if they had been produced by some other group with different intended meanings. Why should we read the Canadian or United States constitutions as if they were written in English if we do not care about the intended meanings of their actual authors? Why not imagine that the marks on the pages are not English but are in some special code that means what we would like it to mean? No mark or sound has any inherent meaning. Marks, sounds, and other symbols have only the meanings those who produce them intend to convey. And although for any set of symbols produced by one author with a given intended meaning, we can always treat those symbols as if they were produced by a different author with a different intended meaning, doing so with constitutional provisions makes the whole process of authoring them and adopting them bizarre. When I read assembly instructions for a toy or gadget, I try to discern what those who wrote them intended, not what someone else might have intended by those symbols, much less what I would have intended. Looking for the authors' originally intended meaning is the only thing that makes sense when it comes to constitutions' structural provisions.

Now someone might object that I have overstated my case. They might argue that interpretation of structural constitutional rules can properly depart from the authors' intended meaning so long as the symbols in the constitution can bear an alternative meaning. But this is confusion on several levels.

First, and to repeat myself, giving a group of people the job of coming up with structural rules but then disregarding the meanings *they* intended their chosen symbols to convey seems quite bizarre and verges on unintelligibility.

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Second, it is a mistake to imagine that a given set of symbols can bear only a limited number of meanings. Any symbol can convey an indefinite number of meanings. And even if we artificially decree that a certain set of symbols must be treated as if it were English—and no set of symbols itself declares what standard language, if any, it is in—words and phrases in English can bear an indefinite number of meanings, again depending on the intentions of their users and the understandings of those intentions by the audience. At some point in time the word "bad" came to convey the meaning "good," as in "That's a really bad car you're driving." At some point in time "He's a really cool cat" came to refer not only to the tabby by the air conditioner but to a jazz musician in sweltering New Orleans. Symbols, languages, codes, idiolects—they can convey any meaning so long as the intended meaning is understood by its audience.

Moreover, it's only the intended meaning of its authors that gives a constitutional text its unity, so that the Canadian or American constitution in one book is the same constitution as that in another book, and the same as that in the national archives. What I mean is this: If a constitution contains an ambiguous word or phrase, and we can resolve the ambiguity either by reference to the authors' intended meaning or by reference to other possible meanings, then the different possible interpretations represent different constitutions. For suppose the ambiguous word or phrase in English has no counterpart in, say, Italian. Rather, there is a separate Italian word for each of the possible meanings. In that case, when translators translate the constitution into Italian, if they resolve the ambiguity differently from one another, they will produce Italian versions that are *symbolically* different one from another. The only thing that makes a given set of symbols the same text as a different set of symbols is that they have the same authorially intended meaning.

When it comes to the Constitution's structural rules, therefore, we do not want our courts to treat them as if they were a "living tree." Those rules have a fixed meaning, the meaning their authors intended by them at the time they were promulgated. A "living tree" approach is a euphemism for judicial re-authoring of the structural rules. The "dead hand" of the authors' original intended meaning must control lest the enterprise of designing a constitutional structure be upended.

XI. Well, how do these remarks about interpreting structural rules bear on the interpretation of constitutional rights? If the rights are embodied in determinate rules, then what I have said about interpreting structural rules applies equally to interpreting rules creating rights. If those rules are given meanings as if they had been authored by someone other than their actual authors, someone who did not mean by them what their actual authors meant by them, then the constitutional rights will have been amended by the courts. If the rules meant on day one what their authors meant by them—and, to repeat, it would be an odd enterprise to have some group come up with rights-creating rules but then assign meanings to those rules that are different from the authors' intended meanings—then the rules continue to mean the same thing on day two and day three and today. The "living tree" approach is as inapplicable to rules specifying rights as it is to rules structuring the government.

XII. What about constitutional rights that represent incorporation by reference of real moral rights? Well, with such provisions, interpretation begins and ends with discovering that the authors intended to refer to real moral rights. Once the courts get into the business of spelling out the content of those rights, they are no longer interpreting the constitution but doing moral philosophy. It would be inapt to describe this enterprise as "living tree" interpretation because it is not interpretation at all. And based on what I said earlier about incorporating real moral rights and making them judicially enforceable, there is room to doubt that the rights mentioned in the *Constitution* or *Charter* were invitations to the courts to consult moral reality and apply their findings as fundamental law.

XIII. The final possibility, the creation of rights other than through determinate rules, is, to repeat, an impossibility.

XIV. Therefore, if a court is interpreting a constitution, it is interpreting *rules* laid down by those authorized to do so and is seeking their authorially intended meaning. Originalism, in the sense of seeking the authorially intended meaning, is the only option in a system that does not allow judicial amendment.

This is not to say that the courts should never engage in first-order moral reasoning. Even if we put aside the incorporation of real moral rights, even the most determinate set of constitutional rules will undoubtedly leave some matters open; that is, there will inevitably be a realm consisting of standards rather than determinate rules. Moreover, the courts will have to implement even the determinate rules through development of their own doctrines, and in doing so they will have no choice but to consult first-order moral and prudential reasons. Nevertheless, their doing so will be hemmed in by the constitutional rules laid down by the constitutional authors.

I also should not be taken to be denying that discerning the originally intended meaning of a constitutional rule will often be difficult. Often it will be difficult for the authors themselves, when faced with a rule's application that was not in mind at the time of the rule's promulgation, to distinguish whether they intended the rule to apply but now regret that they did, did not intend the rule to apply, or possibly had no intent at all with respect to the matter. In other words, it will be difficult, even aided by ordinary norms of conversational implicature, for the authors themselves, as well as their interpreters, to determine what meaning they intended in some range of cases, and it will likewise frequently be difficult for the authors themselves, as well as their interpreters, to distinguish what is implied *in* their rules from what is implied *by* their rules but not in them.

Despite these difficulties in determining authors' intended meanings, determining those meanings is what *interpreting* legal directives issued by legal authorities *is*. Anything else is not interpretation and substitutes some fictitious author for the authors who have the authority to make law, constitutional or subconstitutional.

XV. Of course, I will admit that it is always possible for there to be some sort of bloodless constitutional revolution. Constitutions are fundamental law only if they are accepted by the people as fundamental law, and the people may wake up

tomorrow and begin accepting as fundamental law some new instrument. The *U.S. Constitution* was not an organic continuation of the *Articles of Confederation*. It was just run up a flagpole, and the people saluted. If they hadn't saluted, the *Constitution* would have no more authority today than the *Articles of Confederation* or the *Constitution of the Confederate States of America.*

Therefore, if "living tree" justices depart from the authorially intended meanings, and the people accept these new judicial amendments as fundamental law, then we will have had several constitutional revolutions. Several new constitutions, superficially resembling but actually different from one another, will have come into being through successive judicial amendments and popular acceptance of those amendments. But the real question is then whether the people are actually aware of what is going on. Is their acceptance itself dependent on their belief that the courts are not amending the constitution from the bench but are interpreting it?

XVI. This has been a long journey, but we have now reached the end of it. The function of law and of constitutional law as well is to make determinate what we ought to do. In constitutional law, that is true of both structural provisions and rights provisions. It is not the function of constitutions to establish our real moral rights. We possess those independently of the constitution, which cannot affect them, and all organs of government are bound morally if not legally by those rights. I have taken no position on the relative competence of legislatures and courts to ascertain the content of real moral rights, and it is possible that the judiciary is well-equipped to be our wise Platonic guardians.

However, if the game is interpretation, all that can be interpreted are authored rules, and what those rules mean can only be what their authors meant by them. Anything else is re-authoring—that is, creating new rules.

There is no "living tree" constitutional *interpretation*. The only "living trees" are the judges. So you'd better hope that they are well cultivated. And you may conclude that a bit of pruning is in order.

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