

EVOLUTIONARY ANALYSIS: ORIGINALISM AND THE IMPACT OF INTERPRETIVE THEORY

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INTRODUCTION

Ivan Cleveland Rand changed the shape of Canadian law. Owing to judgments that he rendered as a justice of the Supreme Court of Canada, Justice Rand has been praised as “Canada’s greatest civil libertarian in an era when our constitutional theory was still bounded by the British legacy of parliamentary supremacy”. As other essays in this volume clearly demonstrate, Justice Rand’s remarkable legal legacy reverberates through modern jurisprudence. Indeed, “more of [Justice Rand’s] judgments remain alive and quoted today than those of all of his thirty-four predecessors at the Court combined”.¹ During his tenure on the Supreme Court of Canada, Justice Rand consistently acted with wisdom, logic, and justice, resolving disputes in a principled manner marked by intellectual rigor. There is little more that one can ask of a jurist.

My present task is to evaluate Justice Rand’s impact on the world of statutory interpretation. More specifically, I ask whether Justice Rand followed any particular method of interpreting legislation. Was he an originalist, devoting his mental resources to the task of unearthing historical, static legislative intention, or a dynamist who ignored historical views in favor of progressive ideals? Was he a textualist, bound to apply a statute’s literal terms whatever havoc they might wreak, or a purposivist who breathed meaning into texts by reference to the original author’s motivations? While I believe that questions of this nature are important, there are many legal scholars who disagree. Indeed, many theorists contend that statutory interpretation is nothing more than a matter of unconstrained discretion, with each judge’s personal prejudices

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¹ Taken from the “Biography of Justice Rand” prepared by the University of New Brunswick’s Faculty of Law, found at <<http://lawlibrary.unbf.ca/BiographyofRand.php>>, as it appeared on 13 September 2009; [editors’ note: the quote is from DeLloyd J. Guth’s essay in this volume].

controlling interpretive decisions.² Whether a judge is an originalist, a dynamist, or something in between, the judge's adherence to a specific interpretive theory has no bearing on the results that judge will reach. On the contrary, a judge's personal politics govern the substance of that judge's interpretive holdings, and interpretive theories become no more than ethereal forms of rhetoric used to justify political decisions.

Given the controversy surrounding the constraints imposed by theories of construction, I will not confine myself to an exploration of Justice Rand's jurisprudential impact on the world of interpretive theory. Instead, I will turn this subject on its head and consider interpretive theory's impact on Justice Rand's jurisprudence. Did interpretive theory govern the meanings that Justice Rand found when interpreting the text of legislation, or was his jurisprudence governed entirely by his personal biases and beliefs? Did interpretive theory constrain Justice Rand to reach interpretive holdings that conflicted with his personal ideologies, or did he simply use interpretive theory as a mode of justifying the injection of his personal views into the text of legislation? Can interpretive theory *ever* provide meaningful constraints in the interpretation of legislative language? These questions are explored throughout this article.

JUSTICE RAND'S INTERPRETIVE APPROACH

(a) Introduction

Like many of his colleagues on the Supreme Court of Canada, Justice Rand had an impressive arsenal of interpretive methods at his fingertips.³ He frequently made reference to interpretive techniques rooted in obscure, Latin maxims of statutory interpretation: in *District Registrar Land Titles, Portage La Prairie v. Canadian Superior Oil of California Ltd. and Hiebert* (1954),⁴ for example, Justice Rand relied on *leges posteriores priores contrarias abrogant* as well as *generalialia specialibus non derogant*, dealing with the interplay of apparently inconsistent statutory texts;⁵ in

² Scholars who hold this view are often referred to as adherents of the "Realist" school of statutory interpretation. For assessment of this, see R. Graham, "What Judges Want" (2009) 30 *Statute Law Review* 38-72 (Oxford University Press).

³ My assessment of Justice Rand's views regarding statutory construction is based only on decisions (majority and dissent) written by Justice Rand himself. Decisions with which he concurred (without rendering separate reasons) have been ignored for purposes of this analysis.

⁴ [1954] S.C.R. 321.

⁵ *Ibid.*, at 346-47. *Leges posteriores priores contrarias abrogant* refers to the presumption that later laws impliedly repeal prior inconsistent statutes. *Generalialia specialibus non derogant* is an exception to *Leges posteriores*, and provides that general statutes do not derogate from earlier, inconsistent enactments that are more specific than the later enactment. Note that Justice Rand failed to identify these maxims by their traditional Latin names, but employed

Minister of National Revenue v. Great Western Garment Company Ltd. (1948)⁶ he relied on the presumption that there were no extraneous words in legislation;⁷ in cases such as *The King v. Williams* (1944),⁸ *Williams, et al. v. Aristocratic Restaurants Ltd.* (1951),⁹ and *Workmen's Compensation Board v. C.P.R. and Noell* (1952),¹⁰ Justice Rand relied upon the presumptions against absurdity and legislative nullity;¹¹ and in many of his decisions (including *City of Toronto v. Olympia Edward Recreation Club Ltd.* (1955)¹² and *The King v. Assessors of the Town of Sunny Brae* (1952),¹³ Justice Rand made admirable use of consequential analysis. Despite the presence of a diverse array of interpretive methods in his writing, Justice Rand's interpretive jurisprudence was remarkably consistent. While other jurists floundered between conflicting interpretive canons with no commitment to an over-arching theory, Justice Rand displayed unswerving reliance on a single school of statutory construction. His theory of choice was a unique brand of originalist construction. The particular brand of originalism found throughout Justice Rand's judgments is described and evaluated in the following section of this paper.

(b) Originalism

Most judges of Justice Rand's vintage adhered to the originalist school of statutory construction. According to originalists, interpretation is a process of discovery whereby the interpreter merely unearths the intention of the statute's author. The role of the originalist is not to create law, but to ensure that the law is interpreted in a manner that is consistent with the author's expectations.

The meaning revealed by originalist construction "is that which was sought by the legislator at the time of [the Act's] adoption".¹⁴ In other words, the goal of originalist construction is to ferret out the historical intention that existed in the authors' collective mind at the time of the Act's creation. As Côté noted:

the reasoning at the heart of these interpretive canons. He did refer to *Generalia specialibus* by name in *The King v. Williams*, [1944] S.C.R. 226, at 241.

⁶ [1948] S.C.R. 585.

⁷ *Ibid.*, at 587-88.

⁸ [1944] S.C.R. 226, at 242.

⁹ [1951] S.C.R. 762, at 785.

¹⁰ [1952] 2 S.C.R. 359, at 374.

¹¹ The relevant presumptions are discussed in detail in R. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery Publications, 2001) at 166-71 and in R. Graham, *Statutory Interpretation: Cases Text and Materials* (Toronto: Emond Montgomery Publications, 2002) at 100-23.

¹² [1955] S.C.R. 454, at 460.

¹³ [1952] 2 S.C.R. 76, at 91.

¹⁴ Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Que: Yvon Blais, 1991) at 6.

This historical intention is permanently set, and can never be changed with the passage of time. The interpreter's role resembles that of an historian, or an archaeologist, in quest of an ancient thought of which the enactment may contain traces.¹⁵

Through the process of statutory archaeology, the originalist sifts through the statute's text in search of clues regarding the authors' historical will. The authors' will controls the meaning of the statute, and the interpreter's only role is to reveal and implement the authors' original expectations.

For the originalist, a statute's "true meaning" is said to reside within the Act from the moment of its creation, awaiting discovery and application by the courts. Meaning is something to be *discovered* through an historical inquiry, rather than something to be created by the judge. The interpreter's personal views regarding what the statute ought to mean are wholly irrelevant: the only relevant views are the historical expectations of the legislative author. As a result, the interpreter's goal is never to make law or "create" statutory meaning, but merely to give effect to the static, historical will of the relevant legislative body. The statute's meaning can neither change in response to the interpreter's personal preferences nor evolve in response to changing social conditions. On the contrary, the Act's original (and therefore "true") meaning remains constant over time, changing only when amended by a duly elected legislative authority.¹⁶

A typical example of originalist construction can be found in Justice Rand's decision in *Quebec Railway Light & Power Co. v. Town of Beauport* (1945).¹⁷ In that case, the Supreme Court of Canada was asked to interpret section 323 of the *Railway Act, 1919*,¹⁸ which prevented transport companies from collecting "any toll or money for any service as a common carrier except under and in accordance with the provisions of this Act". The primary purpose of this law was to govern the fares that could be charged to railway passengers. The question before the Court in *Quebec Railway* was whether the relevant text applied to tolls collected for bus services as well.

The literal language of section 323 appeared capable of embracing tolls collected in respect of bus transportation. As noted above, section 323 expressly applied to any tolls that were levied "for any service as a common carrier", and buses were widely regarded as "common carriers" in 1945 (when *Quebec Railway* was heard). The difficulty was that the relevant text had been passed twenty-six years earlier, at a time when (according to Justice Rand) bus transportation didn't exist.

¹⁵ *Ibid.*, at 7.

¹⁶ For a critique of the originalist school of statutory interpretation, see R. Graham, *supra* note 11, at 3-31.

¹⁷ [1945] S.C.R. 16.

¹⁸ S.C. 1919, c. 68.

While the statute's "plain meaning" was certainly broad enough to encompass bus services, it was difficult to attribute to the legislative authors an intention to regulate vehicles that were yet to be invented at the time that the relevant statute was enacted.

True to his originalist perspective, Justice Rand held that despite their current, literal meaning, the words "service as a common carrier" could not apply to bus operations. According to Justice Rand:

...precise language would be necessary to bring within [the Act's] scope transportation operations by means of power and vehicles unknown when the legislation was first enacted.... That enactment cannot, therefore, be held to embrace the regulation of tolls for autobus transportation, either alone or in conjunction with the tramway.¹⁹

As an originalist, Justice Rand believed that the meaning of statutory text was established by the unchangeable, historical expectations of the authors of the relevant legislation. When the legislators had used the phrase "service as a common carrier" in section 323, they could not (according to Justice Rand) have envisioned a form of transport that had yet to be invented.²⁰ Simply stated, one could not attribute a "1945 intention" to legislators who acted in 1919. In accordance with originalist doctrine, Justice Rand felt that the Court was powerless to expand the scope of the phrase "common carrier" beyond the meaning that was specifically envisioned by the statutory authors at the time that the relevant statute had been passed. He therefore held that the statute's meaning was confined to forms of transport that existed at the time of the Act's creation, incapable of responding to social or technological change.²¹

¹⁹ [1945] S.C.R. 16, at 40.

²⁰ Note that this demonstrates one of the difficulties of originalism. It is likely that the relevant legislative authors had witnessed technological change during the course of their lives. It is therefore possible that, when regulating "common carriers", they were aware that changes would take place over time. It is therefore quite possible that they had intended their regulations governing "common carriers" to evolve along with the technology, applying to new developments as they arose. In other words, while the drafters may have had a discernible, original intention, there is no guarantee that their intention was static. On the contrary, their intention may have been to embrace future innovations, whatever shape these may take.

²¹ Justice Rand could have arrived at the same decision without resort to presumptions concerning the authors' specific knowledge or expectations. The fact that the relevant language was found in the *Railway Act*, for example, coupled with the fact that the relevant section was surrounded by provisions dealing specifically with rail transportation, could have provided him with contextual clues regarding the proper application of the enactment. The fact that Justice Rand ignored these textual clues in favour of historical musings, concerning the state of technology at the time that the Act was passed, demonstrated his preference for typically "originalist" reasoning.

The reasoning of the Court in *Quebec Railway* was rooted in originalist construction. This should come as no surprise: a review of decisions handed down by twentieth century courts makes clear that originalism was the courts' "official theory" of statutory interpretation.²² Even today, only the most intrepid researcher can discover more than a handful of decisions in which modern courts do not at least purport to interpret statutes in accordance with the tenets of originalist construction. Not all originalists, however, are cut from the same cloth: while virtually all judges of Justice Rand's vintage claimed to be bound by the "original intention" underlying a statute's text, Justice Rand's method of uncovering that intention was remarkable. Where other judges purported to search for legislative intention in a variety of cumbersome and contradictory ways, Justice Rand consistently uncovered that intention through a painstaking analysis of (a) the language of the statute being interpreted, and (b) the social climate leading up to creation of the Act. For the purposes of this paper, I have dubbed Justice Rand's peculiar brand of originalism "Historical Evolution". This specialised form of originalist construction is discussed in the following section of this paper.

(c) Historical Evolution

Justice Rand was no ordinary originalist. Rather than pursuing whatever *ad hoc* form of analysis might reveal a defensible reconstruction of the legislators' intent, Justice Rand consistently applied an interpretive framework he designed for the purpose of revealing the intentions of legislative authors. This framework was particularly sensitive to the history of the enactment being considered. Pursuant to this, Justice Rand undertook a two-pronged, historical analysis, first reviewing the socio-legal climate that gave rise to the relevant statute and then moving to review the "textual history" of the relevant legal text. Justice Rand's decision in *Canadian Wheat Board v. Nolan* (1951)²³ provided a typical example.

In *Nolan*, the Supreme Court of Canada was asked to interpret section 2 of the *National Emergency Transitional Powers Act, 1945* (the "NETPA").²⁴ As its title suggested, the NETPA was transitional legislation. Its principal objective was to ensure an orderly transition from war-time economic conditions (established under the *War Measures Act*²⁵) to a more stable, "peace-time" economy. In pursuit of that

²² P.-A. Côté, *supra* note 14, at 4. There is an exception for cases involving the interpretation of the Constitution. In those cases, the courts reject originalism and instead apply a dynamic (or 'progressive') approach to interpretation. For a review of the courts' approach to interpreting constitutional language, see Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 421.

²³ [1951] S.C.R. 81. Justice Rand wrote separate reasons concurring with the majority (comprised of Rinfret C.J. and Taschereau, Locke and Cartwright JJ). Kerwin and Estey JJ. dissented.

²⁴ S.C. 1945, c. 25.

²⁵ R.S.C. 1927, c. 206.

objective, section 2(1)(c) of the NETPA granted the federal executive the power to make whatever orders it saw fit for the purpose of:

...maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace....

One question before the Court in *Nolan* was whether the foregoing language gave the government power to expropriate private property.

One could easily argue that the ‘plain meaning’ of section 2(1)(c) embraced the power of expropriation. Surely it was plausible to contend that the authority to control “prices” and the “use and occupation of property” carried with it the power to (a) set a price of zero for certain goods, and (b) require those goods to be ‘sold’ (at a price of zero) to the government. This was, in effect, expropriation. This broad, ‘literal reading’ of section 2(1)(c) led Kerwin J. (dissenting) to hold that:

Taking the words in their ordinary and natural meaning, they include a power to appropriate barley (*inter alia*) and pay the price fixed by the Governor in Council.²⁶

As a result, Justice Kerwin accepted the government’s claim that the statute’s ‘natural meaning’ clothed the executive with the power to expropriate property. Unlike Justice Kerwin, however, Justice Rand was not a textualist. For Justice Rand, the ‘natural meaning’ of an enactment was but a single component in the interpretation of legislative language, which could truly be understood only by placing it into its proper historical context. Rather than accepting his colleague’s musings over the statute’s ‘natural meaning’, Justice Rand held that a statute’s history (including the circumstances surrounding the Act’s creation) controlled the meaning to be given to legislation. He therefore embarked upon an analysis of the historical context surrounding the drafting of the NETPA.

Justice Rand began his history-centered inquiry with a review of the social conditions which led to creation of the *War Measures Act*, the immediate precursor to the NETPA. The *War Measures Act* had clothed the executive with extremely broad powers aimed at curbing various problems brought on by World War II. According to Justice Rand, the broad grant of power contained in the *War Measures Act* arose in light of the fact that:

²⁶ [1951] S.C.R. 81, at 88.

...the political and social existence of the country [was] at stake; that interest [rose] above all distribution of legislative jurisdiction, and the fundamental duty of preservation [was] cast upon Parliament, by which those powers [were] entrusted to the Executive.²⁷

In other words, the *War Measures Act* had been enacted in a time of national crisis, when extremely broad powers were needed in order to stave off crisis conditions that would otherwise have accompanied Canada's entry into that War. Justice Rand further noted that, while certain aspects of this emergency had disappeared when that War had come to an end, the post-war years carried with them their own abnormal social conditions:

The aftermath of war presents abnormal conditions which similarly are of national interest and concern and which likewise transcend the ordinary plane of legislation; but they are of lessened scope and somewhat changed in character. Parliament, therefore, passed the [NETPA] as a truncated *War Measures Act* in which the jurisdiction enjoyed by the Executive under the former Act was reduced.²⁸

This provided Justice Rand with contextual clues: if the 'crisis conditions' accompanying the War had justified a great expansion of federal powers, surely the diminishing state of emergency at the conclusion of the War allowed those powers to diminish. By considering the conditions that prevailed at (and before) the time that the relevant Act was drafted, Justice Rand placed himself in a position to better appreciate the motives of the legislators responsible for the NETPA.

Justice Rand's history lesson went beyond an assessment of social conditions surrounding the origins of the NETPA. As noted above, his particular brand of originalism called for a two-pronged historical inquiry, first focusing on the social context surrounding the text's creation and then analysing the evolution of the text itself. In pursuit of this second objective, Justice Rand tracked the textual differences between the NETPA and the parallel provisions of the earlier *War Measures Act*. In particular, Justice Rand noted that the "appropriation of property of individuals was specifically mentioned as a power conferred in item (f) of section 3 of the *War Measures Act*",²⁹ while the successor provisions of the NETPA spoke only of "maintaining, controlling and regulating supplies". Moreover, where the *War Measures Act* made reference to "appropriation, control, forfeiture and disposition", the NETPA replaced this language with less explicit references to the "use and occupation of property". Placing these linguistic changes into the context of the diminishing state of emergency at the conclusion of World War II, Justice Rand concluded that the power

²⁷ *Ibid.*, at 94.

²⁸ *Ibid.*, at 95.

²⁹ *Ibid.*

of expropriation, while supportable by the “literal language” of the NETPA, had been intentionally excluded when the NETPA replaced the *War Measures Act* at the end of World War II. Justice Rand’s appreciation of the historical circumstances surrounding the origins of the NETPA (and its precursor legislation) ostensibly allowed Justice Rand to determine the historical, static intentions of the authors of the NETPA. Historical context won the day, trumping the ostensibly “natural meaning” of the broad, expansive language of the statute.³⁰

While one decision does not a pattern make, Justice Rand’s decision in *Nolan* was emblematic of the approach he adopted in the bulk of his jurisprudence. Regardless of the nature of the statute being considered, Justice Rand felt the need to (a) place the relevant statute into its historical context and (b) wherever such evidence was available, track the textual evolution of the relevant provisions, before interpreting the legislation in question. Consider the following examples:

- In *Canadian Broadcasting Corporation v. Attorney General for Ontario* (1959),³¹ the Court was asked to determine whether or not the CBC, as an agent of Her Majesty, was insulated from prosecution under the *Lord’s Day Act* for airing programming on Sunday. Justice Rand (writing for himself as well as Cartwright and Fauteux JJ) undertook an exhaustive analysis of the origins and evolution of crown immunity and the royal prerogative in order to determine that ancient “ideas and assumptions of the common law” made clear that the *Lord’s Day Act* did not prohibit the CBC from airing its programs on Sundays.³²
- In *Western Minerals v. Gaumont* (1953),³³ the Court was asked to determine whether a statutory reference to “mines and minerals”³⁴ embraced gravel. In holding that gravel was excluded from the phrase “mines and minerals”, Justice Rand described the history of land transfers in Canada since 1889.³⁵ His Lordship concluded that, based on historical practices followed since creation of the *Railway Act* in 1903, the federal government clearly regarded

³⁰ While Justice Rand’s analysis did ‘win the day’ at the Supreme Court of Canada, it should be noted that this judgment was subsequently overturned by the Privy Council in *AG Canada v. Hallet & Carey*, [1952] A.C. 427. The Privy Council’s judgment was largely based on the ‘plain language’ of the relevant legislation.

³¹ [1959] S.C.R. 188.

³² *Ibid.*, at 198.

³³ [1953] 1 S.C.R. 345.

³⁴ The reference is to the *Land Titles Act*, R.S.A., 1942, c. 205, section 62.

³⁵ *Supra* note 33, at 350.

sand and gravel as items belonging to “a genus of materials forming part of land which embraces gravel but excludes minerals”.³⁶

- In *M. Gordon & Son Ltd. v. Debly* (1956),³⁷ the Court was asked whether section 25 of the *New Brunswick County Courts Act*³⁸ permitted county clerks to enter judgment against defendants who had failed to appear in court where the county clerk had acted as barrister for the plaintiff. In holding that county clerks possessed the relevant power in cases involving liquidated damages, Justice Rand undertook an exhaustive review of the pre-Confederation procedures followed in New Brunswick courts. This historical review began with an account of the creation (and replacement) of several legislative provisions governing county court clerks, and moved on to review the historical practices followed in New Brunswick courts. Interestingly, Justice Rand supplemented his historical reasoning with a persuasive textual argument which (on its own) provided ample support for the Court’s decision.³⁹ Despite availability of a persuasive textual argument, he nonetheless refused to render judgment without first reviewing the history of the relevant legislation.
- In *District Registrar Land Titles, Portage La Prairie v. Canadian Superior Oil of California Ltd. and Hiebert* (1954),⁴⁰ the Court was asked to interpret Manitoba’s *Real Property Act*⁴¹ and the *Provincial Lands Act*⁴² in order to determine whether mineral rights were reserved from certain grants of land in Manitoba. Justice Rand (concurring with the majority) noted that, before the relevant statutes could be interpreted, it was “necessary to refer briefly to the early land registration law in Manitoba”.⁴³ His “brief reference” to history was comprised of a thorough retelling of the evolution of land-law in the province, beginning with the pre-1885 system and passing through a detailed analysis of numerous legislative changes, orders-in-council and federal-provincial agreements.⁴⁴

³⁶ *Ibid.*, at 351.

³⁷ [1956] S.C.R. 522. Justice Rand wrote for the unanimous Court.

³⁸ Revised Statutes of New Brunswick 1952, c. 45.

³⁹ The argument was based on the maxim *expressio unius est exclusio alterius*, found at pp. 526–27 of Justice Rand’s decision in *Debly*. For a full account of the “*expressio unius*” maxim, see R. Graham, *supra* note 1, at 104–09.

⁴⁰ *Supra* note 4.

⁴¹ Revised Statutes of Manitoba 1913, c. 171.

⁴² *Ibid.*, c. 155.

⁴³ *Supra* note 4, at 343.

⁴⁴ While the outcome of this case has little bearing on the topic of this paper, trivia buffs may be

- In *R. v. Assessors of the Town of Sunny Brae Ex Parte Les Dames Religieuses De Notre Dame de Charité du Bon Pasteur* (1952),⁴⁵ the Court was asked to determine whether or not a religious organisation was exempt from certain taxes by virtue of *The Rates and Taxes Act* of New Brunswick.⁴⁶ In holding that the relevant organisation failed to qualify for the exemption, Justice Rand undertook an analysis of (a) the history of the taxation of religious organisations (beginning with cases decided in 1675), and (b) the history of taxation in New Brunswick, dating back to “the inception of the province”.⁴⁷ As usual, Justice Rand’s analysis of history was not limited to an assessment of past decisions. On the contrary, Justice Rand carefully reconstructed the overall historical context in which the relevant Act was passed, tracing each of the minute, incremental changes in taxation law and practice leading up to the legislation being considered.

In these and many other cases, Justice Rand made clear that his interpretive task was incomplete until he had taken time to assess the relevant Act’s historical context and the evolution of the statute’s text. In virtually every interpretive judgment he authored, Justice Rand made clear that a statute’s meaning was dictated by the intentions of its authors, and that these were best determined through the history-centered framework of historical evolution.

Justice Rand’s interpretive framework is aptly described by the phrase ‘Historical Evolution’. The approach was ‘historical’ in the sense that it required the meaning of legislation to be discovered through an historical inquiry, designed to discern the meaning that resided within the authors’ collective mind at the time that the Act was passed. At the same time, the framework was ‘evolutionary’: while the meaning of text was static, the legislative policy that led to the text’s creation was presumed to have followed an evolutionary progression. In the same way that species evolve in response to their physical surroundings, the form a statute finally took would depend in part on the environment in which the Act was passed. While the morphology of an organism evolves in response to its physical environment, Justice Rand’s ‘historical evolution’ held that legislative policy evolved in response to a gradually changing social context. In *Nolan*, for example, the policies underlying creation of the NETPA had evolved in response to the diminishing state of emergency that existed at the end of World War II. By understanding this evolution Justice Rand could unveil the

happy to learn that, according to the Court in this case, the relevant legislation had the effect of ensuring that no grant of lands from the Crown would operate as a conveyance of mineral rights in that land unless those rights were expressly conveyed in the grant instrument.

⁴⁵ *Supra* note 13.

⁴⁶ Revised Statutes of New Brunswick. 1927, c. 190.

⁴⁷ *Supra* note 13, at 89.

intentions of its legislative authors. The policies underlying an Act evolve in response to the environment of the Act's historical context, and all interpretive judgments must accordingly be rendered with the interpreter's eyes focused on that past.

Despite the vast array of interpretive theories available, Justice Rand virtually always relied on his specific brand of originalist construction. Why? What was it about this form of interpretation that compelled him to prefer it over others? What impact did this theory have on his interpretive jurisprudence?

CONSEQUENCES OF INTERPRETIVE THEORIES

(a) Introduction

Justice Rand's jurisprudence favoured an originalist approach buttressed by the analytical framework provided by 'historical evolution'. Pursuant to this, Justice Rand continually looked to the past for interpretive guidance, ostensibly interpreting and applying legislation in accordance with the intentions of those who drafted the relevant text. His method of determining those intentions was intensely focused on historical evidence: he carefully studied the history of the relevant legal text as well as the history of the socio-legal environment in which that text was written. Through this two-pronged historical inquiry, Justice Rand constructed a context which (in his view) allowed the authors' intentions to be discerned. These intentions governed the meaning of the statute, supposedly ensuring that the meaning of the text was set in stone at the time of its enactment.

What was the point of showing allegiance to a specific interpretive theory? For an originalist, the answer lay in the cloak of legitimacy provided by the notion of "legislative intention". According to Côté:

The judge, who is the ultimate interpreter of laws, is not cloaked in the legitimacy of democratic election. Consequently, he must confine himself to being, in the words of Montesquieu, "the mouthpiece for the words of the law". It is Parliament, or whomever has been delegated legislative power by Parliament, which bears the responsibility for the political choices of legislative activity. These principles postulate the predetermination of the meaning by Parliament, the passivity of the interpreter on the political level, and the latter's submission to the sovereign will expressed in the enactment.⁴⁸

⁴⁸ P.-A. Côté, *supra* note 14, at 9.

The legislator, elected by the public and clothed with authority to promote social policy through legislative action, was the only party empowered to breathe meaning into the text of legislation. The interpreter, by contrast, lacked the power to *create* a statute's meaning, but was instead bound to apply the text in a way that coincided with the lawmakers' intention. The unelected judge merely follows the will of the legislative author, interpreting statutes in a way that gives effect to the intentions of elected public officials.

The intention sought by originalists is thought of as a discoverable fact – an objective phenomenon to which the statute's meaning can be tied. Because meaning is tied to an objective fact which is said to exist in the past, this meaning is both singular and immutable. The statute has but one “true meaning” – the meaning that coincides with the lawgivers' intention. This meaning, like the intention from which it is spawned, is rooted in the past and accordingly cannot change in response to changing conditions. Since the Act's “original meaning” cannot change, the identity of the interpreter has no bearing on the outcomes driven by originalist construction. Whether the interpreter is conservative or liberal, his or her political leanings has no bearing on a truly originalist reading of a text. The meaning of the text pre-dates the process of construction, and the identity of the interpreter has no bearing on the discovery of that meaning. By adopting an originalist approach to interpretation, the interpreter effectively claims that his or her reading of the statute is inevitable, and would be reached by any skilled originalist who encounters the relevant text. Simply put, Justice Rand and his fellow originalists would claim that their own political viewpoints have no influence on the outcome of the cases they decided. On the contrary, they were compelled to interpret statutes as they did by virtue of the original intentions of the legislative authors.

Even a cursory review of Justice Rand's jurisprudence makes clear that, despite his open commitment to originalist construction, the lion's share of results generated in Justice Rand's interpretive judgments had a distinctly progressive flavour. Consider the holding in *Quebec Railway* (discussed above).⁴⁹ In that case, Justice Rand used originalist construction to minimise the government's intrusion into a free market economy. Similarly, in *Canadian Wheat Board v. Nolan* (1951)⁵⁰ (discussed above), he made clear that government lacked the power under the relevant legislation to expropriate an individual's property. More striking still was Justice Rand's decision in *Saumur v. City of Quebec* (1953),⁵¹ discussed below,⁵² in which he held that provincial limitations on an individual's freedoms of expression and religion were precluded by the language of the relevant legislation. These decisions were emblematic of Justice

⁴⁹ *Supra* note 19.

⁵⁰ *Supra* note 23. Justice Rand wrote separate reasons concurring with the majority (comprised of Rinfret C.J. and Taschereau, Locke and Cartwright JJ). Kerwin and Estey JJ. dissented.

⁵¹ [1953] 2 S.C.R. 299.

⁵² See discussion *infra* under heading “The Role of Interpretive Theory: (b) Evolutionary Construction”.

Rand's jurisprudence: in contests between the state and the individual, Justice Rand consistently interpreted legislation in a way that minimised state powers and expanded personal liberty.

How was it that an originalist produced these forward-looking, libertarian holdings? Recall that originalists contend that the result of their interpretive process represents the "one true meaning" of an Act, and that the interpreter is compelled to reach a pre-ordained result out of deference to the will of the statute's authors. The Acts at issue in the cases noted above were enacted at times when legislators were committed to an expansive view of parliamentary sovereignty and a narrow view of individual liberties. Was it likely that Justice Rand's holdings, expanding the boundaries of individual freedoms and minimising governmental power, would have been anticipated, let alone required, by those responsible for enacting the relevant texts? Would not the backward looking, history-centered nature of originalist construction prevent the Court from giving effect to these expansions of personal liberty? Apparently not. Justice Rand *was* an originalist, yet he did manage to render a series of forward-looking, progressive interpretations of legislation which broadened the scope of civil liberties far beyond what most commentators believed was envisioned by drafters of the relevant legal texts. While accomplishing this feat, Justice Rand continually purported to be guided by the intentions of the legislative authors.⁵³

This raises serious questions. If Justice Rand's commitment to originalism did not preclude interpretive holdings which went beyond the expectations of the legislative authors, did his commitment to an interpretive theory provide him with any guidance at all? Was his analytical framework, rooted in history and historical evolution, mere "window dressing" for his interpretive holdings, providing no constraints at all on the meaning that Justice Rand could attribute to the statute being interpreted? Was he truly constrained to achieve the results that he "discovered", or was he engaged in a creative exercise of judicial legislation? The nature of the constraints imposed by a judge's commitment to interpretive theory is addressed in the following sections of this paper.

(b) Unfettered Reasoning

It is difficult to contend that a backward looking, history-centered mode of interpretation compelled Justice Rand to reach the progressive, civil libertarian decisions discussed above. Indeed, many theorists now contend that a judge's adherence to a particular school of construction has little or no bearing on the substance of the decisions of that jurist. According to Allan Hutchinson, for example:

⁵³ In *Nolan*, for example, Justice Rand repeatedly claimed to be searching for the "intention" of the legislative author and the "declared purpose of Parliament": *supra* note 23, at 95.

[I]t is possible to deploy any judicial approach to contradictory effect. While some approaches tend to make some kinds of decisions more easy to justify than others, they have no natural or determinate political allegiance.⁵⁴

Similarly, James Boyle has noted that:

Legal rules are supposed ... to produce determinacy through a particular method of interpretation. That method of interpretation alone, however, produces indeterminate results and it cannot be supplemented sufficiently to produce definite results without subverting its supposed qualities of objectivity and political and moral neutrality.⁵⁵

In other words, while adoption of a particular form of construction might *appear* to lead inexorably to a particular result, the decisions of any particular judge are driven by factors other than that judge's commitment to an interpretive theory. A judge's political views, vision of justice or individual brand of logic play crucial roles in shaping that judge's interpretation of legal texts, even where the judge purports to ignore his or her own views by applying interpretive models (like originalism), which ostensibly gain legitimacy by reference to an objective, historical fact such as legislative intent. Simply put, there are no *meaningful* constraints provided by a judge's adherence to a particular school of statutory construction. On the contrary, the identity and politics of the judge may be the deciding factors in the judge's interpretation of legislation. The selection of a specific interpretive theory is inconsequential, and the judge's political biases can still dictate the outcomes of interpretive inquiries.

Despite its apparent objectivity and its reliance on the static will of legislative authors, Justice Rand's framework of historical evolution is as malleable as any other theory of construction. The indeterminate nature of Justice Rand's history-centered method of construction can be shown through the application of that framework to one of the law's most famous history-centered debates. The debate in question focuses on the meaning of the Second Amendment to the U. S. Constitution. Although arguments concerning the meaning of this text typically purport to gain legitimacy through reliance upon the intentions of the constitution's authors, a review of the relevant arguments makes it clear that ideology plays an inescapable role in shaping the interpreter's reading of the relevant text.⁵⁶

⁵⁴ Allan C. Hutchinson, *It's All in the Game: A Nonfoundationalist Account of Law and Adjudication* (Durham, NC: Duke University Press, 2000) at 212.

⁵⁵ J. Boyle (ed.), *Critical Legal Studies* (Aldershot: Dartmouth, 1992) at xx.

⁵⁶ Some of the arguments and examples in this section are drawn from R. Graham, *supra* note 11, at 79–82.

The Second Amendment to the U. S. Constitution provides that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed”. As anyone who has followed American constitutional history will know, this passage has been a minefield of political debate. Since its adoption in 1791, this Amendment has been relied on by both gun enthusiasts and gun-control advocates as support for a broad range of irreconcilable propositions. As noted above, advocates from both ends of the spectrum have looked to the intention of the amendment’s framers for support for their positions.

Would Justice Rand’s interpretive approach, grounded in the history of legislative text and the socio-legal context that led to the text’s enactment, provide meaningful constraints into interpretation of the Second Amendment? Consider the range of history-centered arguments that would be available to Rand:

**The Originalist View of “Arms”
(Gun-Control Version)**

When the Second Amendment was originally adopted, the term “Arms” was understood to embrace only those forms of weaponry which were available in 1791. The framers could not possibly have envisioned the range of armaments that are available today. In 1791, the word “Arms” would have referred to nothing more deadly than a musket: a weapon that took a great deal of time to load, discharge, and reload, and which had a limited range and questionable accuracy. Any attempt to extend the term “Arms” to include weaponry that could not have been imagined by the framers is an unacceptable departure from the intention of the framers. As a result, the term “Arms” cannot be understood in a sense that embraces automatic weaponry, assault rifles, and weapons of mass destruction, which present far greater social dangers (and present different policy concerns) than weapons envisioned by the framers.⁵⁷

**The Originalist View of “Arms”
(Gun-Enthusiast Version)**

When the Second Amendment was originally adopted, the term “Arms” was understood to embrace whatever weapons were required to allow citizens to suppress rebellion, oppose tyranny, and present a meaningful resistance to armed invasion. The framers could not possibly have intended to ‘tie the hands’ of citizens by requiring them to hold outdated weapons in the face of potential attack by forces wielding modern munitions. The framers were intelligent individuals: they had seen technological advances during their lives and understood that such advances would continue. Their

⁵⁷ While this argument may seem simplistic on its face, we have already seen this precise form of argument in Justice Rand’s jurisprudence. Recall the account of *Quebec Railway Light & Power Co. v. Town of Beauport*, *supra* note 17, where Justice Rand refused to accept that parliamentarians legislating in 1919 could have envisioned a bus as a new form of conveyance.

original intention must have embraced the inevitability of invention and advancement. To ignore this aspect of the framers' intention is to fail to pay respect to the true purpose of the constitutional text.

Both of these interpretive arguments are grounded in originalist construction. Both rely on notions of 'authorial intent' and appeal to history as a method of discerning the intention of the constitutional framers. Unfortunately, both history and legislative intention can be used to support wildly divergent interpretations of the relevant text. The selection of an originalist approach to interpretation did nothing to constrain the interpreter from arriving at whatever decision he or she preferred.

Interestingly, the range of results permitted by originalist construction coincides with the range permitted through the use of progressive or dynamic forms of construction which refuse to tie the meaning of legislation to authorial intent.⁵⁸ Consider the following arguments:

**Progressive Interpretation of "Arms"
(Gun-Control Version)**

Circumstances have changed a great deal since the text of the Second Amendment was adopted. In 1791, a large, centralised army or police force was incapable of providing an adequate defence for the citizens of the United States. "Arms" were necessary evils, designed to permit citizens to repel invasions and suppress insurrection. Arms are no longer needed for this purpose. Instead, the only purpose a citizen has for "arms", if any, is recreational or cultural in nature. Because the original purpose of the amendment has disappeared, the amendment should be interpreted narrowly to suppress the current crises caused by the availability of automatic weapons, including the rise in violent crime and the increase in accidental gun-related deaths. The word "arms" should accordingly be read down to include only the least dangerous types of weaponry that can be used to fulfill recreational and cultural purposes.

**Progressive Interpretation of "Arms"
(Gun-Enthusiast Version)**

Circumstances have changed a great deal since the text of the Second Amendment was adopted. In 1791, citizens were not exposed to the same threat of violent crime that they experience today. Criminals now have access, through extra-legal means, to highly advanced weaponry. If citizens are to enjoy their protected rights, they must at the very least have the right

⁵⁸ 'Dynamic Interpretation' is a theory of construction which holds that the views of legislative authors are largely immaterial in the determination of legislative meaning. Instead, dynamic interpreters look to what the statute *can* mean, and how the relevant language can be used in order to implement current social policies. For a full account, see W. Eskridge, *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994) and R. Graham, *supra* note 11.

to present a meaningful resistance to criminal activity, and to defend their homes and families with the most effective means available. A narrow definition of “Arms” would defeat this purpose, unduly curtailing the ability of citizens to protect their homes.

Both of these interpretations can be defended by a progressive or ‘dynamic’ view of statutory construction. The first approach interprets the constitutional text by reference to current developments, namely the rise in violent gun-related crimes and the accompanying increase in accidental gun-related deaths. The second approach reaches the opposite result, but also uses current developments (via dynamic interpretation) to justify the suggested interpretation. Once again, the selection of a particular approach, dynamic or originalist, does not compel an interpreter to reach a pre-ordained result.

Despite the fact that they are grounded in standard interpretive theories, the foregoing arguments may be criticised on the ground that they are simplistic. Although these arguments are frequently put forward by advocacy groups on both sides of the “Gun Control Issue”, they lack sophistication in that they ignore much of the language found in the Second Amendment’s text. By focusing on the construction of one word (namely, “Arms”) to the exclusion of all others, the foregoing arguments could be dismissed as ignoring the context in which that word is found. Justice Rand’s approach to interpretation was far more contextual and textually sensitive than the foregoing interpretive arguments and would surely take into account the full text of the Second Amendment. Although this criticism is well founded, I would still suggest that Justice Rand’s interpretive approach, despite the constraints it allegedly imposed, would not compel a court to reach a pre-ordained result. Consider the range of arguments that would be available even if the interpreter did heed the full text of the Second Amendment:

Originalist Interpretation of the Second Amendment (Gun-Control Version)

The opening text of the Second Amendment clarifies the amendment’s purpose. The freedom to “keep and bear Arms” is related to the need for state militia. The original framers saw the need for a collective right to provide for the safety of the community: this right is embodied in the text of the Second Amendment. This amendment does not create an individual right to bear weapons but a collective right to security. The Second Amendment simply means that no law shall abridge the ability of the community to provide for its protection. Provided that no law prevents the establishment and arming of a “well regulated Militia” designed to protect the “free State”, the intention of the framers is respected. The regulation of *private* gun ownership does not breach this amendment, as the framers never envisioned an individual right to own weapons.

Originalist Interpretation of the Second Amendment (Gun-Enthusiast Version)

The opening text of the Second Amendment clarifies its purpose. The freedom to “keep and bear Arms” is related to the need for a “well regulated Militia”. In 1791, the phrase “well-regulated” was often understood to mean “well trained and organized”, rather than “regulated by the government”. The term “militia”, as it was understood in 1791, related to a self-regulating body of citizens who banded together, using their own weapons, for defence of the community. The current vision of a “state militia” (which includes such government organised bodies as the National Guard and the Armed Forces) is a clear departure from the framers’ understanding. The Second Amendment must be understood in its historical context: having been drafted soon after an armed rebellion against the British had been used as a vehicle to establish a free nation, the Second Amendment must have been intended to protect this possibility in the future. It was intended as a safeguard against armed incursions as well as a form of protection against the tyranny of the state. By removing control of the militia from the hands of the community and placing it in the hands of a centralised government, the courts would ignore the original intentions of the framers and deprive the Second Amendment of its original force and purpose.

Unlike the relatively simple arguments based on the word “Arms”, above, the foregoing arguments are contextual, historical and grounded in relatively sophisticated understandings of language, custom, and law. Both arguments make use of “historical evolution” in that they are based on an understanding of the socio-legal context in which the relevant text was drafted. Given their history-centered nature, their sensitivity to text and their reliance on the socio-legal context in which the relevant text was crafted, either of the foregoing arguments could have been generated through Justice Rand’s interpretive framework. Both arguments purport to be originalist in nature, yet they lead to results that are diametrically opposed. All are potentially correct, and arguably none has any greater claim at capturing “true meaning” than any other. History, in effect, is pointing in two directions; and the judge is clothed with the freedom to select those strands of history which support that judge’s preferred interpretation. A pro-gun jurist is likely to emphasise different “strands of history” than a jurist who favours strict gun control. As a result, the interpretations rendered by those two jurists are unlikely to correspond, despite the fact that both jurists have purported to base their interpretations on the historical, static thoughts of the framers of the Second Amendment.

The preceding example illustrates that both “history-centered” and “progressive” forms of construction can be used to justify an extremely wide range of arguable conclusions, many of which could be supported by both an originalist and a dynamic mode of construction. The selection of a particular theory of interpretation does little to restrict the interpretive options that are available to the interpreter. Indeed, all that the selection of an originalist mode of construction guarantees is that

the decision, whatever result it might support, will be couched in terms relating to ‘history’, ‘intention’, ‘legislative authority’ and the ‘original meaning’ of any legislative text. A dynamic decision, by contrast, will ignore this ‘language of intention’ and refer instead to ‘current needs’, ‘modern policies’, ‘community standards’ and the ‘current political climate’. The textualist will frame his or her decision in phrases describing “natural meaning”, ‘plain meaning’, ‘literalism’ and a reader’s ‘interpretive right’ to assume that a statute’s words have been used in conventional ways. The selection of one interpretive theory over another seems to be largely inconsequential, altering only the language in which the judge must ‘sell’ the court’s decision. The distinction between opposing forms of construction is more illusory than real, governing only the terminology that is used in the court’s decision.

If adoption of a specific interpretive theory lacks the power to constrain judicial interpretation, why bother paying attention to interpretive theory at all? If the decisions rendered by judges are governed by personal preference and ideology, rather than by any constraints imposed by interpretive theory, is interpretive theory a useless pursuit? Not surprisingly, I think that the answer is ‘no’. But if originalism, dynamism, and other interpretive theories lack the power to truly constrain judicial decisions, why bother studying these interpretive theories? This question is answered in the concluding sections of this paper.

THE ROLE OF INTERPRETIVE THEORY

(a) The Limiting Power of Text, History and Interpretive Theory

The analysis offered above is typical of the Critical Legal Studies movement. Adherents of Critical Legal Studies (CLS) seize upon the indeterminate nature of interpretive theory, history, and language and in many cases conclude that legal adjudication is nothing more than an exercise in ideological appropriation. The act of interpretation, like every act of “judging”, becomes an act of unbridled discretion, with the personal views and biases of judges controlling the meaning of legal texts. According to Allan Hutchinson:

The unsettling threat of indeterminacy is that without the possibility of a right or wrong interpretation that can be certified as authoritative, the possibility of knowledge and, therefore, goodness is subverted and lost. This fear is felt to be especially troubling in law. In contrast to literary criticism, jurisprudence is not considered to be a study through which to celebrate a text’s contradictions and playfulness; legal answers to questions of textual authority and interpretive validity can have devastating consequences for individuals and society generally. In particular, legal theorists worry that, divested of a disciplining protocol, adjudication will be revealed as an inescapably creative and self-referential act which, in turn, will engender “the deepest and darkest of all nihilisms” – a demeaning vision of social

existence in which the very idea of not only the Rule of Law but life in general is rendered meaningless and right becomes simply a function of might.⁵⁹

The interpreters, charged with the task of interpreting indeterminate language through indeterminate means, exercise a political function, imposing their own political views on the words of legislation. The selection of an interpretive methodology, it is argued, is an empty, rhetorical choice, governing only the language in which the judges' preferences will be expressed. There is no consequence to the selection of a specific interpretive theory apart from the "packaging" it provides for the judge's own political views.

Although there is a kernel of truth in the claims of CLS, its nihilistic views are often too extreme. While language is indeterminate at the margins, words *do* carry meaning and place limits on the discretion of the interpreter.⁶⁰ The phrase "Justice Rand was an originalist", for example, means something very different from the phrase "estate in fee simple". While each phrase is indeterminate in the sense that it gives rise to a range of meanings,⁶¹ it is unlikely that the ranges of meaning produced by these two phrases overlap in a troubling way. Indeterminacy has its limits. As a result, an interpreter reading the phrase "Justice Rand was an originalist" will, in fact, be compelled (by the constraining power of words) to reach a different result than one who is interpreting the phrase "estate in fee simple". The same is true of history: while history is riddled with indeterminate elements, it does provide some rather useful guidance. We know, with relative certainty, that Trudeau was Prime Minister, that Elvis made records, that the 1930s weren't a time of limitless prosperity in North America and that Neil Armstrong walked on the moon. There *is* truth in history, and that truth, like any contextual frame of reference, can be used to interpret words that were uttered (or legislated) in the past.

Consider the phrase "British Colonies". The meaning of that phrase is sure to vary depending upon the time at which it was uttered. Similarly, phrases such as "enemies of democracy", "taxable income", "Aboriginal rights" and "Canadian territory" vary according to the time at which they were written. In the realm of legislation, statutory texts refer to borders, rights, evidence, products, governmental institutions and other concepts which shift and evolve alongside social, political and technological changes. The meanings those texts carry depend upon the timing of

⁵⁹ A. Hutchinson, *supra* note 54, at 88.

⁶⁰ As Peter Hogg is fond of saying, despite the indeterminate power of language, people still manage to "keep dental appointments and stop at stop signs" (see R. Graham, *supra* note 11, at vii). This idea is expanded to develop a micro-economic account of adjudication in R. Graham, "What Judges Want", *supra* note 2.

⁶¹ For example, the phrase 'Justice Rand was an originalist' immediately begs the questions: what kind of originalist was he? For how long was he an originalist?

their enactment. Just as language divorced from context is largely robbed of meaning, statutory text divorced from history is vulnerable to misinterpretation. As a result, the selection of an interpretive theory which pays attention to historical context has an impact on the outcome of the interpretive decision. The choice to place a statute in its historical context (rather than in a context made up of “current policy”, “interpretive rights” or “textual clues”, for example) will have an impact on the meaning that is given to the text. As we saw in *Nolan*,⁶² Justice Kerwin’s selection of a context consisting only of textual clues led to a radically different outcome than Justice Rand’s interpretation, which placed the relevant legislation into the context of history. The judge’s interpretive theory of choice governs the context that the relevant text will inhabit, and the context plays a role in shaping meaning.

If the selection of a specific interpretive theory does have an impact on the meaning generated through the interpretive process, are the criticisms of Critical Legal Theorists unimportant? Certainly not. While the selection of an interpretive methodology can suggest a particular outcome, our analysis of the Second Amendment made clear that many texts (together with the historical contexts that enfold them) leave the judge with room to maneuver, and that interpretive theory is incapable of fully curtailing a judge’s interpretive freedom. Like history and language, interpretive theory is malleable. The views and biases of the interpreter play an inescapable role in shaping meaning. While text and history have a certain amount of constraining force, the interpreter exercises significant discretion at the margins. The personal views, biases and political leanings of the interpreter play a role in shaping meaning, as does the text of the relevant statute and the contexts it inhabits. The manner in which these forces interact will depend in part on the interpretive theory applied by the judge. Neither the text nor the interpreter is the arbiter of meaning: meaning is formed through a complex interplay among these, and many other, sources of meaning.

(b) Evolutionary Construction

The complex interplay of interpreter and text can be understood by an expansion of the evolution metaphor developed above. In biological evolution, the development of a species will depend on two factors, namely, the species’ genetic profile and the environment in which the species is found. Darwin summarised the impact of environment on the development of a species as follows:

...it is well known to furriers that animals of the same species have thicker and better fur the further north they live; ... much of this difference may be due to the warmest-clad individuals having been favoured and preserved during many generations...for the conditions determine whether this or that variety shall survive [And] if it be true that all the species of the same genus are descended from a single parent-form, acclimatization must be

⁶² See discussion *supra* under heading “Historical Evolution”.

readily effected during a long course of descent. It is notorious that each species is adapted to the climate of its own home.⁶³

This parallels the development of legislative meaning. The “environment” of a legislative provision is the context by reference to which the Act is interpreted. While the morphology of a species will be altered by its physical environment, legislative morphology, in this case the “meaning” of a statute, will be modified by the context in which the relevant text is placed. For the originalist, this context is the historical, socio-legal environment in which the legislation was enacted. In the same way that we can understand an animal’s traits by reference to the environment in which those traits evolved, the originalist can understand the purpose and meaning of statutory language by observing the environment that led to its enactment. While this metaphor is helpful in understanding the role and usefulness of an Act’s historical context, the way it accounts for interpretation is too simplistic. Indeed, a more thorough review of the nature of “statutory evolution” takes account of the concerns of Critical Legal Theorists, while at the same time acknowledging the constraining power of words, history and interpretive theory.

Whether one considers statutory construction or biology, the phenomenon of evolution is more complex than it initially appears. In biological evolution, organisms do not merely inhabit an environment which alters their morphology. On the contrary, organisms have an impact on their environment, substantially altering the environmental conditions which in turn will act upon the organisms and drive their evolution. Consider a somewhat simplified account of one aspect of human evolution:

Early humans confronted scarcity in their physical environment, and developed irrigation in order to help ensure a steady supply of food. This irrigation led to the creation of large, stagnant pools of water adjacent to human populations. These stagnant pools of water (an environmental change created by humans) provided a breeding ground for mosquitoes. The mosquito population increased due to these favourable (and human-made) conditions.

Mosquitoes are a vector for malaria – an increased population of mosquitoes (under certain conditions) also leads to an increased incidence of malaria in nearby human populations. Malaria kills off humans who are susceptible to the disease, lessening the chance that these susceptible individuals will pass their genes along to future generations. On the other hand, humans who are heterozygous for sickle-cell anemia are resistant to malaria. As a result, people who are heterozygous for sickle-cell anemia tend to survive to pass their genes along to succeeding generations. Over the course of time, the relevant population shows a much-increased incidence of sickle-cell anemia. The population, due to its malaria-plagued environment, has

⁶³ Charles Darwin, *The Origin of Species* (New York: Random House Inc., 1998) at 174–81.

evolved a form of resistance to malaria. The presence of malaria in the region was, as we have seen, caused by the human population in the first place.⁶⁴

In this example, the physical environment shapes human evolution and humans then re-shape their environment. The re-shaped environment once again impacts upon the continuing evolution of the relevant population. Humans are not passively evolving in response to their environment. On the contrary, humans *change* their environment as the environment changes them. Humans and their environment are evolutionary partners, each contributing to the development of the other, and each indirectly shaping its own development by altering its evolutionary counterpart. Humans are complicit in shaping the course of their own species' evolution through the changes that they make in their surroundings.

The dynamic interaction of organisms and their environment presents a far more accurate evolutionary picture than the simple examples described earlier. It also closely approximates the interpretation of legislative language. Consider Justice Rand's approach to interpretation. When confronting an unclear statute, he selected originalism as his interpretive theory of choice and therefore placed the relevant text in its historical and social contexts. That helped to shape his opinions concerning the meaning of the text, allowing those views to adapt and evolve in response to the environment that was discovered through the historical inquiry. Justice Rand's personal biases, political views and vision of justice, however, coloured his understanding of the text's historical context: he shaped the historical context just as much as historical context helped to shape his opinions. As we have seen, he consistently emphasised those strands of history which supported civil libertarian views, strands of history which coincided with his ideology. Justice Rand shaped historical contexts through his personal ideologies, and historical context helped to shape his construction of whatever legislation he confronted. Historical context and judicial personality rebounded upon each other in a process of mutual modification driving the evolution of statutory meaning. The meaning of the enactment was born of the evolutionary partnership between Justice Rand's personal views, the text of the statute and the context that the statute's text inhabited. Interpretive theory mediated the interaction between the judge's views and the text to be considered, defining the environment which contributed to creation of the legislation's meaning.

The interplay of historical environment and judicial personality can be seen in Justice Rand's interpretive jurisprudence. Consider his decision in *Saumur v. City*

⁶⁴ For a more detailed account of the evolutionary relationship between malaria and sickle-cell anemia, see *Human Genetics: Concepts and Application* at <www.pbs.org/wgbh/evolution/educators/course/session7/explain_6_pop1.html>, or *Natural Selection*, found at <http://anthro.palomar.edu/synthetic/synth_7.htm>. I thank Professor Norman Siebrasse of the Faculty of Law, University of New Brunswick, for reminding me of this example.

of *Quebec* (1953).⁶⁵ In that case, the Supreme Court of Canada was asked to determine whether or not a Quebec City by-law regulating pamphleteering was contrary to provisions of the *Constitution Act, 1867*. The by-law in question provided (in part) as follows:

It is by the present by-law forbidden to distribute in the streets of the City of Quebec any book, pamphlet, booklet, circular, or tract whatever without having previously obtained for so doing the written permission of the Chief of Police.

According to the appellant in *Saumur*, this by-law was invalid on the grounds that it (a) infringed “freedom of religious worship”, and (b) invaded federal legislative territory by “restraining freedom of communication by writings”.⁶⁶ In striking down the relevant by-law,⁶⁷ Justice Rand interpreted the *Constitution Act, 1867* in his usual way: through an appeal to historical context viewed through the lens of historical evolution.

Justice Rand began his analysis by considering the historical role of written communication:

From its inception, printing has been recognized as an agency of tremendous possibilities, and virtually upon its introduction into Western Europe it was brought under the control and license of government. At that time, as now in despotisms, authority viewed with fear and wrath the uncensored printed word: it is and has been the *bête noir* of dogmatists in every field of thought; and the seat of its legislative control in this country becomes a matter of the highest moment.⁶⁸

Justice Rand’s historical quest continued with a careful review of the history of freedom of religion:

The Christian religion, its practices and profession, exhibiting in Europe and America an organic continuity, stands in the first rank of social, political and juristic importance. The *Articles of Capitulation* in 1760, the *Treaty of Paris* in 1763, and the *Quebec Act of 1774*, all contain special provisions placing safeguards against restrictions upon its freedom, which were in fact liberations from the law in force at the time in England.... From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we

⁶⁵ *Supra* note 51.

⁶⁶ *Ibid.*, at 326.

⁶⁷ Justice Rand wrote separate reasons concurring with the majority.

⁶⁸ *Supra* note 51, at 326.

have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.⁶⁹

Finally, Justice Rand tackled the language of the *Constitution Act, 1867*, which declares in its preamble that Canada is to have a constitution that was “similar in principle to that of the United Kingdom”. Not surprisingly, Justice Rand interpreted this language by exploring the history of the United Kingdom’s constitution:

Under that constitution, government is by parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion: government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under license, its basic condition is destroyed: the government, as licensor, becomes disjoined from the citizenry. The only security is steadily advancing enlightenment, for which the widest range of controversy is the *sine qua non*.⁷⁰

As a result, Justice Rand found that the Canadian constitution (being “similar in principle” to that of the United Kingdom) called for “free public opinion and free discussion throughout the nation on all matters affecting the State”.⁷¹ He therefore held that the province’s by-law, touching as it did upon the fundamental matters of free expression and the exercise of religion, went beyond mere “street regulation” and trod upon the legislative soil of the federal government. The Court, accordingly, held that the relevant by-law was invalid.

Justice Rand’s use of history in *Saumur* demonstrated the interplay of interpretive theory and judicial personality. In interpreting the Constitution’s preamble and striking down the relevant legislation, Justice Rand undertook a review of history. History provided the environment which would colour the morphology (or meaning) of the legislation’s language. Justice Rand’s personal views and biases, however, coloured his perception of the text’s historical context. Where another historian may have focused on Britain’s tradition of parliamentary supremacy, or the history of governmental control of public spaces, Justice Rand focused on those elements of history which supported a broad view of civil liberties. When considering the history of the state’s observance of religious freedoms, Justice Rand focused only on the “Christian religion”, which was relatively free of regulation, rather than considering other religions which had been subject to strict controls and had little or no official recognition by governmental bodies. Because of the ideological lens through which he

⁶⁹ *Ibid.*, at 327.

⁷⁰ *Ibid.*, at 330.

⁷¹ *Ibid.*, at 331, quoting Justice Cannon.

perceived history, Justice Rand seized upon those elements of history which supported his libertarian ideals. His vision of history was not the only defensible account of the relevant Act's historical context; and another jurist with a different political outlook might have constructed a radically different (yet no less accurate) view of history. Because *Saumur* was a difficult case without an obvious answer, a nuanced picture of history, mediated by Justice Rand's personal ideology, had the capacity to change the meaning of the relevant text.

Justice Rand's consistent practice of using history to justify libertarian ideology did not suggest that he sought to rely upon a distorted view of history. He was not engaged in judicial chicanery, using a fraudulent view of history to justify political decisions. On the contrary, Justice Rand (like all human beings) was simply unable to divorce himself from his personal value system. There is no such thing as an unmediated view of history and no fully objective view of historical context divorced from personal bias or ideological affiliation. All that an individual sees will be coloured by the lens of his or her own preferences. In his review of historical contexts, Justice Rand (as a civil libertarian) saw history from the perspective of a civil libertarian, focusing on those strands of history which made the most sense when viewed through a libertarian lens. An advocate of parliamentary supremacy and 'big government', with a narrow view of individual freedoms, would undoubtedly have painted a very different view of history than the one presented in Justice Rand's decisions. His system of beliefs coloured his view of historical contexts, which in turn shaped his views regarding the meaning of legislation. In effect, Justice Rand's personal value system was engaged in an evolutionary partnership with the historical context of the relevant texts. As was the case in the example concerning sickle-cell anemia, each evolutionary partner played a role in shaping its own development through its impact on its evolutionary counterparts.

In difficult cases, where the constraining power of text and history fails to yield an obvious answer, neither an Act's historical context nor a judicial personality is the sole determinant of the statute's meaning. On the contrary, each element has an impact on its counterpart. Through a process of mutual modification, judicial personality and historical context collectively shape the meaning of statutory language.

CONCLUSION

Originalism tells us that the identity of the judge is irrelevant to the interpretation of statutes. If the judge is an originalist, then that judge's reading of legislative language will do nothing more than reveal the intentions of the statute's authors. Critical Legal Studies, by contrast, suggests that the judge is the sole determinant of a statute's meaning, and that originalism, like other interpretive theories, provides nothing more than fuel for the judge's rhetorical fire: interpretive theory is inconsequential, serving only as a creative means of justifying constructions which are rooted in the judge's

personal preference. As we have seen, neither conception of the interpretive process is correct. The judge is neither a passive oracle charged with the task of channeling Parliament's disembodied thoughts nor an unconstrained ideologue who appropriates the text of legislation for personal purposes. Neither 'the will of Parliament' nor 'the will of the judge' controls the meaning of legislation. On the contrary, the text of the Act (as established by Parliament), interpretive theory and judicial personality come together in a symbiotic relationship which generates the meaning of legislation. In difficult cases, where the text of the statute fails to yield an obvious meaning, judicial personality engages with whatever context is generated through the invocation of interpretive theory. Where the interpretive theory in question is originalist construction, the judge's views are partnered with historical context, crafting meaning in a way that pays heed to historical context, mediated through the lens of the interpreter's ideology.

A judge's selection of a specific interpretive theory will neither compel the judge to reach a specific result nor grant the judge free rein to impregnate legislation with the judge's personal views. On the contrary, interpretive theory provides the environment within which the judge's view of meaning can evolve. If the judge is an originalist, an historical environment will mould the judge's views of the statute's meaning, shaping those views by reference to the historical landscape which initially spawned enactment of the text. If the judge is an adherent of dynamic interpretation, the landscape will be shaped by current social policies, which in turn will help to shape the judge's reading of the text. In neither case is the judge compelled to reach a particular decision, nor is the judge completely free to give effect to personal preference. On the contrary, the judge's personal values interact with the environment provided by interpretive theory, allowing the statute's meaning to evolve. A change in interpretive theory, like a change in the identity of the judge who writes the decision, has the capacity to change the interpretation that this evolutionary partnership will yield.

What has this "evolutionary model" of legislative meaning told us concerning Justice Rand's impact on the world of statutory interpretation? Certainly, it has questioned the accuracy of Justice Rand's frequent suggestion that a static, legislative intention governed his interpretive decisions. As we have seen, there was something of the interpreter in each act of interpretation. Despite his protestations to the contrary, Justice Rand was not compelled to reach specific interpretive holdings by virtue of his commitment to originalist construction. On the contrary, his personal vision of justice was an 'evolutionary partner' with the historical contexts that Justice Rand discovered. The fact that libertarian politics played a role in generating Justice Rand's holdings is not an indictment of his interpretive jurisprudence, but a testament to Justice Rand's vision of justice. Despite the history-centered, intention-focused nature of the language found in his jurisprudence, Justice Rand was not *forced* to reach the forward-thinking, progressive interpretations that he so frequently claimed to discover through historical evolution. Instead, his pivotal judgments in the realm of civil liberties were based in part on his personal ideology and his vision of the Canadian legal system.

We need not applaud Justice Rand for his deft applications of originalist construction or his unerring ability to uncover the will of long-dead parliamentarians. On the contrary, we should applaud him for his vision of Canada's future. Through his commitment to the values of justice, equity and freedom, Justice Rand entered into an evolutionary partnership with each Act's historical context, crafting meaning in a way that gave effect to some of Canada's greatest advances in the realm of civil liberties. Our current libertarian state was shaped in part by Justice Rand's personal ideologies; and for this all Canadians should be grateful.

