THE EVOLVING APPROACH TO *CHARTER* INTERPRETATION

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The Supreme Court of Canada's living tree metaphor and purposive method of interpretation shaped Charter *jurisprudence over the last four decades. This article explains that the Supreme Court is revising its approach to* Charter *interpretation in reaction to criticism by observers who advocate textualism and originalism. The article explores the contours of the Supreme Court's emerging purposive textual method of interpretation and considers the implications of the interpretive approach for existing* Charter *jurisprudence. Potentially significant implications of the changes in the Supreme Court's interpretive method are identified.*

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I. INTRODUCTION

Patriation and the adoption of the *Canadian Charter of Rights and Freedoms* represented a break with the constitutional law and culture of Canada's first century, and the foundation

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for a new jurisprudence of constitutional rights.[1] The *Charter* is a constellation of choices made at that moment in time — choices about what rights to include and exclude, and choices about the language to express the included rights. The choices made in 1982 echo through the jurisprudence that has poured forth from the courts in the ensuing four decades. But is this body of law an enduring edifice or a castle made of sand? *Charter* jurisprudence is a product of interpretation. As the *Charter* turns 40, the method of interpreting the *Charter* is at an inflection point.

A recurring question in *Charter* scholarship and case law is the extent to which the choices made in 1982 constrain the courts. At the outset, the Supreme Court of Canada made it clear that it was not going to follow the restrained jurisprudence of the *Canadian Bill of Rights*[2] and was instead going to interpret the *Charter* using a generous and purposive method.[3] The Supreme Court was determined that the *Charter* would remain responsive to contemporary society; Lord Sankey's invocation of the constitution as a "living tree" in the *Persons Case* was exhumed[4] and became canonical.[5] Purposive interpretation, that is, an interpretation that seeks to give effect to the purpose of a *Charter* right, quickly became the Supreme Court's dominant interpretive method and was said to be consistent with the idea of the *Charter* as a living organism.[6]

Central to the early approach to the *Charter* was the rejection of originalism. Originalism was at that time understood to be the interpretation of a constitution in accordance with the subjective intentions of its framers.[7] To the Supreme Court and the Canadian legal academy in the mid-1980s, originalism was anathema because it was a tool of conservative United States legal thinkers aiming to roll back the civil rights decisions of the US Supreme Court. Just as important, originalism resembled the interpretive method required by the much-derided *Canadian Bill of Rights*. To the judges charged with interpreting the *Charter*, the originalism of the 1980s seemed ill-suited to the task with which they had been entrusted.

Through the *Charter*'s fourth decade, calls for a reappraisal of the Supreme Court's method of interpreting the *Charter* grew louder and more frequent. Textualists and originalists on the bench and in the Canadian legal academy — a loosely-defined group that I call Canadian textualists — have made the case that the Supreme Court's method for

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 SC 1960, c 44.

3 See *Hunter v Southam Inc*, [1984] 2 SCR 145 at 156 [*Hunter*]; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344 [*Big M Drug Mart*].

4 Asher Honickman, "The Living Fiction: Reclaiming Originalism for Canada" (2014) 43:3 Adv Q 329 at 335–36 [Honickman, "The Living Fiction"] (shows that after the first "living tree" reference in *Re Section 24 of the BNA Act* (1929), [1930] 1 DLR 98 at 106–107 [*Persons Case*], it did not surface again until the 1970s).

5 *Persons Case*, *ibid*; *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at 365–66 [*Skapinker*]; *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 509.

6 See Peter W Hogg, *Constitutional Law of Canada*, 3rd ed (Toronto: Carswell, 1992) ("The Court has generally assumed that a 'purposive' approach and a 'generous' approach are one and the same thing – or at least are not inconsistent" at 814).

7 See Scott A Boykin, "Original-Intent Originalism: A Reformulation and Defense" (2021) 60:2 Washburn LJ 245 at 246.

interpreting the *Charter* is undertheorized, anti-democratic, and inconsistently applied.[8] Some have suggested that when the evolution in originalist methodology in recent decades is considered, it is not even clear that the Supreme Court has rejected originalism as it is now understood and practised.[9] New originalism, as some call it,[10] no longer focuses on the subjective intentions of constitutional framers; instead it seeks to determine the original public meaning of the constitutional text. New originalism is most closely associated with Justice Antonin Scalia.[11] The Canadian textualists, inspired by the new originalism, contend that the Supreme Court's understanding of the *Charter* has strayed too far from its text. The remedy for this, they suggest, is a revised interpretive methodology firmly rooted in the text of the *Charter*.

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8 I refer to this group as Canadian textualists rather than Canadian originalists because a range of opinion exists within the group. The common trait amongst the group is a call for a greater emphasis on written text in constitutional interpretation. The Canadian textualists were preceded by FL Morton & Rainer Knopff, "Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights" (1990) 1 SCLR (2d) 533, who argued at 546 that "[i]f written constitutionalism is to make sense, there must be a core meaning that remains permanent even as it is flexibly applied to changing circumstances." For Canadian textualists on the bench, see the writing of Justices Bradley Miller and Grant Huscroft of the Ontario Court of Appeal, both before and after their appointments: Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) [Huscroft & Miller, *The Challenge of Originalism*]; Bradley W Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22:2 Can JL & Jur 331; The Honourable Bradley W Miller, "Constitutional Supremacy and Judicial Reasoning" (2020) 45:2 Queen's LJ 353 [Miller, "Constitutional Supremacy"]; Grant Huscroft, "The Trouble with Living Tree Interpretation" (2006) 25:1 UQLJ 3; Jeffrey Goldsworthy & The Honourable Grant Huscroft, "Originalism in Australia and Canada: *Why the Divergence*?" in Richard Albert & David R Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge, UK: Cambridge University Press, 2018) 183. For academics and practitioners advocating textualism, see Grégoire CN Webber, "Originalism's Constitution" in Huscroft & Miller, *The Challenge of Originalism*, *ibid*, 147; Benjamin J Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the Canadian Charter of Rights and Freedoms" (2015) 65:3 UTLJ 239 [Oliphant, "Taking Purposes Seriously"]; Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42:1 Queen's LJ 107; Léonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50:2 UBC L Rev 505 [Sirota & Oliphant, "Originalist Reasoning"]; Kerri A Froc, "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment'" (2015) 19:2 Rev Const Stud 237 [Froc, "Is Originalism Bad for Women?"]; Kerri A Froc & Michael Marin, "The Supreme Court's Strange Brew: History, Federalism and Anti-Originalism in *Comeau*" (2019) 70 UNBLJ 297; J Gareth Morley, "Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada" (2016) 53:3 Osgoode Hall LJ 745; Honickman, "The Living Fiction," *supra* note 4; Asher Honickman, "The Original Living Tree" (2019) 28:1 Const Forum Const 29. See also Mark Carter, "The Rule of Law, Legal Rights in the *Charter*, and the Supreme Court's New Positivism" (2008) 33:2 Queen's LJ 453 (arguing that the Supreme Court has sometimes adopted a non-originalist textualist approach).

9 Oliphant & Sirota, *ibid*.

10 Keith E Whittington, "The New Originalism" (2004) 2:2 Georgetown JL & Public Policy 599.

11 See generally Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) [Scalia, *A Matter of Interpretation*] (outlining views on textualism and originalism). Textualism and originalism are similar interpretive methods with originalism usually referring to constitutional interpretation and textualism being a broader term that also applies to the interpretation of statutes and other legal documents. Many of the Canadian textualists also seek to change the method of statutory interpretation used in Canada. Critics of originalism and textualism consider the two methodologies to be substantially the same. See e.g. Michael C Dorf, "The Supreme Court 1997 Term — Foreword: The Limits of Socratic Deliberation" (1998) 112:1 Harv L Rev 4 at 14 [Dorf, "The Supreme Court 1997 Term"] (calling textualism a "close relative" of originalism); Neil H Buchanan & Michael C Dorf, "A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism" (2021) 106:3 Cornell L Rev 591 at 621 (explaining that originalism and textualism offer "roughly the same prescription").

The Supreme Court has responded to the criticisms of its interpretive methodology by taking a textual turn.[12] The turn began in 2019 and is exemplified in Justice Martin's reasons in *R. v. Poulin*. Justice Martin, writing for the majority, cautioned against generous interpretation and implemented an interpretation that bears many of the hallmarks of textualism.[13] The Supreme Court's textualism was again manifested the following year in *Quebec (Attorney General) v. 9147-0732 Québec inc.* where Justices Brown and Rowe writing for the majority stated that, "constitutional interpretation, being the interpretation *of the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text."[14] The idea that purposive interpretation of *Charter* rights cannot exceed the text was reiterated in the 2021 decision *Toronto (City) v. Ontario (Attorney General)* where Chief Justice Wagner and Justice Brown writing for the majority labelled the method "purposive textual interpretation."[15] The Supreme Court's purposive textual interpretation is unmistakably a more restrained approach to interpretation than the method that prevailed for most of the *Charter*'s first four decades.

Perhaps it should not be surprising that as the *Charter* enters what humans consider to be middle age, the Supreme Court is signalling a move away from the ambitious jurisprudence of the *Charter*'s youth and the interpretive method that enabled the Supreme Court in those early years. The *Charter* once represented a blank canvas that cried out for bold brush strokes; now, with less white space remaining, the Supreme Court is indicating that smaller and more delicate brush strokes are appropriate. A critical question going forward is whether the Supreme Court's evolving interpretive method represents a challenge to existing precedents. There are some clues that suggest that the revised interpretive approach could be used to reverse important decisions and narrow the *Charter*'s scope.

II. THE SUPREME COURT'S CHOICE OF INTERPRETIVE METHOD

A. META-INTERPRETATION

The task of choosing an interpretive method is called meta-interpretation.[16] Meta-interpretation is to be distinguished from the application of the chosen interpretive method to legal texts, which is simply legal interpretation. The adoption of the *Charter* required the Supreme Court to engage in meta-interpretation. Of course, the Supreme Court in the mid-1980s did not use the term meta-interpretation, but it nevertheless was self-conscious about the need to choose an interpretive method and to justify its choice.

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12 Just as the finishing touches were being put on this article in February 2022, two articles touching on the same development were released: Léonid Sirota, "Purposivism, Textualism, and Originalism in Recent Cases on *Charter* Interpretation" (2021) 47:1 Queen's LJ 78 [Sirota, "Purposivism, Textualism, and Originalism"]; Vanessa MacDonnell, "The Enduring Wisdom of the Purposive Approach to *Charter* Interpretation" (2022), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=4032661> [MacDonnell, "The Enduring Wisdom of the Purposive Approach"]. Sirota and MacDonnell approach the issue from different perspectives but conclude as I do that the Supreme Court is changing its approach to *Charter* interpretation.

13 2019 SCC 47 [*Poulin*].

14 2020 SCC 32 at para 9 [*9147-0732 Québec inc*] [emphasis in original].

15 2021 SCC 34 at para 53 [*City of Toronto*].

16 Scott J Shapiro, *Legality* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011) at 305 [Shapiro, *Legality*].

The two interpretive methods considered by the Supreme Court in the mid-1980s — purposivism and textualism — remain the leading candidates today. These methods are not monolithic and the discussion in this article necessarily glosses over some of the internecine debates amongst proponents of each method. Purposivism requires the interpreter to ascertain the purpose of a constitutional provision and then give the constitutional provision the interpretation that best furthers its purpose. Textualism, in contrast, is focused on the semantic meaning of the words in the constitutional provision read in context. Most textualists believe that the semantic meaning to be given to words is the public meaning of those words at the time the text was framed.[17] This form of textualism — the dominant form — is called originalism. Other textualists prefer to give words their plain contemporary meaning.[18] For the sake of convenience, this article will refer to textualism in the constitutional context as originalism. Purposivism generally leaves more discretion in the hands of the interpreter than textualism, though some forms of textualism and originalism are significantly discretionary.[19]

A choice between interpretive methods could be made on different bases. An interpretive method might be chosen because it is broadly accepted by officials as legitimate.[20] Or an interpretive method might be chosen because it produces what the meta-interpreter considers to be better interpretations.[21] For example, a meta-interpreter might favour an interpretive method because it best accords with a fundamental value such as democracy or the rule of law.[22] Scott Shapiro suggests a different way of choosing that minimizes the role of normative judgment. An interpretive method should be chosen based on what he calls the economy of trust in a legal system.[23] The economy of trust is the relative trust reposed by the architects of the legal system in different institutions. The greater the degree of relative trust reposed in the courts, the greater the discretion that should be accorded to judges in interpretation.

The relative trust reposed in courts, legislatures, and constitutional framers is not to be assessed subjectively. Shapiro explains that a better approach is to seek the objective allocation of trust in a legal system by looking at the attitudes of the planners (framers) of the system as expressed in the structure of the system. He concedes that there will often be

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17 See e.g. Lawrence B Solum, "What is Originalism? The Evolution of Contemporary Originalist Theory" in Huscroft & Miller, *The Challenge of Originalism*, *supra* note 8, 12 [Solum, "What is Originalism?"].

18 See e.g. Frederick Schauer, "Unoriginal Textualism" (2022) 90:4 Geo Wash L Rev 825.

19 Shapiro, *Legality*, *supra* note 16 at 373. See e.g. Jack M Balkin, *Living Originalism* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011).

20 See generally Kent Greenawalt, "The Rule of Recognition and the Constitution" (1987) 85:4 Mich L Rev 621 at 655–58.

21 Richard H Fallon Jr, "How to Choose a Constitutional Theory" (1999) 87:3 Cal L Rev 535 (argues that "theories should be judged by their likely fruits" at 539). See also Michael C Dorf, "Create Your Own Constitutional Theory" (1999) 87:3 Cal L Rev 593. Better interpretations might be interpretations that accord with a conception of morality as per Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press of Harvard University Press, 1986) at 348–50, are consistent with a view of public welfare as per Richard A Posner, *How Judges Think* (Cambridge, Mass: Harvard University Press, 2008) at 40, or promote a particular conception of the common good as per Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Cambridge, UK: Polity Books, 2022).

22 Proponents of both originalism and purposivism claim that their methods are more consistent with democracy and the rule of law. On purposivism and democracy and the rule of law, see e.g. Stephen Breyer, "Our Democratic Constitution" (2002) 77:2 NYUL Rev 245; Aharon Barak, *Purposive Interpretation in Law*, translated by Sari Bashi (Princeton: Princeton University Press, 2005) at 242–43, 282–83 (on purposivism and the rule of law). On the claim that originalism is more consistent with democracy and the rule of law, see the discussion below at 51–53.

23 See Shapiro, *Legality*, *supra* note 16.

conflicting attitudes of trust in a legal system. The meta-interpreter's job is to reconcile and make sense of the different attitudes of trust by constructing a rational synthesis or a theory of trust that underlies the legal system.

This meta-interpretive approach does not presuppose that one interpretive methodology or another is best for all legal systems. Shapiro's approach may reveal different answers for different systems. The question when choosing a method of constitutional interpretation is whether a system places more trust in constitutional framers or contemporary courts. A system that places greater trust in constitutional framers should have an interpretive method that accords little discretion to courts. Conversely, a system that places more trust in contemporary courts than in constitutional framers should have a discretionary interpretive method. The same logic applies to choosing a method for statutory interpretation, but there the question is whether the system places more trust in legislatures or courts. Looking at the US Constitution, Shapiro identifies competing conceptions of trust. On one hand, there is Justice Scalia who is an example of those who distrust the willful judge.[24] On the other hand, there are public choice scholars who identify the problem of rent-seeking legislators.[25] Shapiro does not come down in favour of any specific interpretive method; rather, his view is that in the US system good arguments can be made for different interpretive methods.

B. THE ECONOMY OF TRUST AND THE LIVING TREE

The story of the early days of *Charter* interpretation is familiar. First-year law students are told, often uncritically, that the *Charter* is a "living tree" and that the appropriate method of interpretation is purposivism. Too often, little consideration is given by courts to what that organic metaphor means in practical terms for interpretive methodology.[26] Moreover, until recently, there has been little introspection as to whether and how purposivism and the progressive interpretive perspective implied by the living tree analogy can be reconciled. The discussion that follows looks at the Supreme Court's choice of the interpretive methodology for the *Charter*.

Prior to the *Charter*, judicial protection of individual rights existed in two weak forms. The first was the judicially-constructed doctrine of the implied bill of rights.[27] The implied bill of rights was implied because there was no explicit protection for individual rights in what was then called the *The British North America Act, 1867*.[28] Protection from heavy-handed provincial legislation was sometimes indirectly effected when such legislation was found to be criminal law and hence outside provincial jurisdiction.[29] The implied bill of rights was never fully accepted by the Supreme Court[30] and, in any event, provided no

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24 *Ibid* at 343, 376.

25 *Ibid* at 374, citing various works of Judge Frank Easterbrook including Frank H Easterbrook, "Foreword: The Court and the Economic System" (1984) 98:1 Harv L Rev 4 at 14–18.

26 For a spirited defence of living tree constitutionalism, see Wilfrid J Waluchow, "The Living Tree, Very Much Alive and Still Bearing Fruit: A Reply to the Honourable Bradley W Miller" (2021) 46:2 Queen's LJ 281. See also WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (New York: Cambridge University Press, 2007).

27 See generally Dale Gibson, "Constitutional Amendment and the Implied Bill of Rights" (1967) 12:4 McGill LJ 497.

28 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (*The British North America Act, 1867*) as it appeared before 17 April 1982.

29 See e.g. *Reference re Alberta Statutes*, [1938] SCR 100; *Saumur v City of Quebec*, [1953] 2 SCR 299.

30 Gibson, *supra* note 27 at 497–98.

protection for individual rights when provinces acted within their jurisdiction, nor did it provide any protection from encroachments on individual rights by the federal government. Second was the 1960 *Canadian Bill of Rights*.[31] The *Canadian Bill of Rights,* being merely a statute, did not empower courts to invalidate legislation.[32] Instead, the *Canadian Bill of Rights* required courts to construe federal statutes to be consistent with the rights it enumerated. The ineffectual protection for individual rights provided by the judicial doctrine of the implied bill of rights and the statutory *Canadian Bill of Rights* was a motivating factor in Prime Minister Pierre Elliott Trudeau's push for the *Charter*.[33]

Parliament and provincial legislatures in creating the *Charter* empowered courts to protect individual rights in a way that was more robust and effective than in the past.[34] Justice Lamer explained that "the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility."[35] The adoption of the *Charter* and the corresponding allocation of trust to the Supreme Court disposed the Supreme Court to a discretionary mode of interpretation. Peter Hogg observed that "it is clear as a matter of fact that the original understanding of many of the framers of 1982 was not that the Charter rights should be frozen in the shape that seemed good in 1982, but rather that the rights should be subject to changing judicial interpretations over time."[36]

The Supreme Court staked its claim for a discretionary approach to interpretation by anchoring it in the *Persons Case* decided by the Judicial Committee of the Privy Council (JCPC) in 1929.[37] The JCPC decided that the word "persons" in section 24 of the *British*

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31 *Canadian Bill of Rights*, *supra* note 2.

32 This was a subject of debate. The one exception where legislation was invalidated was *R v Drybones*, [1970] SCR 282.

33 See Honourable Pierre Elliott Trudeau, *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968) at 14 (describing the limited protection for human rights resulting from the narrow interpretation of the *Canadian Bill of Rights* as "unsatisfactory"). See also generally Lorraine E Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, The Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80:1&2 Can Bar Rev 699.

34 The Supreme Court has never addressed the question of competency which is relevant to an assessment of the economy of trust. Grégoire Webber argues that in important respects legislatures have more capacity than courts to make decisions about the needs of contemporary society and, accordingly, should have a role in specifying the content of constitutional rights through legislation: see Grégoire Webber, "Past, Present, and Justice in the Exercise of Judicial Responsibility" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge, UK: Cambridge University Press, 2019) 129.

35 *Re BC Motor Vehicle Act*, *supra* note 5 at 497. See also *Skapinker*, *supra* note 5 ("[t]he fine and constant adjustment process" of *Charter* rights was left "of necessity to the judicial branch" at 366). Years later in *Vriend v Alberta*, [1998] 1 SCR 493 at para 132 the majority observed, "[w]e should recall that it was the deliberate choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts."

36 Hogg, *Constitutional Law of Canada*, *supra* note 6 at 811. A similar view is expressed in Adam M Dodek, ed, *The Charter Debates: The Special Joint Committee on the Constitution, 1980–81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018) at 12 [Dodek, *Charter Debates*]. See also "Interpreting the Constitution: The Living Tree vs. Original Meaning," *Policy Options* (1 October 2007), online: <policyoptions.irpp.org/magazines/free-trade-20/interpreting-the-constitution-the-living-tree-vs-original-meaning/>.

37 *Persons Case, supra* note 4. For a discussion of the *Persons Case*, see The Honourable Justice Robert J Sharpe, "The Persons Case and the Living Tree Theory of Constitutional Interpretation" (2013) 64 UNBLJ 1; Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007). Miller, "Constitutional Supremacy," *supra* note 8 at 366 argues that the living tree is "the metaphor that swallowed the decision" because the *Persons Case* stripped of its rhetoric is an example of conventional statutory interpretation that resembles modern textualism.

North America Act, 1867, which governed eligibility to sit in the Senate, included women. Lord Sankey famously remarked, "[t]he B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits."[38] He continued to explain that "[t]he Act should be on all occasions interpreted in a large, liberal, and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words."[39] The reallocation of trust represented by the adoption of the *Charter* pulled the Supreme Court toward the generous and liberal posture captured in the living tree metaphor.[40]

Just as the Supreme Court was drawn toward a discretionary interpretive approach, two factors pushed the Supreme Court away from restrictive approaches to interpretation. The first was its understanding that the adoption of the *Charter* represented a rejection by the framers of the *Charter* of the way that the courts had interpreted the *Canadian Bill of Rights*. The *Canadian Bill of Rights* defined rights and freedoms that "existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and … protect them from infringement by any federal statute."[41] The result of this understanding was an interpretive method that looked back to the rights that existed at the time of the adoption of the *Canadian Bill of Rights*.[42] Critics called this the "frozen law" or "frozen concepts" approach.[43] The practical consequence of this interpretive method was that time and again, when faced with the choice between a narrow and expansive reading of the provisions of the *Canadian Bill of Rights*, the Supreme Court chose the more restrictive reading.[44] Following the adoption of the *Charter*, Justice Le Dain explained that courts approached the *Canadian Bill of Rights* with "uncertainty or ambivalence" because "it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament."[45] Now armed with a clear constitutional mandate, the Supreme Court was determined to exercise it. Justice Wilson explained that the adoption of the *Charter* "sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be re-examined."[46]

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38 *Persons Case*, *ibid* at 106–107.

39 *Ibid* at 107.

40 The living tree approach is not limited to the *Charter*: see e.g. *Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714 at 723, citing *Persons Case*, *ibid*; *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 ("[t]he Constitution is an organic instrument, and must be interpreted flexibly to reflect changing circumstances" at para 33). See also *Beauregard v Canada*, [1986] 2 SCR 56 ("[t]he Canadian Constitution … lives and breathes and is capable of growing to keep pace with the growth of the country and its people" at 81).

41 *R v Burnshine*, [1975] 1 SCR 693 at 702, Martland J for the majority.

42 This is very similar to the originalism seen in *New York State Rifle & Pistol Association, Inc v Bruen*, 597 US __ (2022) at 16 where the majority held, "reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments'" [citations omitted, emphasis in original].

43 See e.g. WS Tarnopolsky, "The Canadian Bill of Rights and the Supreme Court Decisions in *Lavell* and *Burnshine*: A Retreat from Drybones to Dicey?" (1975) 7:1 Ottawa L Rev 1 at 12; WS Tarnopolsky, "A Bill of Rights and Future Constitutional Change" (1979) 57:4 Can Bar Rev 626.

44 See e.g. Justice Ritchie's plurality decision in *Attorney General of Canada v Lavell*, [1974] SCR 1349 (rejecting a suggestion that the equality provision in section 1(b) of the *Canadian Bill of Rights*, *supra* note 2 be read to provide similar protection to the US 14th Amendment and instead finding that section 1(b) protected only procedural equality). See also Justice Ritchie's majority decision in *Miller v The Queen*, [1977] 2 SCR 680 at 705 (concluding that the death penalty is not "cruel and unusual treatment or punishment" for murder).

45 *Re BC Motor Vehicle Act*, *supra* note 5 at 510, citing *R v Therens*, [1985] 1 SCR 613, Le Dain J.

46 *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 209, Wilson J (quoted with approval by Justice Lamer writing for the majority in *Re BC Motor Vehicle Act*, *ibid* at 510–11).

The second factor pushing the Supreme Court away from a restrictive approach to interpretation was a distaste for the originalist interpretive method of US conservative legal scholars like Robert Bork. Bork believed that courts should "interpret the [Constitution]'s words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments."[47] The Supreme Court's rejection of 1980s vintage originalism cannot be separated from the Supreme Court's disavowal of the "frozen concepts" approach to interpretation that prevailed under the *Canadian Bill of Rights*. Indeed, the Supreme Court's aversion to the restrictive approach that prevailed under the *Canadian Bill of Rights* led it to eschew originalism which could be deployed to similar effect; the Supreme Court did not want to be tied to a method that gave more weight to the past than the present. Justice Lamer in his majority decision in *Re B.C. Motor Vehicle Act* held that reliance on the subjective intentions of the framers cannot carry "anything but minimal weight" in interpretation.[48] The Supreme Court later, following Hogg, made the connection between Justice Lamer's discounting of the subjective intention of the framers in *Re B.C. Motor Vehicle Act* and a rejection of originalism.[49] The Supreme Court explained that it "has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution."[50]

The Supreme Court's analysis of the economy of trust — even if it was not always stated in terms of trust — supported its conclusion that a discretionary approach to interpretation was appropriate. There was a fundamental and intentioned reallocation of trust from Parliament and legislatures, which had hitherto played a significant role in shaping and protecting individual rights, to the courts. Moreover, the adoption of the *Charter* was quite reasonably interpreted by the Supreme Court to be a rejection of the rights jurisprudence under the *Canadian Bill of Rights* and a mandate for a more discretionary mode of interpretation. The question that remains after determining whether the appropriate method is discretionary is what kind of discretionary interpretive method should be chosen. Concluding that a discretionary methodology is appropriate does not necessarily imply purposivism.[51] The Supreme Court, however, did choose purposivism, so the parameters of its brand of purposivism must be explored.

C. THE SUPREME COURT'S PURPOSIVISM

The first *Charter* cases explained that the Supreme Court's interpretive task was "to delineate the nature of the interests [that the right in question] is meant to protect."[52] How the Supreme Court was to do this was not explained. This might be called proto-purposivism. The proto-purposivist cases, *Skapinker* and *Hunter*, show that such an approach could ground an interpretation that was narrower or broader than the text.[53] The Supreme Court in

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47 Robert H Bork, "The Constitution, Original Intent, and Economic Rights" (1986) 23:4 San Diego L Rev 823 at 826. For a more fully formed version of Bork's originalism, see Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster, 1990).

48 *Re BC Motor Vehicle Act*, *supra* note 5 at 508–509.

49 *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 409 [*Ontario Hydro*], quoting Peter W Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25:1 Osgoode Hall LJ 87 at 97–98.

50 *Ontario Hydro*, *ibid*.

51 Shapiro, *Legality*, *supra* note 16 at 373.

52 *Hunter*, *supra* note 3 at 157.

53 *Skapinker*, *supra* note 5; *Hunter*, *ibid*.

Skapinker considered a claim by a permanent resident of Canada who was denied the right to practise law in Ontario on the grounds that he was not a citizen of Canada. He asserted that he should be permitted to practise law pursuant to section 6(2)(b) of the *Charter* which states, "every person who has the status of a permanent resident of Canada has the right … to pursue the gaining of a livelihood in any province."[54] The Supreme Court found that a possible reading of section 6(2)(b) was to provide for a right to work. However, the Supreme Court looked to the purpose of the provision, aided by the heading "Mobility Rights," to conclude that the provision was really about inter-provincial mobility and not a free-standing right to work.[55] By contrast, in *Hunter*, the issue before the Supreme Court was whether the section 8 "right to be secure against unreasonable search or seizure" should be interpreted narrowly to follow the common law of trespass and only apply to the protection of property, or whether it should be interpreted more broadly like the US Fourth Amendment which protects "people, not places."[56] The Supreme Court found that the purpose of section 8 was to protect a reasonable expectation of privacy and that this, in turn, supported giving the broader meaning to the words "unreasonable search and seizure."[57]

The explanation of the Supreme Court's purposive method in *Big M Drug Mart* is the touchstone for all subsequent discussions of the Supreme Court's purposivism.[58] *Big M Drug Mart* required the Supreme Court to interpret the *Charter* guarantee of "freedom of religion." The *Lord's Day Act*, which required businesses to close on Sunday, the Christian sabbath, was challenged. The law did not restrict any religious activity of non-Christians or require observance of Christian rituals or beliefs. The respondent submitted that mandatory Sunday closings preferred Christianity over other faiths and imposed the burden of forced inactivity in commercial matters on the members of other faiths who observed different sabbaths. To decide the case, the Supreme Court once again had to choose between a narrow conception and a broad conception of a *Charter* right. The narrow version of freedom of religion guaranteed only the right of individuals to exercise their religion without government interference (the principle of government non-interference).[59] The principle of non-interference did not prevent the government from favouring certain religions. By contrast, the broad version of freedom of religion prevented government from imposing laws that preferred one religion over another (the principle of government neutrality).

Chief Justice Dickson articulated the Supreme Court's purposive methodology. He explained that "the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*."[60] Chief Justice Dickson continued explaining that a purposive interpretation is "a generous rather than a legalistic one, aimed

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54 *Charter*, *supra* note 1, s 6(2)(b).
55 *Skapinker, supra* note 5 at 382–83.
56 *Charter*, *supra* note 1, s 8; *Hunter*, *supra* note 3 at 157–59, quoting Justice Stewart in *Katz v United States*, 389 US 347 at 351 (1967).
57 *Hunter*, *ibid* at 159.
58 *Big M Drug Mart*, *supra* note 3.
59 See *Robertson and Rosetanni v The Queen*, [1963] SCR 651 (finding that the *Lord's Day Act* was consistent with the *Canadian Bill of Rights* and that the principle that informs freedom of religion is one of government non-interference with religious belief and practice).
60 *Big M Drug Mart*, *supra* note 3 at 344.

at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection."[61] Lest he be thought to be opening the door to unrestrained judicial discretion in interpretation, he cautioned that "it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore … be placed in its proper linguistic, philosophic and historical contexts."[62] Using this purposive interpretive methodology, Chief Justice Dickson concluded that "whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose."[63] Accordingly, it was "constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion."[64] As with *Hunter*, purposivism was found to support the broader of two plausible interpretations of a *Charter* right.

The purposive method of interpretation that emerged from *Big M Drug Mart* was not prescriptive. To the contrary, the Supreme Court outlined elements to be considered in ascertaining the purpose of a right, but left open the weighting of the different elements. The Supreme Court's purposivism is closer to being a list of ingredients for a cake than a recipe; it identifies flour, sugar, and eggs but fails to specify the quantities of each or how the ingredients are to be combined. The exception being Justice Lamer's admonition in *Re B.C. Motor Vehicle Act* not to give much weight to the debates of the framers of the *Charter*,[65] which is akin to the list of ingredients adding "and not too much salt." The Supreme Court chose a discretionary mode of interpretation based on its assessment of the economy of trust, but it may be asked whether the loosely defined purposivism that emerged from the *Charter*'s first decade limited judicial discretion at all.

D. MAKING SENSE OF THE SUPREME COURT'S INTERPRETIVE METHOD

The Supreme Court's interpretive method in the early *Charter* era was undertheorized. The relationship between the generous approach to interpretation represented by the living tree metaphor and purposive interpretation was asserted but not explained.[66] The generous approach to interpretation was said to have limits but those limits were not specified. Much in the same vein, purposive interpretation was guided by factors to consider but there was no direction as to how the various factors were to be weighted. Some Canadian legal scholars have suggested that the Supreme Court's lack of prescription in its purposive method is a strength because interpretation is a complex process and it allows judges to draw upon the different sources of authority in different cases to craft appropriate interpretations.[67]

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61 *Ibid*.
62 *Ibid* [citations omitted].
63 *Ibid* at 347.
64 *Ibid* at 351.
65 *Re BC Motor Vehicle Act*, *supra* note 5.
66 Hogg, *Constitutional Law of Canada*, *supra* note 6.
67 See e.g. The Honourable Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 56–57, 64 (describing the interpretive process as "complex" and "anything but the mechanical application of pre-established rules").

The Supreme Court is not alone in its loose conception of purposivism and living constitutionalism. Michael Dorf has described the purposivism practiced by the liberal members of the US Supreme Court as "difficult to define" and eclectic.[68] Dorf explains that the interpretive flexibility offered by ill-defined purposivism mirrors the advantages of "standards over rules" and is suited to adjudicating in a rapidly changing world.[69] Despite the potential advantages of interpreting constitutional text without a prescriptive methodology, the downside is the perception of unbounded judicial discretion. A perception of excessive judicial discretion, in turn, gives rise to concerns about the rule of law. The lack of principled direction from the Supreme Court of Canada on how to reconcile living tree-style generous interpretation and purposive interpretation and how to weight the elements of purposive interpretation opened the Supreme Court to criticism that its approach to interpretation was subject to the whims of the justices.[70]

Even legal scholars sympathetic to the Supreme Court's interpretive method have offered more prescriptive or structured versions. I will refer to more prescriptive versions of purposivism as "structured purposivism." For example, Eric Adams offers a different way to understand the Supreme Court's approach to interpretation. Adams likens the Supreme Court's approach to a three-legged stool comprised of text, purpose, and context "even if [courts] have not always recognized it as such."[71] Interpretation must rest equally on each of its three supporting legs or the stool will tip over. From his perspective, Canada has been "reasonably well served" by this interpretive method.[72] Though he ostensibly offers a descriptive account of the Supreme Court's interpretive method, Adams' work is in equal measure a prescription for a more structured approach to interpretation. He would require purpose to be grounded in text and cautions against context — history, philosophy, international law, and other factors — being given too much weight in interpretation.[73] Adams' approach may be seen as a gentle nudge in the direction of a more structured approach that remains within the Supreme Court's traditional interpretive paradigm.

The loose purposivism of the early *Charter* era stands in contrast to former President of the Supreme Court of Israel Aharon Barak's more completely theorized purposivism.[74] Judge Barak, though writing for a mostly US audience, draws heavily upon the work of the Supreme Court of Canada. Judge Barak starts from the premise that the text of a constitution is a limiting factor. Purpose is used to give meaning to a constitution, but "[o]ne should not

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68 Dorf, "The Supreme Court 1997 Term," *supra* note 11 at 17.

69 *Ibid* at 10. Dorf and Laurence Tribe have argued that all interpretive methods allow for judicial discretion whether they purport to or not and that the best approach is a common law style approach that involves narrow decisions and incrementalism: see Laurence H Tribe & Michael C Dorf, *On Reading the Constitution* (Cambridge, Mass: Harvard University Press, 1991).

70 See generally the work of the Canadian textualists, *supra* note 8 (discussed in Part III of this article, below).

71 Eric M Adams, "Canadian Constitutional Interpretation" in Cameron Hutchison, *The Fundamentals of Statutory Interpretation* (Toronto: LexisNexis Canada, 2018) 129 at 146. See also Joanna Harrington, "Interpreting the *Charter*" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 621 at 636 (using the same construct of text, purpose, and context).

72 Adams, "Canadian Constitutional Interpretation," *ibid*.

73 *Ibid* at 144, citing the Supreme Court's section 2(d) jurisprudence and especially *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 as an example where context was given too much weight.

74 Aharon Barak, "The Supreme Court 2001 Term – Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116:1 Harv L Rev 16 [Barak, "The Supreme Court 2001 Term"]; Barak, *Purposive Interpretation in Law*, *supra* note 22.

give the constitution a meaning that its express or implied language cannot sustain."[75] Importantly, for Judge Barak, the text of a constitution also includes implications drawn from the written words. He further explained that "[p]urpose is a normative concept that the law constructs."[76] Purpose, according to Judge Barak, is constructed by looking at the subjective purpose — what the framers intended to the extent that it can be determined[77] — and the objective purpose — the hypothetical intent a reasonable author would have had. The hypothetical intent of a reasonable author would be to "realize the fundamental values of the legal system."[78] Put differently, "[t]he constitution is intended to solve the problems of the contemporary person, to protect his or her freedom. It must contend with his or her needs. Therefore, in determining the constitution's purpose through interpretation, one must also take into account the values and principles that prevail at the time of interpretation, seeking synthesis and harmony between past intention and present principle."[79] Judge Barak concludes by saying that when the subjective purpose and objective purpose of a constitutional provision are in conflict, "preference should be given to the objective purpose that reflects deeply held modern views."[80]

Justice Sharpe has articulated a vision of purposivism which, though much less detailed, can be seen to be a Canadian analogue to Judge Barak's structured purposivism. Justice Sharpe endorses the Supreme Court's traditional purposivism and rejection of originalism, but writes that "we should remain mindful of the need for judicial discipline and restraint."[81] He further explains that "the text of the Constitution … define[s] the parameters of judicial interpretation."[82] Though the text defines the parameters of interpretation, Justice Sharpe maintains that the limits of living tree constitutionalism are to be found not just in the text but also in a broader "values and principles" that underlie our "legal culture and democratic tradition."[83] This idea is similar to Judge Barak's concept of objective purpose which is the realization of the fundamental values of the legal system.

Judge Barak's account of purposivism addresses key questions left unanswered by the Supreme Court of Canada. First, purposive interpretation is consistent with the living tree metaphor because contemporary meaning prevails over historical meaning when the two are in conflict. Second, purposive interpretation is limited by the text, express and implied, of the Constitution. Barak's purposivism remains discretionary but the bounds of discretion are better defined. This is a more limited conception of living constitutionalism and purposivism than was outlined by the Supreme Court in the first decades of the *Charter* era. As will be

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75 Barak, "The Supreme Court 2001 Term," *ibid* at 67–68.

76 *Ibid* at 66.

77 Barak's position is consistent with that of Adam Dodek who makes a plea for the Supreme Court to consider the framers' subjective intent as a part of its purposive analysis: see Dodek, *Charter Debates, supra* note 36 at 12–13. He asserts that the Supreme Court's rejection of evidence of the framers' intent is at odds with the Supreme Court's use of other contextual evidence and inconsistent with Peter Hogg and Allison Bushell's dialogue theory: Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75.

78 Barak, "The Supreme Court 2001 Term," *supra* note 74 at 67.

79 *Ibid* at 69.

80 *Ibid* at 70–71.

81 Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 241 [Sharpe, *Good Judgment*].

82 *Ibid*.

83 *Ibid*.

evident in the following Part of this article, there are similarities between Barak's purposivism and the more liberal versions of contemporary originalism.

III. THE RISE OF TEXTUALISM

A. THE ORIGINALIST-TEXTUALIST CRITIQUE OF *CHARTER* INTERPRETATION

A group of jurists and scholars are determined to rescue originalism from the scrapheap of Canadian constitutional discourse and to push the Supreme Court, if not to originalism, at least in the direction of an interpretive method more closely tied to the constitutional text.[84] The Canadian textualists' argument is based on three premises. First, Canadian textualists assert that Canadian courts and legal academics have dismissed originalism based on a superficial understanding of the doctrine. Second, the Canadian textualists contend that the Supreme Court's living tree concept and its purposive method are poorly explained and inconsistently applied, especially with respect to how history is to be weighed in the interpretive process. This, combined with the Supreme Court's predilection for using historical reasoning despite disavowing originalism, results in what they suggest is "sloppy thinking" with quasi-originalist decisions being made by courts in "an intellectual vacuum."[85] Lastly, political scientist Christopher Manfredi asserts that "by dissociating the Charter's text from the meaning intended by those who wrote it (again, with some notable exceptions), the Court has provided itself with maximum flexibility to define the text as it wishes."[86] Manfredi's point, which is common to most of the Canadian textualists, is that the discretion afforded to judges by the Supreme Court's interpretive method is anti-democratic and inimical to the rule of law. The corrective the Canadian textualists call for is more serious engagement with contemporary originalism and the development of "a coherent account of the place that originalism ought to play in Canadian constitutional law."[87]

The claim that the Canadian courts and legal academy have not taken originalism seriously is correct. Originalism has been caricatured and dismissed without any genuine attempt to understand it or consider whether it has a place in Canadian constitutional law.[88] The originalism rejected by the Canadian legal establishment was an originalism that sought to accord meaning to a constitutional text consistent with the subjective intentions of the framers. But, as the Canadian textualists point out, that is not the dominant form of originalism today. The originalism that now holds sway in parts of the US legal academy and judiciary has grown and changed in response to criticism.[89] Canadian textualists assert that

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84 *Supra* note 8.

85 Sirota & Oliphant, "Originalist Reasoning," *supra* note 8 at 573.

86 Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed (New York: Oxford University Press, 2001) at 196 [Manfredi, *Judicial Power*].

87 Sirota & Oliphant, "Originalist Reasoning," *supra* note 8 at 573.

88 Miller, "Constitutional Supremacy," *supra* note 8 at 110; Dodek, *Charter Debates*, *supra* note 36 at 10; Adam M Dodek, "The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits" in Jamie Cameron, ed, *Reflections on the Legacy of Justice Bertha Wilson* (Markham: LexisNexis Canada, 2008) 331 at 333 (calling originalism "a dirty word in Canadian constitutional law").

89 See Solum, "What is Originalism?," *supra* note 17; Oliphant & Sirota, *supra* note 8 at 160–61.

it is this new originalism that can contribute to the interpretive methodology applied to the Constitution.[90]

The avatar of new originalism is Justice Scalia,[91] but it would be a mistake to view new originalism as being confined by Justice Scalia's conception of originalism. Nevertheless, Justice Scalia is the place to start to understand how originalism has evolved since it was rejected by the Supreme Court of Canada. The foundation of Justice Scalia's approach is the idea that "[a constitution's] whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."[92] He further explains that laws, including the Constitution, should not be interpreted to "mean whatever they ought to mean" and that it is anti-democratic for "unelected judges" to decide what the Constitution ought to mean because that is tantamount to judicial amendment of the Constitution.[93] Though this distrustful view of contemporary interpreters of the Constitution might support a strict constructionist approach to constitutional interpretation, Justice Scalia bristles at that thought. He asserts that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[94] He continues explaining that when interpreting the Constitution, the judge must "give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear."[95]

The diverse strands of new originalism agree on two core ideas. The first is the "constraint principle" which holds that the constitutional text constrains the content of constitutional doctrine.[96] The second is the "fixation thesis" which holds that the meaning of the Constitution is unchanged since the time it was framed.[97] The meaning at the time of the framing does not refer to what the framers subjectively intended the meaning to be. New originalism rejects the idea that it is possible to ascertain the subjective intent of framers for much the same reason as that expressed by Justice Lamer in *Re B.C. Motor Vehicle Act*.[98] Essentially, it is impossible to ascertain authorial intent of a document that has many authors. Instead, new originalism seeks the original public meaning of the words of the constitutional text.[99] The original public meaning of the text reveals the objective intent of the framers of the Constitution because that is the meaning of the words that the framers used at the time that those words were written.[100] The focus is on the meaning of words at the time they were

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90 See e.g. Oliphant & Sirota, *ibid* at 119ff; Miller, "Constitutional Supremacy," *supra* note 8 at 363.

91 Scalia, *A Matter of Interpretation*, *supra* note 11; Antonin Scalia & Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012).

92 Scalia, *A Matter of Interpretation*, *ibid* at 40.

93 *Ibid* at 22. Heather Gerken has pointed out that whatever the merits of originalism may be, it is not an accurate descriptive account of constitutional change over time because it is indisputable that constitutional meaning has changed (Heather K Gerken, "The Hydraulics of Constitutional Reform: A Skeptical Response to *Our Undemocratic Constitution*" (2007) 55:4 Drake L Rev 925).

94 Scalia, *A Matter of Interpretation*, *ibid* at 23.

95 *Ibid* at 37.

96 Lawrence B Solum, "Construction and Constraint: Discussion of *Living Originalism*" (2013) 7:1 Jerusalem Rev Leg Studies 17 at 21–22.

97 Lawrence B Solum, "The Fixation Thesis: The Role of Historical Fact in Original Meaning" (2015) 91:1 Notre Dame L Rev 1.

98 *Re BC Motor Vehicle Act*, *supra* note 5 at 508–509.

99 Richard H Fallon Jr, "The Chimerical Concept of Original Public Meaning" (2021) 107:7 Va L Rev 1421 (asserts that "claims that determinate original public meanings existed as a matter of historical and linguistic fact reflect a conceptual or metaphysical mistake" at 1432).

100 Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004) at 92.

chosen because constitutions are not meant to change.[101] Justice Bradley Miller explains that interpretation "presupposes that the meaning of the text is fixed at the time it was made. No amount of subsequent linguistic drift, or changes as to how we use words, can be used to alter the [constitutional] settlement that was locked in at the time of enactment."[102] And the focus is on the meaning of the words because unelected judges are not to assign whatever meaning they believe ought to prevail.[103] This approach is meant to banish judicial subjectivity and impose neutrality in adjudication.[104]

Originalism is associated with political and legal conservatism. But it would be wrong to portray originalism as invariably dictating conservative outcomes.[105] There are leading liberal scholars who adhere to originalism. For example, Jack Balkin contends that living constitutionalism and originalism can be reconciled.[106] The modus vivendi is found in the distinction drawn by Balkin and other new originalists between interpretation and construction. Constitutional interpretation is "the activity that discerns the communicative content (linguistic meaning) of the constitutional text."[107] Whereas constitutional construction "is the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text."[108] If the constitutional text is clear, there is little room for construction and meaning is dictated by the original public meaning. By contrast, where the constitutional text is silent, vague, or states abstract principles, the original public meaning cannot provide the whole answer and construction is required. The so-called "construction zone"[109] allows for constitutional evolution because "construction is an endeavor that … depend[s] on normative theories about the law."[110] Léonid Sirota and Benjamin Oliphant explain, "New Originalism leaves a considerable amount of room for the evolution of constitutional norms, particularly where certain rights or freedoms are declared in the text at a high level of abstraction."[111]

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101 The Canadian Constitution may be as unamendable as the US Constitution: see Richard Albert, "Constructive Unamendability in Canada and the United States" (2014) 67 SCLR (2d) 181. On the idea that judicial interpretation can amount to an amendment of the Constitution, see Emmett Macfarlane, "Judicial Amendment of the Constitution" (2021) 19:5 Intl J Constitutional L 1894.

102 Miller, "Constitutional Supremacy," *supra* note 8 at 358.

103 Scalia, *A Matter of Interpretation*, *supra* note 11 at 18.

104 Originalism's claims of neutrality are disputed: see e.g. Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good and Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const Forum Const 39.

105 Though not a constitutional case, the US Supreme Court deployed originalist and textualist methods in *McGirt v Oklahoma*, 591 US __ (2020) to find that tribal and federal courts rather than Oklahoma courts have jurisdiction over major crimes in much of the eastern portion of Oklahoma. A similar approach was used in *Bostock v Clayton County, Georgia*, 590 US __ (2020) to interpret Title VII of the *Civil Rights Act of 1964* where the majority concluded discrimination by employers against homosexual and transgender employees was prohibited. Kerri Froc has made the case in Canada that an originalist interpretation of the *Charter* would result in greater protection of women's rights: see Froc, "Is Originalism Bad for Women?," *supra* note 8; Kerri A Froc, "A Prayer for Original Meaning: A History of Section 15 and What it Should Mean for Equality" (2018) 38:1 NJCL 35. Mary Eberts and Kim Stanton argue that an interpretation of section 15 of the *Charter* that paid more heed to the text would result in broader protection for equality rights: see Mary Eberts & Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38:1 NJCL 89.

106 Balkin, *Living Originalism*, *supra* note 19.

107 Lawrence B Solum, "Originalism and Constitutional Construction" (2013) 82:2 Fordham L Rev 453 at 457.

108 *Ibid*.

109 *Ibid* at 458.

110 Oliphant & Sirota, *supra* note 8 at 128.

111 *Ibid* at 130. See also Miller, "Constitutional Supremacy," *supra* note 8 at 356–59.

The liberal originalism of Balkin and others has been described as "politically motivated" and a "rhetorical gambit."[112] Not surprisingly, some conservative-minded new originalists find it troubling that originalism, through the device of construction, allows for the evolution of constitutional meaning. Specifically, they worry that "[a] large construction zone ... sacrifice[s] most of what is promised by originalism—a constitutional law fixed at the framing of the relevant provision—in favor of a malleable Constitution that depends on the fiat of construction."[113] In other words, normative analysis in the construction zone is no better than the normative analysis found in living constitutionalism. Conservative new originalists contend that, properly understood, the construction zone is small because the language of the US Constitution is not as indeterminate as it may seem at first glance and the construction zone is not likely "to have a central role to play in the implementation of the Constitution."[114] The arguments for minimizing the construction zone are the same arguments that are made for originalism in the first place: the Constitution can only be changed in accordance with the amending formula and an interpretive method that allows for contemporary normative judgments is anti-democratic.

What does new originalism have to offer Canadian constitutional jurisprudence? The Canadian textualists suggest that new originalism, at least the version that allows for a healthy amount of construction, offers a corrective to the perceived excesses of the Supreme Court's interpretive method. The emphasis on original meaning of the constitutional text offers some certainty and predictability by putting limits on constitutional interpretation. At the same time, the idea of a construction zone where contemporary norms may be used to give vague constitutional principles meaning prevents the Constitution from ossifying.

B. OLIPHANT'S REVISIONIST PURPOSIVISM

Oliphant, in an article that significantly influenced the Supreme Court's new purposive textual interpretation, sketched a picture of purposive interpretation of the *Charter* in a new light. Oliphant's revisionist account of the Supreme Court's purposive method of *Charter* interpretation is a serious challenge to decades of *Charter* jurisprudence. The challenge is threefold. First, Oliphant articulates a theoretical justification for a more constrained approach to *Charter* interpretation. Second, he offers a descriptive account of *Charter* interpretation — purposivism as constraint — that is at odds with the Supreme Court's frequent description of its interpretive methodology in expansive terms. And third, he erects a framework for classifying types of purposivism and identifies what he considers to be the correct form of purposivism. Oliphant's purposivism is a form of structured purposivism, but it does much more to limit judicial discretion than Barak's version.

To Oliphant, the Supreme Court's *Charter* interpretation has been irresponsible, "abjuring constraint and maximizing discretion."[115] He makes two arguments against judicial discretion in interpretation. First, he makes an argument from democracy: "The absence of discernible constraints upon the range of meanings available to judicial interpreters raises the spectre that

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112 Posner, *How Judges Think*, *supra* note 21 at 328.
113 John O McGinnis & Michael B Rappaport, "The Power of Interpretation: Minimizing the Construction Zone" (2021) 96:3 Notre Dame L Rev 919 at 969.
114 *Ibid* at 958.
115 Oliphant, "Taking Purposes Seriously," *supra* note 8 at 241.

the content attributed to the constitution — and therefore the permissible scope of self-governance retained by the people — will merely reflect the will of the interpreters."[116] Essentially, judicial review is only legitimate in a democratic sense if judicial discretion in interpretation is cabined. Second, he makes an argument based on certainty and the rule of law saying that "a constitution that can mean anything is one that means nothing."[117] Judicial interpretive discretion is the antithesis of the certainty of meaning required by Oliphant's conception of the rule of law.

To address the problem of judicial discretion in interpreting the *Charter*, Oliphant's objective is to disconnect purposivism from the Supreme Court's rhetoric which sometimes describes its interpretive approach as "broad," "generous," "large and liberal," and "flexible."[118] Purposivism, according to him, is none of those things. Instead, purposivism is a tool to limit the scope of rights that are framed in broad terms. Oliphant appeals to Hogg who observed that "[t]he effect of a purposive approach is normally going to be to narrow the scope of the right."[119] Hogg is no doubt correct that a purposive interpretation will often narrow the scope of a vaguely stated right, but as explained earlier in this article, purposivism does not always operate to narrow interpretations. Oliphant, it seems, envisions purposivism as a one-way ratchet that only narrows the scope of rights.

Oliphant identifies three types of purposivism in the Supreme Court's *Charter* jurisprudence: (1) definitive document purposivism; (2) necessary implications purposivism; and (3) abstract principles purposivism. His preferred form of purposivism, definitive document purposivism, is a method that is deployed when the text of a *Charter* right can support more than one meaning. Under this method, an analysis of the purpose of the right assists the Supreme Court in determining which of the meanings supported by the text is the appropriate meaning. The virtue of this method, according to Oliphant, is that it "constrain[s] the scope of the text and impose[s] constraints on interpretive discretion."[120]

Oliphant considers the second form of purposivism, necessary implications purposivism, to only be appropriate "[w]here a constitutional provision can make no sense whatsoever in the absence of the implication drawn, or where the clear purpose sought to be achieved would be not only undermined or imperfectly realized but actually eviscerated."[121] Putting the threshold for necessary implication so high is a significant departure from the Supreme Court's traditional purposivism and, indeed, is more limiting than Barak's structured purposivism.

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116 *Ibid* at 244.

117 *Ibid* at 246.

118 See for example Chief Justice McLachlin writing for the Supreme Court in *R v 974649 Ontario Inc*, 2001 SCC 81 at para 18 (referring to *Charter* interpretation as "broad and purposive" and "large and liberal"); Chief Justice Wagner writing for the majority in *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 32 [*Frank*] (describing the interpretive approach to *Charter* section 3 as "broad and liberal"); Justice Wilson writing for the majority in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 153 (explaining the need to interpret *Charter* section 15 "with sufficient flexibility to ensure the 'unremitting protection' of equality rights in the years to come").

119 Peter W Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28:4 Osgoode Hall LJ 817 at 821.

120 Oliphant, "Taking Purposes Seriously," *supra* note 8 at 249.

121 *Ibid*.

The last form of purposivism, abstract principles purposivism, is never appropriate according to Oliphant because it crosses the line between "making a constitution and interpreting or construing one."[122] The example of abstract principles purposivism identified by Oliphant is the Supreme Court's right to vote jurisprudence. Here, the rights to "effective representation" and "meaningful participation" have been derived from section 3 of the *Charter* which expressly provides only for the right to vote and the right to stand for election.[123] Later in this article, I will return to the question of the interpretation of *Charter* section 3 raised by Oliphant.

C. THE SUPREME COURT'S PURPOSIVE TEXTUAL INTERPRETATION

The first hints of the Supreme Court's remaking of its purposive approach are in the majority decision of Justice Martin in *Poulin*.[124] The issue in *Poulin* was the interpretation of *Charter* section 11(i) which provides that "if the punishment for the offence has been varied between the time of commission and the time of sentencing" the offender has the right "to the benefit of the lesser punishment."[125] The Supreme Court was faced with two potential interpretations; one reading where offenders have a "global right" to the most lenient punishment in force between commission and time of sentencing, and another reading where offenders only have a "binary right" to the lesser punishment under the laws in force at two set points in time (namely, the time of commission and the time of sentencing). Justice Martin, using an interpretation that was ostensibly purposive but heavily focused on the text, found that *Charter* section 11(i) only protected the narrower binary right. Justice Karakatsanis, writing for the minority, asserted that Justice Martin's "technical construction" was at odds with the Supreme Court's traditional "generous *and* purposive approach."[126] Justice Martin responded to this criticism by pointing out that "while it has often been said that *Charter* rights must be interpreted in a 'large and liberal' manner, they are ultimately bounded by their purposes. Put differently, *Charter* rights … must be interpreted liberally within the limits that their purposes allow."[127] The idea that generous or liberal interpretation is subordinate to purposive interpretation had been expressed before by the Supreme Court,[128] but this time the admonition in tandem with the text-dependent interpretation of *Charter* section 11(i) foreshadowed the interpretive methodology that was to be deployed in *9147-0732 Québec inc* and *City of Toronto*.[129]

Justice Martin in *Poulin* makes a second important contribution to the evolution of the Supreme Court's purposivism by explaining when the Supreme Court should focus on textual meaning and when a more discretionary approach may be appropriate. She explains that a more discretionary approach to interpretation is appropriate in cases of "evolving, open-

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122 *Ibid* at 250.
123 *Charter*, *supra* note 1, s 3.
124 *Poulin*, *supra* note 13.
125 *Charter*, *supra* note 1, s 11(i).
126 *Poulin*, *supra* note 13 at para 151 [emphasis in the original].
127 *Ibid* at para 54.
128 See Chief Justice McLachlin and Justice Charron in *R v Grant*, 2009 SCC 32 [*Grant*] ("While the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose" at para 17 [citations omitted]).
129 *9147-0732 Québec inc*, *supra* note 14; *City of Toronto*, *supra* note 15.

ended standards — such as 'reasonable' and 'unreasonable' (ss. 8, 11(*a*), 11(*b*) and 11(*e*)), 'fundamental justice' (s. 7), and 'cruel and unusual' (s. 12)."[130] A more strict approach is called for when dealing with a *Charter* provision that "enunciates a rule with a particular application."[131] The distinction drawn by Justice Martin between open-ended standards and rules and the corresponding interpretive method for each mirrors the interpretation-construction distinction found in new originalism. But it would be wrong to call Justice Martin an originalist. After seeking out the historical origins of section 11(i) in *Poulin*, she explained that, "[w]hile the origins of s. 11(*i*) do not support a global [right], s. 11(*i*) could still receive that interpretation if its purposes justified it."[132] This interpretive position is not originalism; instead, it echoes the structured purposivism of Barak which considers historical meaning but prefers contemporary meaning when there is a conflict.

The resort to history as an important, but not determinative, tool to discover the meaning of *Charter* section 11(i) in *Poulin* followed closely on the heels of *R. v. Stillman* where the majority looked to history to determine the meaning of *Charter* section 11(f).[133] The issue in *Stillman* was whether criminal offences not connected to military function — the appellants were charged with sexual assault — committed by military personnel were "offences under military law." This was significant because *Charter* section 11(f) provides an exception to the right to a trial by jury for offences under military law. The majority conducted a review of the history of the exclusion of military offences from the right to trial by jury including statements made in the debates before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada prior to the adoption of the *Charter*.[134] The majority concluded that "the purpose of the military exception was to recognize and preserve the *status quo*."[135] This reasoning resembles the interpretive approach used for the *Canadian Bill of Rights*. Some commentators have suggested that the approach by the majority in *Stillman* is originalist.[136] However, as in *Poulin,* the approach is more consistent with Barak's structured purposivism which uses subjective intentions to assist in determining meaning where, as in *Stillman*, there is no conflict with contemporary meaning identified. Perhaps more importantly, the majority's use of history was to search for purpose, not for semantic meaning. Whether the use of history in *Stillman* is a sign of a move to originalism or it is a feature of a refashioned purposivism is unclear, but it is inconsistent with the Supreme Court's traditional view that only minimal weight should be given to evidence of subjective intention in *Charter* interpretation.

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130 *Poulin*, *supra* note 13 at para 70.

131 *Ibid*.

132 *Ibid* at para 85 [citations omitted].

133 *R v Stillman*, 2019 SCC 40 [*Stillman*]; *Charter*, *supra* note 1, s 11(f). For similar recent uses of history, see the dissenting reasons in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13; *Ontario (Attorney General) v G*, 2020 SCC 38.

134 *Stillman*, *ibid* at para 77, citing the evidence of then Minister of Justice, Jean Chrétien (Senate & House of Commons, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Guidance of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 36 (12 January 1981) at 12 (The Honourable Jean Chrétien)).

135 *Stillman*, *ibid* at para 78. The minority at para 129 rejected this conclusion and found that a "broad and generous" approach to the right to a jury trial results in a narrower interpretation of the exception for offences under military law that requires a "military connection test" to be met.

136 Sirota, "Purposivism, Textualism, and Originalism," *supra* note 12; MacDonnell, "The Enduring Wisdom of the Purposive Approach," *supra* note 12.

9147-0732 Québec inc and *City of Toronto* saw the same five judges endorsing what appears to be a significant change in constitutional interpretive methodology.[137] Interestingly, Justice Martin, whose decision in *Poulin* can be seen as a precursor to the new methodology, was not aligned with the majority in either case on the issue of interpretive methodology. *9147-0732 Québec inc* involved the question of whether the *Charter* section 12 proscription on cruel and unusual punishment applied to corporations.[138] The whole Supreme Court agreed that the *Charter* section 12 protects people, not corporations, from cruel and unusual punishment. The Supreme Court, however, divided over the correct approach to constitutional interpretation, though both the majority and the main concurring judgment assert fidelity to the Supreme Court's traditional purposive approach. The differences between the majority judgment of Justices Brown and Rowe, writing also for Jutices Moldaver, Côté, and Chief Justice Wagner, and the concurring judgment of Justice Abella, writing also for Justices Martin and Karakatsanis, are differences in emphasis and rhetoric.

Justices Brown and Rowe assert that "[t]his Court has consistently emphasized that, within the purposive approach, the analysis *must begin* by considering the text of the provision."[139] The italics reinforce the mandatory nature of the direction. Here, it seems, is some of the prescriptive approach that has been absent from the Supreme Court's purposive interpretive methodology. Justices Brown and Rowe further explain that purposive interpretation must begin with the text of the provision in issue "because constitutional interpretation, being the interpretation *of the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text."[140] Again, the use of italics to emphasize the point being made indicates the majority's desire that its exhortation to focus on the text in constitutional interpretation be taken seriously.

Justices Brown and Rowe do not expressly cast aside purposivism and embrace a form of textualism or originalism. To the contrary, they present their interpretive approach as consistent with the interpretive method that the Supreme Court has always used.[141] Further, Justices Brown and Rowe considered the other contextual factors typically reviewed in purposive interpretation before reaching a conclusion as to whether the proscription on cruel and unusual punishment protected corporations. Viewed in isolation, it is not clear whether the decision of Justices Brown and Rowe is a minor tweak to the Supreme Court's existing approach or whether it is a more profound change in interpretive methodology.

Justice Abella in her concurring judgment had no doubt that the majority had announced a significant departure from the traditional purposive approach to *Charter* interpretation. She asserted that "[i]nstead of using the text as the beginning of the search for purpose, the majority has given it 'primacy' and assigned a secondary role to the other contextual factors,

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137 *9147-0732 Québec inc*, *supra* note 14; *City of Toronto*, *supra* note 15.

138 *Charter*, *supra* note 1, s 12.

139 *9147-0732 Québec inc*, *supra* note 14 at para 8 [emphasis in original].

140 *Ibid* at para 9 [emphasis in original].

141 *Ibid*, citing *Caron v Alberta*, 2015 SCC 56 [*Caron*]; *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313. The citation of these two cases to support the view that the purposive textual interpretation method is consistent with the Supreme Court's historical practice is curious because *Caron* is not a *Charter* case and *Reference re Public Service Employee Relations Act (Alta)* has been overruled by the Supreme Court's more recent section 2(d) jurisprudence. As noted at note 173 below, there are reasons to believe that the Supreme Court's recent section 2(d) jurisprudence may face renewed challenges appealing to purposive textual interpretation.

thereby erasing the difference between constitutional and statutory interpretation."[142] What is it about statutory interpretation that Justice Abella was concerned about? Statutory interpretation in recent years has drifted away from Elmer Driedger's classic interpretive approach which is essentially a form of purposivism.[143] The Supreme Court signalled a move toward a more text focused approach in *Canada Trustco Mortgage Co. v. Canada* where it was held that "[w]hen the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process."[144] Justices Abella and Karakatsanis pushed back against what they considered to be a "return of textualism" in statutory interpretation in their dissent in *TELUS Communications Inc. v. Wellman* where they believed that "words [had] been permitted to dominate and extinguish the contextual policy objectives of [the statutes in issue]."[145] To Justice Abella, it seems, the majority's move toward textualism in constitutional interpretation is a rejection of Justice Dickson's admonition in *Hunter* that "[t]he task of expounding a constitution is crucially different from that of construing a statute."[146]

Justices Brown and Rowe's interpretive approach in *9147-0732 Québec inc* is inspired by Oliphant's revisionist concept of purposivism. Justices Brown and Rowe, quoting Oliphant, explain that "the words [of the Constitution] used remain 'the most primal constraint on judicial review' and form 'the outer bounds of a purposive inquiry.'"[147] Time will tell, but Justices Brown and Rowe's new conception of purposivism seems to be the one-way ratchet proposed by Oliphant. The text of a constitutional provision is the starting point and purposive analysis is to be used to narrow the interpretation of the text.

Chief Justice Wagner and Justice Brown, writing for the same justices who comprised the majority in *9147-0732 Québec inc*, returned to the subject of constitutional interpretation in *City of Toronto*. The issue in *City of Toronto* was whether section 2(b) of the *Charter* and the unwritten constitutional principle of democracy could be invoked to prevent the restructuring of municipal electoral boundaries in the midst of an election campaign.[148] The majority reiterated its principles of *Charter* interpretation emphasizing that "[a] purposive interpretation of *Charter* rights must begin with, and be rooted in, the text … and not overshoot the purpose of the right."[149] Later in the judgment, the majority labelled its approach "purposive textual interpretation."[150] The interpretive approach described and applied by the majority in *City of Toronto* is indistinguishable from the method deployed by the majority in *9147-0732 Québec inc*.

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142 *9147-0732 Québec inc*, *ibid* at para 61.

143 The Supreme Court in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87, held "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

144 2005 SCC 54 at para 10. See also *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 at para 23 where the Supreme Court further emphasized the point holding "legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision."

145 2019 SCC 19 at para 109.

146 *Hunter, supra* note 3 at 155.

147 *9147-0732 Québec inc*, *supra* note 14 at para 9, quoting Oliphant, "Taking Purposes Seriously," *supra* note 8 [citations omitted].

148 *City of Toronto*, *supra* note 15; *Charter*, *supra* note 1, s 2(b).

149 *City of Toronto*, *ibid* at para 14 [citations omitted].

150 *Ibid* at para 53.

City of Toronto is also noteworthy because the majority's discussion of unwritten constitutional principles underscores the central role of text in constitutional interpretation. The majority concluded that unwritten principles are not independently enforceable and cannot be relied upon to invalidate legislation. Three reasons were offered to support this conclusion. First, Chief Justice Wagner and Justice Brown held that judicial use of unwritten principles to invalidate legislation would "trespass into legislative authority to amend the Constitution."[151] Second, they concluded that giving force to highly abstract unwritten principles would "render many of our written constitutional rights redundant."[152] Lastly, the majority expressed concern that use of unwritten principles to invalidate legislation would circumvent the *Charter* section 1 justification analysis and deny elected branches of government the ability to invoke the section 33 legislative override.[153]

Chief Justice Wagner and Justice Brown held that unwritten principles are only "context and backdrop to the Constitution's written terms."[154] They then confined the use of unwritten constitutional principles to two situations. First, unwritten principles may be used in the interpretation of constitutional text; specifically, "unwritten principles assist with purposive interpretation" of *Charter* rights.[155] Unwritten principles in this sense seem to be just another contextual consideration. Second, unwritten principles may be used to develop structural doctrines unstated in the written Constitution per se, but necessary to the coherence of, and flowing by implication from, its architecture.[156] In this way, "structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent."[157] Limiting the use of unwritten constitutional principles to the interpretation of rights enumerated in the constitutional text and development of structural doctrines appears to preclude use of unwritten constitutional principles to expand rights beyond the text or discover unenumerated rights.

IV. POTENTIAL IMPLICATIONS OF THE SUPREME COURT'S EVOLVING INTERPRETIVE METHOD

A. PURPOSIVE TEXTUAL INTERPRETATION AND STARE DECISIS

The big question about the Supreme Court's purposive textual interpretation method is whether it will make much of a difference in practical terms.[158] There can be no doubt that it will have a stylistic impact on counsel arguing cases and on courts in crafting reasons. Now analysis of the text of a *Charter* provision must be front and center. But it is difficult to know the effect of the revised method of constitutional interpretation on substantive outcomes. If purposive textual interpretation is merely a reminder that constitutional text is an essential aspect of purposive interpretation, then the result may be more aesthetic than substantive.

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151 *Ibid* at para 58.
152 *Ibid* at para 59, quoting *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 65.
153 *City of Toronto*, *ibid* at paras 60–61.
154 *Ibid* at para 50.
155 *Ibid* at para 55.
156 Examples of such structural doctrines given by the majority were "the doctrine of full faith and credit …; the doctrine of paramountcy …; the remedy of suspended declarations of invalidity …; and the obligations to negotiate that would follow a declaration of secession by a province": *ibid* at para 56 [citations omitted].
157 *Ibid*.
158 For example, the justices' differences over interpretation did not prevent agreement on results in both *Poulin*, *supra* note 13 and *9147-0732 Québec inc*, *supra* note 14.

After all, the Supreme Court has from time to time pointed out the importance of constitutional text without much lasting impact on interpretive method.[159] The majority reasons in *9147-0732 Québec inc* and *City of Toronto* do not read like a helpful reminder to counsel and lower courts of the role that text plays in purposive interpretation. Instead, the insistence on the primacy of text, the conception of purposive analysis as an exercise in narrowing text, and the limited role for unwritten principles all suggest that the Supreme Court's purposive textual interpretation heralds a substantive change.

Looking afresh at *Charter* issues through the lens of purposive textual interpretation may reveal very different answers. Will purposive textual interpretation prompt a reexamination of the last 40 years of *Charter* jurisprudence? The answer to this question may be determined by how the Supreme Court approaches the question of stare decisis. A similar debate has raged in the US as originalism has become the dominant method of constitutional interpretation.[160] Should originalist judges overturn non-originalist precedents? Justice Scalia once called himself a "faint-hearted originalist"[161] because he allowed that the principle of stare decisis was a "pragmatic *exception*"[162] to his brand of originalism.[163] He thought that in some cases precedent must prevail even if it is inconsistent with the original public meaning of the Constitution. Other originalists disagree; most notably Justice Amy Coney Barrett, who contends that "a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it."[164] The question is whether the justices of the Supreme Court of Canada are faint-hearted purposive textualists or are determined to enforce their best understanding of the *Charter*.

The extent to which the principle of stare decisis would restrain the Supreme Court from revisiting its earlier decisions using purposive textual interpretation is unclear. On the one hand, some justices have endorsed the view that "[*s*]*tare decisis* places significant limits on this Court's ability to overturn its precedents."[165] On the other hand, the Supreme Court has held that "courts as guardians of the constitution" will overturn precedent where it is "inconsistent with or fails to reflect the values of the *Charter*."[166] Specifically, "the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to

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159 See e.g. *Grant*, *supra* note 128.

160 Randy E Barnett, "Ketanji Brown Jackson and the Triumph of Originalism," *The Wall Street Journal* (24 March 2022), online: <www.wsj.com/articles/ketanji-brown-jackson-and-the-triumph-of-originalism-public-meaning-testimony-hearing-supreme-court-11648151063?> (explaining that Justice Jackson's testimony before the Senate Judiciary Committee shows that originalism "is the norm").

161 Antonin Scalia, "Originalism: The Lesser Evil" (1989) 57:3 U Cin L Rev 849 at 864.

162 Scalia, *A Matter of Interpretation*, *supra* note 11 at 140 [emphasis in original].

163 For a discussion of the stare decisis debate among US originalists, see Amy Coney Barrett, "Originalism and Stare Decisis" (2017) 92:5 Notre Dame L Rev 1921. See also Oliphant & Sirota, *supra* note 8 at 133 (asking whether originalists accept the "principle of *stare decisis*, so that existing precedents that are inconsistent with original meaning should be left undisturbed[?]").

164 Amy Coney Barrett, "Precedent and Jurisprudential Disagreement" (2013) 91:7 Tex L Rev 1711 at 1728. See also Justice Alito's majority reasons in *Dobbs v Jackson Women's Health Organization*, 597 US __ (2022) at 37 (overturning *Roe v Wade*, 410 US 113 (1973) explaining that "[u]nder the doctrine of *stare decisis*, those precedents are entitled to careful and respectful consideration, and we engage in that analysis below. But as the Court has reiterated time and time again, adherence to precedent is not 'an inexorable command'" [citations omitted]).

165 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 255, Abella and Karakatsanis JJ. See also *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 426, Brown J, dissenting.

166 The Honourable Justice Malcolm Rowe & Leanna Katz, "A Practical Guide to *Stare Decisis*" (2020) 41 Windsor Rev Legal Soc Issues 1 at 23.

uphold a law which is unconstitutional."[167] The possibility that the Supreme Court would reconsider important *Charter* precedents using the new purposive textual interpretation cannot be dismissed.[168]

As this article was in the final stages of editing prior to publication, four of the five justices who were in the majority in *9147-0732 Québec inc* and *City of Toronto* addressed the question of stare decisis in concurring reasons in *R. v. Kirkpatrick*.[169] Their reasons stress the importance of stare decisis to the rule of law, stability of the law, and the legitimacy of the Supreme Court.[170] The concurring justices' affirmation of the centrality of stare decisis to our legal system may indicate that fears that purposive textual interpretation will lead to a large scale reappraisal of *Charter* jurisprudence are unwarranted. Indeed, the concurring justices in *Kirkpatrick* observed in *obiter dicta* that "[t]he ability to revisit constitutional precedent is not an unbridled licence to reinterpret the Constitution."[171] They went on, however, to explain that "[i]nterpretation of the Constitution must be anchored in the historical context of the provision in issue and the natural limits of the text."[172] The implications of this statement are unclear. What does stare decisis mean in circumstances where the Court concludes that an existing interpretation of the *Charter* is not supported by the historical context of the provision or exceeds the natural limits of the text? Should the Court abide an interpretation of a provision of the *Charter* that it considers to be unsupported by historical context or the text just because it is established precedent? The dissent in *Frank*, discussed below, indicates that, unless they have changed their minds since 2019, two of the four justices (Justices Brown and Côté) who joined the concurring reasons in *Kirkpatrick* would enforce their best understanding of the *Charter* by implementing an alternative and ostensibly textual reading of section 1 of the *Charter* despite it being contrary to a foundational precedent.

B. POTENTIAL CHALLENGES TO *CHARTER* PRECEDENTS USING PURPOSIVE TEXTUAL INTERPRETATION

The potential for a reappraisal of *Charter* jurisprudence will be illustrated using two examples.[173] First, the dissenting judgment of Justices Brown and Côté in *Frank* offers what

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167 *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 43 [*Bedford*]. The Supreme Court in *R v Comeau*, 2018 SCC 15 emphasized that vertical stare decisis means that lower courts must follow decisions of higher courts on the issue of constitutionality unless there is new evidence. This principle, of course, does not prevent the Supreme Court of Canada from revisiting its own precedents. The words "*a* court" in the preceding quote from *Bedford* should probably, in light of *Comeau*, be read as "*the* Court."

168 Justice Sharpe observed in *Good Judgment*, *supra* note 81 at 163 that "[t]he willingness of today's Supreme Court of Canada to review its prior [*Charter*] decisions is striking." See also *Edgar Schmidt v Attorney General of Canada*, 2018 FCA 55 at para 93 (reviewing cases where the Supreme Court of Canada has overruled an earlier constitutional decision).

169 2022 SCC 33 [*Kirkpatrick*].

170 *Ibid* at paras 184–89.

171 *Ibid* at para 266.

172 *Ibid* [citations omitted].

173 For another example of a textualist challenge to a seemingly settled *Charter* interpretation that is on the horizon, see *R v Hills*, 2020 ABCA 263, Wakeling JA, concurring, leave to appeal to SCC granted, 39338 (18 February 2021) (advancing a textual and historical reading of "cruel and unusual punishment" inconsistent with the Supreme Court's *Charter* section 12 jurisprudence starting with *R v Smith*, [1987] 1 SCR 1045 and continuing through *R v Nur*, 2015 SCC 15; *R v Lloyd*, 2016 SCC 13). Yet another possible example of a potential textualist challenge, in this case to the Supreme Court's *Charter* section 2(d) jurisprudence, can be seen in The Honourable Justice Marshall Rothstein, "Checks and Balances in Constitutional Interpretation" (2016) 79:1 Sask L Rev 1 at 13, where he states that the right to strike

they call a more "textually faithful" approach to section 1 of the *Charter*.[174] Perhaps now that a majority of the Supreme Court has adopted purposive textual interpretation, Justices Brown and Côté's novel textual approach to section 1 will gain new life. Second, Oliphant identified the Supreme Court's *Charter* section 3 jurisprudence as being an example of where purposivism has been used to expand the meaning of a right beyond its text.[175] Maybe given that the Supreme Court's purposive textual interpretation resembles the method recommended by Oliphant, leading section 3 precedents will be subject to renewed scrutiny.

1. A TEXTUAL APPROACH TO *CHARTER* SECTION 1

The issue in *Frank* was whether denying the right to vote to citizens who had been absent from Canada for more than five years was justified pursuant to section 1 of the *Charter*. The Crown conceded that section 3 had been infringed and the majority proceeded to conduct a section 1 analysis as provided for by *R. v. Oakes*.[176] Justices Brown and Côté took the majority to task for accepting the Crown's concession and for stating that there had been an "infringement" of section 3 prior to conducting the section 1 analysis.[177] The difficulty with the majority approach, according to them, was that it disregarded the text of section 1 of the *Charter* which provides that "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[178]

The analysis of a *Charter* right under *Oakes* begins with a court asking whether the *Charter* right has been infringed by state action before moving to the justification analysis. Justices Brown and Côté assert that because of the text of section 1, it is improper to speak of an infringement before the reasonable limits of the right have been determined. They say that the term infringement should only be used if it is found that the state action does not constitute a reasonable limit. Justices Brown and Côté explain that "a reasonable limit does not justify an *infringement*, but is inherent in the right itself, shaping the right's outer boundaries…. In short, a right is infringed only where the right, *as reasonably limited*, is breached."[179] In the specific context of *Frank*, they explained that "[t]he issue … is *not* whether the limit to the right to vote effected by the restriction on long-term non-resident voting justifies an infringement of s. 3, but whether that limit is unreasonable, such that s. 3 is infringed."[180]

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and right to collective bargaining "is far removed from the text and context of the term 'freedom of association.'" On this point, see also Adams, "Canadian Constitutional Interpretation," *supra* note 71 at 144.

174 *Frank*, *supra* note 118. Whether or not Justices Brown and Côté's reading of section 1 is "textually faithful" or not is debatable: see Jacob Weinrib, "The *Frank* Dissent's Novel Theory of the Charter: The Rhetoric and the Reality" (2021) 100 SCLR (2d) 85 at 88 [J Weinrib, "The *Frank* Dissent's Novel Theory"] (who refers to their approach as "selective textualism").

175 Oliphant, "Taking Purposes Seriously," *supra* note 8 at 250.

176 *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

177 *Frank*, *supra* note 118. Justices Brown and Côté qualify the plain wording of *Charter* section 3 — "Every Citizen of Canada has the right to vote" — saying that when the right in question is a positive right, the legislature specifies the content of the right and the Supreme Court must defer to the legislature. The use of a textualist approach to section 1 to avoid the plain meaning of section 3 is perplexing.

178 *Charter*, *supra* note 1, s 1.

179 *Frank*, *supra* note 118 at para 120 [citations omitted, emphasis in original].

180 *Ibid* [emphasis in original].

Justices Brown and Côté take their new textual approach to section 1 from an essay written by Justice Bradley Miller prior to his appointment to the bench.[181] Justice Miller explained that the conventional two-step model of rights adjudication under the *Charter* has the "potential to significantly skew public discourse over rights" and outlined an "alternative reading."[182] According to Justice Miller, "reasonable limits are inherent in the rights themselves" and the appropriate question to ask is whether the limit is justified.[183] Justice Miller's approach is similar to the concept of legislative specification of rights set out by Grégoire Webber who Justices Brown and Côté cite for different propositions.[184] Justices Brown and Côté accuse the majority in *Frank* of confusing the concepts of limits and infringements and eliding the text of section 1. They explain that "[a] conceptually sensible and textually faithful account of the s. 1 analysis properly focuses on whether a *limit* on a *Charter* right is justified."[185] Justice Miller, writing after *Frank*, reiterated his view that "reasonable limits are inherent in the nature of the rights themselves" and explained that "the Court could permissibly abandon the *Oakes* test in favour of some other doctrine" without offending originalist principles.[186]

Chief Justice Wagner, writing for the majority in *Frank*, did not seriously engage with Justices Brown and Côté's textualist interpretation of section 1 of the *Charter*, dismissing it as merely a "semantic" difference.[187] He seems not to have appreciated Justice Miller's perspective that the idea advanced by the minority would rewrite *Oakes*. Jacob Weinrib agrees with Justice Miller that the reinterpretation of section 1 of the *Charter* by Justices Brown and Côté in *Frank* is much more than semantics.[188] Indeed, Weinrib contends, the new approach to defining *Charter* rights and justifying limits on those rights is a rejection of two core ideas in *Oakes*.[189] First, "rights are constitutional standards to which legislation must conform" and that "legislation that is inconsistent with these standards is presumptively unconstitutional."[190] Second, to rebut the presumption of unconstitutionality there must be a "special justification demonstrating that the loss to the constitutional right is offset by a proportional gain to a competing constitutional principle."[191] The change in approach to section 1 proposed by Justices Brown and Côté would diminish Supreme Court protection of *Charter* rights.

Despite dismissing Justices Brown and Côté's textualist interpretation of section 1 as semantic, Chief Justice Wagner appreciated that in some sense it was a significant challenge to a foundational *Charter* decision. He explained that: "Given that my colleagues' approach would constitute a departure from decades of *Charter* jurisprudence, was neither raised nor

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181 *Ibid*, citing Bradley W Miller, "Justification and Rights Limitation" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008) 93.

182 Miller, "Justification and Rights Limitation," *ibid* at 96.

183 *Ibid*.

184 Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, UK: Cambridge University Press, 2009); Grégoire Webber et al, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge, UK: Cambridge University Press, 2018). Hints of Webber's legislative specification concept may also be seen in *Stillman*, *supra* note 133 at paras 112, 121.

185 *Frank*, *supra* note 118 at para 121 [emphasis in original].

186 Miller, "Constitutional Supremacy," *supra* note 8 at 359.

187 *Frank*, *supra* note 118 at paras 40, 122.

188 J Weinrib, "The *Frank* Dissent's Novel Theory," *supra* note 174 at 102.

189 *Oakes*, *supra* note 176.

190 J Weinrib, "The *Frank* Dissent's Novel Theory," *supra* note 174 at 86.

191 *Ibid*.

argued at any stage of these proceedings and, above all, need not be considered in order to dispose of this appeal, I will decline to discuss the merits of their position on this point."[192] Chief Justice Wagner's refusal to entertain Justices Brown and Côté's textualist interpretation of section 1 should not be read as a rejection of the merits of the approach, especially given Chief Justice Wagner's subsequent endorsement of purposive textual interpretation. Indeed, his refusal to address the textual interpretation of section 1 was procedural. If in a future case Justices Brown and Côté's textual interpretation of section 1 is properly before the Supreme Court, it may be seriously entertained.[193]

2. SUPERVISION OF THE DEMOCRATIC PROCESS

Oliphant, in the article relied upon by Justices Brown and Rowe in articulating the Supreme Court's revised interpretive method in *9147-0732 Québec inc*, takes aim at what he considers to be the excesses of the Supreme Court's purposive approach by discussing the jurisprudence of *Charter* section 3. He calls the Supreme Court's section 3 jurisprudence his "*bête noire*" because of its lack of connection to the constitutional text.[194] He explains that the Supreme Court's section 3 jurisprudence is the paradigmatic example of the abstract principles purposivism that he believes needs to be purged from the constitutional repertoire. Oliphant is correct that some of the Supreme Court's section 3 jurisprudence is not rooted in the constitutional text. The discussion that follows offers two questions for consideration if the Supreme Court undertakes a significant reevaluation of its section 3 jurisprudence. First, is there any reason to interpret section 3 differently than other parts of the *Charter*? Second, if a more textualist reading of section 3 were to supplant the existing approach to section 3, what might that interpretation mean for democracy disputes?

Section 3 is expressed in simple terms that, on its face, protect only the right to vote and right to stand for election. There are two kinds of section 3 cases relevant to the present discussion. The first kind of section 3 case involves a straightforward restriction on voting or the ability to stand for election; for example, the limits on prisoner voting,[195] the limits on ex-pat voting,[196] or the restriction on holding elected office after a conviction.[197] This first category of section 3 case requires consideration of the plain text of section 3 and not much more because the abridgment of the right is obvious. The bulk of the analytical work in these cases occurs under the rubric of section 1 where the government's justification for infringing the right is weighed. The second kind of section 3 case is where the right is invoked to remedy unfairness in the electoral system. The best examples of this second kind of section 3 claim are: (1) challenges to unequally weighted votes resulting from the electoral boundary drawing process; and (2) challenges to political finance rules that favour some electoral participants over others. The Supreme Court has resolved electoral boundary and political finance disputes using principles derived from section 3 — effective representation[198] and

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192 *Frank, supra* note 118 at para 41.

193 Justice Côté cited the *Frank* dissent's textual approach to section 1 in her dissent in *R v Chouhan*, 2021 SCC 26 at para 229, and Justice Miller cited the *Frank* dissent's textual approach to section 1 in his dissent in *R v Sharma*, 2020 ONCA 478 at para 264.

194 Oliphant, "Taking Purposes Seriously," *supra* note 8 at 250.

195 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé*].

196 *Frank, supra* note 118.

197 *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876.

198 *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 [*Electoral Boundaries (Sask)*].

meaningful participation.[199] Yasmin Dawood, referring to the concepts of effective representation and meaningful participation, contends that the Supreme Court has "treated the right to vote as a *plural* right; that is, properly understood, the right to vote is an umbrella concept that consists of several democratic rights."[200]

Canada is not alone in having fashioned a democracy jurisprudence that extends beyond the constitutional text. The US Constitution has no express right to vote or right to stand for election and yet the US Supreme Court has developed an extensive constitutional jurisprudence of democracy. Richard Pildes described the US democracy jurisprudence as "probably the most radically non-originalist body of constitutional law that we have."[201] The reason for the parallel development of a democracy jurisprudence that is not rooted in constitutional text may come back to the idea of trust. The weighting of trust in democracy cases is different because legislators have an incentive to manipulate the rules of electoral competition to favour their re-election.[202] Justice Morgan explained recently that "the subject of electoral design is one in which the incumbent government has a structural conflict of interest in that its interest in self-preservation may dominate its policy formulation. This potential for partisan self-dealing poses a fundamental challenge to the democratic system, and represents a context in which a more rights-oriented logic is called for to safeguard democratic institutions."[203] The distrust of legislators in policing the democratic process articulated by Justice Morgan is underscored by the exemption of section 3 from the application of the section 33 democratic override — the structure of the *Charter* itself reflects an allocation of trust away from the political branches and in favour of the courts in the supervision of the democratic process.

A relative weighting of trust in favour of the courts suggests a more discretionary approach to interpretation. Perhaps the economy of trust justifies the Supreme Court's departure from the constitutional text in the section 3 electoral fairness cases. Indeed, Manfredi, a critic of the Supreme Court's use of the living tree metaphor to justify interpretations extending beyond the text, has said that "[j]udicial activism may be employed to reinforce the representative nature of democratic politics."[204] Quite apart from the economy of trust, the Supreme Court may justify the existing interpretation of section 3 by drawing upon the unwritten principle of democracy which the majority in *City of Toronto* explained is available to "assist with purposive interpretation"[205] and by reference to the provisions of the *Constitution Act, 1867* which provide some of the basic structure of

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199 *Figueroa v Canada (Attorney General)*, 2003 SCC 37 [*Figueroa*].

200 Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the *Charter*" (2013) 51:1 Osgoode Hall LJ 251 at 255 [emphasis in original] [Dawood, "Democracy and the Right to Vote"]. Dawood explains at 281 that "[t]he right to effective representation and the right to meaningful participation are not necessarily stand-alone constitutional rights, but are instead better conceived as soft rights that provide meaning and interpretive content to the right to vote."

201 Dean Reuter et al, "Why, or Why Not, Be an Originalist?" (2020) 69:4 Cath U L Rev 683 at 689.

202 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980); Samuel Issacharoff & Richard H Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50:3 Stan L Rev 643. For versions of this argument applied to the Canadian context, see Colin Feasby, "Freedom of Expression and the Law of the Democratic Process" (2005) 29 SCLR (2d) 237; Michael Pal, "Breakdowns in the Democratic Process and the Law of Canadian Democracy" (2011) 57:2 McGill LJ 299.

203 *Working Families Ontario v Ontario*, 2021 ONSC 4076 at paras 73–74.

204 Manfredi, *Judicial Power*, *supra* note 86 at 28.

205 *City of Toronto*, *supra* note 15 at para 55.

Canadian democracy.[206] The Supreme Court could clarify that effective representation and meaningful participation, rather than being rights, are concepts drawn from the unwritten principle of democracy.[207]

Despite the economy of trust and the unwritten principle of democracy, it is possible that a Supreme Court committed to interpretation more closely tied to the text would not find that the unenumerated rights presently housed within section 3 exist. So what might a more textual interpretation of *Charter* section 3 look like? For the first kind of section 3 cases identified earlier — challenges to straightforward restrictions on voting or standing for election — a purposive textual interpretation is likely to be the same as the present interpretation because section 3 uses "clear language."[208] The second kind of section 3 cases identified earlier — challenges to the unfairness of certain rules governing the electoral process — cannot be resolved by reference to the plain meaning of the text. The problem can be illustrated with a hypothetical example. Consider the type of one-party rule seen in the Soviet Union and its satellites during the Cold War era. These countries were governed by authoritarian regimes that maintained superficial trappings of democracy including the ritual of voting. Would the implementation of a Soviet-style system of government in Canada that preserved the formal act of voting but effectively denied citizens choice be contrary to section 3? On a literal reading of section 3, so long as a citizen has a vote there can be no constitutional objection.

Perhaps if faced with an existential issue like the imposition of a Soviet-style political system, the Supreme Court would draw upon the unwritten principle of democracy and draw inferences from the democratic architecture found in the Constitution to find that section 3 is a bulwark that protects the Canadian system of democracy. But what about lesser but still serious affronts to democracy? Take the common problem of overrepresentation of rural citizens compared to urban dwelling citizens considered in *Electoral Boundaries (Sask)*,[209] which dilutes the votes of minorities and persists largely unabated.[210] The Supreme Court dismissed the claim that section 3 guaranteed voter equality and found instead that it protected the more nebulous concept of "effective representation."[211] Effective representation was held to be a concept that was comprised of a number of elements, including rough voter parity, though the electoral map in question was found to be constitutional. The Supreme Court in *Figueroa* followed a similar path of reasoning.[212] The issue in *Figueroa* was whether a political finance statute that discriminated against small political parties and their candidates contravened section 3. The Supreme Court held in *Figueroa* that section 3

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206 See e.g. *Constitution Act, 1867*, *supra* note 28, ss 41, 51 (which presumes the existence of election laws, and which provides for the readjustment of representation in the House of Commons based on population, respectively).

207 The Supreme Court in *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 63 refers to effective representation in its explanation of the unwritten principle of democracy.

208 *Frank*, *supra* note 118 at para 29.

209 *Electoral Boundaries (Sask)*, *supra* note 198.

210 For a discussion of malapportionment in Canada and particularly the effect of the systemic under-weighting of urban voters on minorities, see Michael Pal & Sujit Choudhry, "Still Not Equal? Visible Minority Vote Dilution in Canada" (2014) 8:1 Can Political Science Rev 85.

211 Mark Carter, "Reconsidering the *Charter* and Electoral Boundaries" (1999) 22:1 Dal LJ 53 at 58 (argues that "effective representation" is too vague to provide guidance and provides little protection against "cynical political activity").

212 *Figueroa*, *supra* note 199.

guarantees a right of "meaningful participation" and found the law in question unconstitutional.[213]

An approach to these cases that gave primacy to the text of section 3 would be unlikely to lead to the ill-defined unenumerated rights to "effective representation" and "meaningful participation." But the Supreme Court might be able to resolve the issues of malapportionment of electoral districts and biased political finance rules by looking to what is necessarily implied by the right to vote and the right to stand for election. As discussed earlier, the structured purposivism of both Oliphant and Barak allow for necessary implication, though Oliphant sets a much higher bar for implication than Barak. The fact that each citizen is granted a right to vote is indicative of the "equal rights and equal membership embodied in and protected by the *Charter*."[214] Arguably, section 3's grant of a vote to each citizen necessarily implies that each vote will have roughly equal weight subject to the provisions of the Constitution that guarantee minimum levels of representation to smaller provinces. Similarly, it is reasonable to conclude that the right to stand for election necessarily implies that candidates must be treated equally by the law.[215] The idea that the right to vote and the right to stand for election necessarily imply a simple concept of equality is arguably more consistent with the text of section 3 and more easily administered than the plural right described by Dawood.[216]

V. CONCLUSION: THE FUTURE OF PURPOSIVE TEXTUAL INTERPRETATION

The Supreme Court's approach to interpreting the *Charter* has changed in the last several years with a renewed emphasis on the role of text. The majority in *City of Toronto* seemingly gives this new method a name — purposive textual interpretation. Purposive textual interpretation prioritizes text and limits interpretive discretion; it is not the same old purposivism. The emergence of a more disciplined approach to *Charter* interpretation is not a surprising development nor is it necessarily a bad thing. With the Supreme Court's change of interpretive method, it must be asked: Has the Supreme Court concluded that its original choice of a highly discretionary form of purposivism was wrong? Or have circumstances changed in such a way as to demand that the interpretive method evolve? A possible answer suggested in this article is that the economy of trust considered by the Supreme Court in the 1980s justified a reasonably discretionary interpretive method, but the method adopted by the Supreme Court lacked definition and was more discretionary than the circumstances warranted.

The parameters of the new purposive textual interpretation will be determined in the coming years. This article has suggested that a structured form of purposivism, such as that

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213 *Ibid* at paras 50, 90.

214 *Sauvé*, *supra* note 195 at para 35.

215 This idea is similar to the norm of government neutrality found to inform freedom of religion in *Big M Drug Mart*, *supra* note 3.

216 The simplicity of this necessary implications approach may sacrifice the flexibility that exists in the current section 3 jurisprudence. Dawood acknowledges that the Supreme Court's plural conception of the right to vote "poses certain challenges" but argues that it is better than the alternatives because it provides the Supreme Court with "the conceptual resources to respond to the highly complex nature of democratic governance and participation" (Dawood, "Democracy and the Right to Vote," *supra* note 200 at 295).

proposed by Judge Barak, offers a way to reconcile the Supreme Court's idea of the living tree with a greater commitment to the text of the *Charter*. This type of structured purposivism is more disciplined than the Supreme Court's traditional purposivism and provides meaningful guidance to, and limits on, the interpretive process. Despite its differences from the Supreme Court's traditional purposivism, Barak's purposivism can be seen to be consistent with much of the Supreme Court's *Charter* jurisprudence over the last 40 years and unlikely to prompt a large-scale re-evaluation of that jurisprudence. By contrast, Oliphant's conception of purposivism as a tool that functions primarily to narrow the constitutional text calls into question important *Charter* precedents. If this narrowing version of purposive textual interpretation prevails, whether the members of the Supreme Court are faint-hearted purposive textualists or determined to enforce their best understanding the *Charter* may determine if foundational precedents are undone.

At this juncture it is also impossible to tell if the evolving method of *Charter* interpretation is still a form of purposivism or whether it is a waystation on a journey to originalism. Both purposivism and originalism have been reformed in response to critiques and many commentators have argued that today there is little daylight between the two opposing methods.[217] There is some truth to this if the focus is on a flexible conception of originalism and a structured form of purposivism. But it is clear that there remains a battle within originalism to constrain judicial discretion as much as possible and limit the ability of interpretation to accommodate contemporary norms. Put simply, despite some convergence it still matters whether purposive textual interpretation is a form of purposivism or a form of originalism. Perhaps in future decisions the Supreme Court will provide clarity on this and other questions that surround its new interpretive method.

[217] See e.g. Oliphant & Sirota, *supra* note 8 at 143ff; Miller, "Constitutional Supremacy," *supra* note 8 at 364 (noting the similarities between contemporary originalism and the interpretive method used by Lord Sankey in the *Persons Case*, *supra* note 4).