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The Frank Dissent's Novel Theory of the Charter: The Rhetoric and the Reality

Jacob Weinrib
Faculty of Law, Queen's University

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The *Frank* Dissent’s Novel Theory of the Charter: The Rhetoric and the Reality

Jacob Weinrib*

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I. INTRODUCTION

Since the early days of the *Canadian Charter of Rights and Freedoms*,¹ the Supreme Court of Canada has applied a two-stage framework to determine whether legislation complies with the Charter. The first stage considers whether the legislation infringes a right or freedom.² The second determines whether the infringement is demonstrably justified.³ In *Frank v. Canada (Attorney General)*,⁴ the dissenting opinion of Côté and Brown JJ. rejects this framework and formulates an alternative. Their central claim is that the Charter does not justify the infringement of the rights that it elaborates. Accordingly, instead of focusing on whether an *infringement* is justified, courts should focus on whether the *limit* that shapes the “right’s outer boundaries” is justified.⁵ A limit that is justified does not

* Faculty of Law, Queen’s University. I am grateful to Ben Ewing, Colin Grey, John Martin Gillroy, Sabine Tsuruda and Grégoire Webber for comments on an earlier draft. Alysha Flipse, Oliver Flis, Aicha-Raeburn Cherradi and Luke Sabourin provided outstanding research assistance. This research was supported by an Insight Development Grant awarded by the Social Science and Humanities Research Council of Canada.

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

² *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.); *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.); *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.). I will use the term “rights” as encompassing both rights and freedoms.

³ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

⁴ [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.) [hereinafter “*Frank*”].

⁵ *Frank*, at para. 120.

infringe a right. A limit that infringes a right cannot be justified.

Chief Justice Wagner’s majority opinion acknowledges the novelty of the dissent’s proposal,⁶ but gives it short shrift. He does not respond to the dissent’s textual argument that the wording of section 1 authorizes the justification of limits rather than infringements. He characterizes the dissent’s proposal as “largely semantic in nature, driven by a disagreement” about whether an infringement refers to a limit that demands justification or a limit that is unjustified.⁷ Nor does he engage with the dissent’s normative claim that its proposal transcends “mere semantics” by clarifying “our understanding of rights and of the legitimate boundaries of state action”.⁸ After observing that the dissent’s proposal departs “from decades of *Charter* jurisprudence, was neither raised nor argued at any stage of these proceedings and, above all, need not be considered in order to dispose of this appeal”, Chief Justice Wagner “decline[s] to discuss the merits of their position on this point”.⁹

The purpose of this essay is to assess the merits of the *Frank* dissent’s proposal. I begin by considering the dissent’s textual argument that its approach alone coheres with the language of “s. 1 itself”.¹⁰ This argument fails because the dissent’s claims about section 1 are inconclusive and commit it to ignoring constitutional text pertaining to infringements that appears in section 24. I then assess the dissent’s normative argument that its proposal would enhance the quality of rights-protection under the Charter. When the ramifications of the proposal are unpacked, the rhetoric does not match the reality. Under the prevailing Charter framework, rights-protection is rooted in two ideas. The first is that rights are constitutional standards to which legislation must conform. Accordingly, legislation that is inconsistent with these standards is presumptively unconstitutional.¹¹ The second is that rebutting this presumption requires a special justification demonstrating that the loss to the constitutional right is offset by a proportional gain to a competing constitutional principle.¹² The *Frank* dissent’s proposal abandons these ideas. On the one hand, the dissent conceives of rights not as constitutional standards that bind legislative bodies, but as policies established through legislative choice. On the other, the dissent insists that these policies must be justified under section 1, but defends a notion of justification that proceeds on the basis that the limit of the right must be understood as a policy choice to which courts must show deference. Taking these strands together, in the dissent’s framework legislative choices are constrained by

⁶ *Frank*, at para. 40.

⁷ *Frank*, at para. 40.

⁸ *Frank*, at para. 122.

⁹ *Frank*, at para. 41.

¹⁰ *Frank*, at para. 120.

¹¹ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 63 (S.C.C.).

¹² *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 64 (S.C.C.).

neither broad Charter rights nor the imperative to justify limitations. While this framework denies that rights may be infringed, it affords individuals no more protection than legislative bodies happen to impart.

Frank considers whether Parliament may deny Canadians who have resided outside Canada for more than five consecutive years of eligibility to vote in federal elections. The *Canada Elections Act* defines an elector as a citizen “who on polling day is 18 years of age or older”.¹³ Electors may cast their ballots in person at a polling station of the “polling division in which he or she is ordinarily resident”.¹⁴ Citizens who do not reside in Canada may vote “by means of a special ballot”.¹⁵ However, citizens who have resided outside Canada for more than five consecutive years are ineligible to vote unless they fall under one of the exemptions found in section 11.¹⁶ For these citizens, residency in Canada is required to restore voting eligibility. The claimants in *Frank* are Canadian citizens who pursued university study in the United States. Subsequently, both claimants sought employment related to their respective fields in Canada, without success, but would return if suitable employment was available.¹⁷ They challenge the residency requirement on the grounds that it is an unjustified infringement of section 3 of the Charter: “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”¹⁸

Propelled by diverging approaches, the justices of the Supreme Court of Canada embrace opposing conclusions. Chief Justice Wagner’s majority opinion and Rowe J.’s concurrence apply the prevailing Charter framework. After observing that the Attorney General of Canada conceded that the residency requirement in the *Canada Elections Act* infringes the right to vote,¹⁹ the majority and the concurrence find the infringement to be unjustified. In contrast, the dissent maintains that the Attorney

¹³ S.C. 2000, c. 9, s. 3.

¹⁴ *Canada Elections Act*, S.C. 2000, c. 9, s. 6.

¹⁵ *Canada Elections Act*, S.C. 2000, c. 9, s. 127(c).

¹⁶ *Canada Elections Act*, S.C. 2000, c. 9, s. 11. The exemption applies to “(a) a Canadian Forces elector; (b) an elector who is an employee in the federal public administration or the public service of a province and who is posted outside Canada; (c) a Canadian citizen who is employed by an international organization of which Canada is a member and to which Canada contributes and who is posted outside Canada; (d) a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident; (e) an incarcerated elector within the meaning of that Part; and (f) any other elector in Canada who wishes to vote in accordance with that Part” [emphasis added].

¹⁷ *Frank v. Canada (Attorney General)*, [2014] O.J. No. 2098, 2014 ONSC 907, at paras. 13, 17 (Ont. S.C.J.).

¹⁸ Charter, s. 3.

¹⁹ *Frank*, at para. 4, Wagner C.J.C., and at para. 84, Rowe J., concurring.

General of Canada made an “analytical error by conceding an ‘infringement’”.²⁰ The residency requirement limits the right by shaping its “boundaries and contours”,²¹ but the right to vote is not infringed because the limit is justified.

II. SELECTIVE TEXTUALISM

The dissent maintains that a “textually faithful account of s. 1” would focus on whether a limit is justified, not on whether an infringement is justified.²² This interpretation encounters two difficulties. First, the text of section 1 does not indicate that the word *limits* bears the distinctive meaning the dissent attributes to it. Second, the dissent’s interpretation of section 1 requires it to ignore the wording of section 24, a constitutional provision that sheds light on the permissibility of infringements under the Charter.

The dissent’s textual argument proceeds from the following observation: “[T]he text of s. 1 itself . . . speaks *not* of reasonable and demonstrably justifiable *infringements*, but of reasonable and demonstrably justifiable *limits*.”²³ Consider the text of section 1: “The *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.”²⁴ Accordingly, the dissent rejects the view that section 1 offers government the opportunity to restrict the protections that rights afford by justifying infringements. Instead, the dissent insists that section 1 offers government the opportunity to justify the way in which legislation limits the right by specifying the “right’s outer boundaries”.²⁵

The *Frank* dissent is correct that the text of section 1 refers to *limits*. But what is the meaning of that term? One possibility is that *limits* refer, as the dissent insists, to “the right’s outer boundaries”.²⁶ Thus, we might speak of violent acts as falling beyond the “limits to the ambit of freedom of expression”.²⁷ Another possibility is that *limits* refer not to the boundary of a thing, but to a restriction or constraint on an instance of a thing.²⁸ Thus, the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* indicate that the “term ‘limitations’ in these principles includes the term ‘restric-

²⁰ *Frank*, at para. 123.

²¹ *Frank*, at para. 124.

²² *Frank*, at para. 121.

²³ *Frank*, at para. 120 [emphasis in original].

²⁴ Charter, s. 1 [emphasis added].

²⁵ *Frank*, at para. 120.

²⁶ *Frank*, at para. 120.

²⁷ *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at para. 226 (S.C.C.), Iacobucci and Major JJ., concurring.

²⁸ John Simpson & Edmund Weiner, *Oxford English Dictionary* (Oxford: Oxford University Press, 1989), *sub verbo* “limit”.

tions' as used in the Covenant".²⁹ In turn, the *International Covenant on Civil and Political Rights* refers to the right to free expression, association and assembly as being subject to "restrictions" that are prescribed by law and necessary to achieve certain enumerated objectives.³⁰ For example, although political discourse is protected by the guarantee of free expression, "it may be legitimate for a State party to restrict political polling imminently preceding an election in order to maintain the integrity of the electoral process".³¹ Here, a limitation refers not to the boundary of a right, but to an infringement or restriction on what lies within its bounds.

The dissent's textual argument is inconclusive because the term *limits* is open to multiple interpretations. The text of section 1 of the Charter does not indicate whether *limits* refers to a boundary that may not be transgressed or to a restriction of that which lies within a boundary. While the dissent prefers the former meaning, it offers no textual argument to exclude the latter. Accordingly, the dissent's claim that its approach alone adheres to the text of section 1 lacks textual support.

If the text of section 1 does not indicate the meaning of the word *limits*, perhaps other provisions of the Charter can shed light on this term. Justice Lamer (as he then was) once remarked: "Our constitutional *Charter* must be construed as a system where '[e]very component contributes to the meaning as a whole, and the whole gives meaning to its parts. . . .' The court must interpret each section of the *Charter* in relation to the others."³² Accordingly, we must ask whether other provisions of the Charter support or subvert the dissent's proposal.

Having asserted that the Charter does not authorize the justification of infringements, it is striking that the dissent does not consider the provision of the Charter that explicitly refers to infringements:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been *infringed or denied* may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that *infringed or denied* any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard

²⁹ *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (New York: American Association for the International Commission of Jurists, April 1985).

³⁰ *International Covenant on Civil and Political Rights*, December 19, 1966, 999 U.N.T.S. 171, arts. 19, 21-22 (entered into force March 23, 1976, accession by Canada May 19, 1976).

³¹ *General Comment No. 34: Article 19: Freedom of Opinion and Expression*, UNHRC, 102nd Sess., CCPR/C/GC/34 (2011), at para. 37.

³² *R. v. Dubois*, [1985] S.C.J. No. 69, [1985] 2 S.C.R. 350, at 365 (S.C.C.), quoting P.A. Côté, *The Interpretation of Legislation in Canada* (Cowansville, QC: Yvon Blais, 1984), at 236.

to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.³³

Each subsection of section 24 refers to rights and freedoms that have been *infringed*. And each time, the word *infringed* is accompanied by the word *denied*. From the standpoint of the dissent's proposal, the coupling of these words is mysterious. On the dissent's view, the limitation of a right can be justified, but the infringement — or, what amounts to the same thing — the denial, or violation of a right cannot be. Using the terms *infringement* and *violation* interchangeably, the dissent writes: "It distorts our constitutional discourse, and our understanding of rights and of the legitimate boundaries of state action, to speak of individuals having rights which may be justifiably *violated* by the state."³⁴ From the dissent's standpoint, infringement, violation and denial are equivalent terms for referring to limitations that cannot be justified under section 1. This interpretative stance generates a textual difficulty because both provisions in section 24 of the Charter refer to rights or freedoms that have been "infringed or denied".³⁵ By maintaining that these terms are synonymous, the dissent commits itself to the view that the Constitution's meaning would remain unchanged if either of these terms was omitted. Having argued that their approach alone is faithful to the text of the Charter, the dissenters fail to observe that their approach renders constitutional text that appears in both subsections of section 24 meaningless.³⁶

In the early days of the Charter, the Supreme Court of Canada offered a framework that gave independent meaning to infringements and denials. In *Big M*, Dickson J. (as he then was) rejected the government's attempt to justify the *Lord's Day Act*³⁷ on the basis of "convenience and expediency" as "fundamentally repugnant because it would justify the law upon the very basis upon which it is attacked for violating s. 2(a)".³⁸ Justification is possible only where the infringement's "aims and objectives . . . are consonant with the guarantees enshrined in the *Charter*".³⁹ In contrast, where such aims and objectives are absent, the right is not subject to an infringement, which might be justified, but to a "total negation".⁴⁰

³³ Charter, s. 24 [emphasis added].

³⁴ *Frank*, at para. 122 [emphasis added].

³⁵ Charter, s. 24.

³⁶ *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 179 (S.C.C.) (Wilson J. writing that constitutional text "should not be treated as tautologous if capable of independent, although related, meaning").

³⁷ R.S.C. 1970, c. L-13.

³⁸ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 140 (S.C.C.).

³⁹ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 81 (S.C.C.).

⁴⁰ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 84

Justice Dickson illustrated the idea of a negation by pointing to a hypothetical drawn from the Supreme Court's first Charter case:

An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the *Charter*, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1.⁴¹

On Dickson J.'s view, infringements and denials are different in kind. An infringement restricts a right for the sake of a principle consonant with Charter guarantees and is therefore susceptible to section 1 justification. In contrast, a denial restricts a right for the sake of an objective that is antithetical to Charter guarantees and is therefore invalid unless temporarily authorized by the override provision or permanently authorized by a constitutional amendment.⁴² While Dickson J. did not root this distinction in the text of section 24, he offers an explanation of how the terms *infringed or denied* that appear repeatedly within it can be given independent meaning.

The distinction between limits and denials can be formulated in terms of the terminology found in *R. v. Oakes*.⁴³ Infringements are susceptible to justification because they restrict a right in order to advance a pressing and substantial objective. In contrast, a denial violates a right for the sake of "objectives which are trivial or discordant with the principles integral to a free and democratic society".⁴⁴ Trivial objectives include legislative or administrative convenience⁴⁵ and non-prohibitive cost.⁴⁶ Discordant objectives, such as objectives that are discriminatory, are directly opposed to rights guarantees.⁴⁷ Objectives incapable of justifying the limitation of

(S.C.C.). On the limit-denial distinction in the context of s. 35, see McLachlin J. (dissenting) in *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 306 (S.C.C.).

⁴¹ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 84 (S.C.C.), citing *Quebec (Attorney General) v. Quebec Assn. of Protestant School Boards*, [1984] S.C.J. No. 31, [1984] 2 S.C.R. 66 (S.C.C.).

⁴² *Quebec (Attorney General) v. Quebec Assn. of Protestant School Boards*, [1984] S.C.J. No. 31, [1984] 2 S.C.R. 66, at 86 (S.C.C.).

⁴³ [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

⁴⁴ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 69 (S.C.C.).

⁴⁵ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 140 (S.C.C.); *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, at para. 70 (S.C.C.).

⁴⁶ *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, at para. 73 (S.C.C.). But see *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2004] S.C.J. No. 61, 2004 SCC 66 (S.C.C.).

⁴⁷ *Rosenberg v. Canada (Attorney General)*, [1998] O.J. No. 1627, 158 D.L.R. (4th) 664 (Ont. C.A.).

a Charter right “do not gain s. 1 protection”.⁴⁸

On this interpretation of subsection 24(1), courts are to provide Charter remedies to individuals in two kinds of cases. In the first, a right is infringed and the ensuing justification fails. In the second, a right is denied and no justification is available. This interpretation of subsection 24(1) does not require the court to grant a remedy where an infringement is “demonstrably justified”.⁴⁹ After all, the text of subsection 24(1) stipulates that a court must provide “such remedy as the court considers appropriate and just in the circumstances”.⁵⁰ Where the infringement is itself appropriate and just, there is nothing to remedy. Thus, subsection 24(1) requires courts to remedy infringements that are *unjustified* and denials that are *unjustifiable*.

The dissent’s statement that “there is no good reason for . . . ignor[ing] constitutional text” is fatal to its own argument.⁵¹ By maintaining that infringements cannot be justified under section 1, the dissent advances an interpretation of section 1 that requires ignoring constitutional text that appears in both subsections of section 24. Its claim to textual fidelity therefore dissolves. In contrast, the prevailing Charter paradigm, in which *limits* refer to *infringements*, does not generate this difficulty. In section 1, the government may seek to justify infringements, not denials. Section 24 requires the court to extend remedies for infringements in which justification is inadequate and for denials in which justification is impossible. Such an interpretive approach coheres to the text of both subsections of section 24 of the Charter.

Although the dissent’s textual argument fails, its normative argument remains. For the dissenters, rights-protection would be enhanced if Canadian courts rejected the possibility of justifying infringements on Charter rights. If this argument is correct, those who seek to enhance rights-protection under the Charter might regard the prevailing paradigm and the constitutional text from which it issues with some regret. This would be unwarranted. When the ramifications of the dissent’s proposal are unpacked, it delivers no more protection than legislative bodies happen to grant. In the sections that follow, I unpack the ramifications of the dissent’s proposal for rights and justified limits in turn.

III. SPECIFYING RIGHTS

Constitutional rights are often formulated in the language of “majestic generalities”.⁵² If such generalities are to extend concrete protections to their bearers, a framework is needed for determining what falls within the scope of a right. In Charter jurisprudence, that framework is purposive interpretation.⁵³ The dissent

⁴⁸ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 69 (S.C.C.).

⁴⁹ Charter, s. 1.

⁵⁰ Charter, s. 24(1).

⁵¹ *Frank*, at para. 122.

⁵² *Fay v. New York*, 332 U.S. 261, at 282 (1947), Jackson J.

⁵³ *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 156 (S.C.C.); *R.*

neither refers to purposive interpretation nor to the purpose of the right to vote. Instead, it invokes the idea of “legislative specification”.⁵⁴ This section explores what the dissent means by this term. I argue that while there is a conception of legislative specification that accords with purposive interpretation, this is not the conception that the dissent affirms. On the purposive view, a constitutional right protects its bearers by requiring legislation to conform to the right’s underlying purpose (or purposes). Legislation that is inconsistent with that purpose breaches the right. In contrast, on the dissent’s view, the scope of a broad Charter right is the product of legislation. The right therefore offers its bearer no protection from legislation. If the Charter offers any protections at all, that protection comes not from rights, but from some other constitutional source, such as the justification analysis.

The guiding idea of purposive interpretation is that the protections that a right affords are to be determined in reference to that right’s purpose.⁵⁵ As Dickson J. put the point in *Big M*: “The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.”⁵⁶ Purposive interpretation proceeds by identifying the purpose of the constitutional text as a whole, formulating the purpose of each of the provisions within this whole, and, finally, determining how the purpose of the relevant provision can be fulfilled in a given context. In *Hunter v. Southam Inc.*, Dickson J. characterized the purpose of a constitution as a “continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties”.⁵⁷ Within this framework, the scope of a particular right is determined in light of its purpose. For example, in *Big M*, he interpreted the right to freedom of conscience and religion in subsection 2(a) of the Charter as protecting the freedom of an individual to “hold and to manifest whatever beliefs and opinions his or her conscience dictates”.⁵⁸ Because the *Lord’s Day Act* empowered government to “coerce individuals to manifest a specific religious practice for a sectarian purpose”, the Act stood in diametric opposition to the purpose of subsection 2(a). Thus, Dickson J. concluded that the Act was inconsistent with subsection 2(a).

v. *Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 116 (S.C.C.).

⁵⁴ *Frank*, at paras. 113-114, 124.

⁵⁵ Dieter Grimm, “The Basic Law at 60 – Identity and Change” (2010) 11:1 German L.J. 33, at 44. See also Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016), at 218-21.

⁵⁶ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 116 (S.C.C.) [emphasis in original].

⁵⁷ [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155 (S.C.C.).

⁵⁸ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 123 (S.C.C.).

The *Frank* majority follows the purposive approach. Chief Justice Wagner observes that the majority opinion in *Sauvé v. Canada (Chief Electoral Officer)*⁵⁹ “stressed the critical importance of a broad and purposive interpretation of the right to vote”.⁶⁰ After referring to the broad wording of section 3, Wagner C.J.C. explains that the “central purpose of s. 3 is to ensure the right of each citizen to participate meaningfully in the electoral process”.⁶¹ This right is essential to democracy, a form of government in which each citizen has “a genuine opportunity to participate in the governance of the country through the electoral process”.⁶² Since the *Canada Election Act*’s residency requirement excludes Canadian citizens who have resided outside Canada for five consecutive years from meaningful participation in the electoral process, the requirement infringes section 3 of the Charter.⁶³

The dissent’s analysis of the right to vote neither invokes the idea of purposive interpretation nor the purpose of the right to vote. Instead, its organizing idea is legislative specification:

We start from the premise that s. 3 is a *positive* right which, unlike most *Charter* rights, *requires* legislative specification in order for the right to be operative. It follows that Parliament acted to define and shape the boundaries and contours of a positive entitlement which, as such, necessarily requires legislative specification.⁶⁴

[T]he right to vote is a *positive* entitlement. It is therefore, at least in part, a necessarily *legislated* right. Meaning, it is “given form and content in legislation” which specifies “the distinctions on which the general affirmation is silent” . . . Such legislation . . . breathes life into the right so that it may be recognized and exercised.⁶⁵

In what follows, I explain that the idea of legislative specification could be committed to purposive interpretation or opposed to it. My claim here is twofold. First, the conception that opposes purposive interpretation abandons the simple idea that individuals can constrain the conduct of their government through their rights. Second, this is the conception that the dissent adopts.

There is a notion of legislative specification that is consistent with purposive interpretation. Consider how Dieter Grimm distinguishes between the kinds of duties imposed by the negative and positive dimensions of a constitutional right. The

⁵⁹ [2002] S.C.J. No. 66, 2002 SCC 68 (S.C.C.).

⁶⁰ *Frank*, at para. 25.

⁶¹ *Frank*, at para. 26, citing *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at paras. 25-26 (S.C.C.).

⁶² *Frank*, at paras. 25-26

⁶³ *Frank*, at para. 79.

⁶⁴ *Frank*, at para. 113 [emphasis in original].

⁶⁵ *Frank*, at para. 142 [emphasis in original], quoting Richard Ekins, “Legislation as Reasoned Action” in Grégoire Webber *et al.*, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018) 86, at 102-103.

negative aspect “requires the state to abstain from certain actions. Consequently, there is *only one way* to comply with this duty, namely, to omit acts violating fundamental rights”.⁶⁶ In contrast, the positive aspect of a fundamental right requires not forbearance but state action. Because the Constitution does not indicate how the positive aspect is to be fulfilled, the “duty can be fulfilled in various ways”.⁶⁷ The role of legislation is to “lend concrete form” to the right by determining the particular scheme through which its broad purpose will be fulfilled.⁶⁸ Because this view demands legislative conformity to the right’s purpose, I will refer to it as the *purposive view* of legislative specification.

On the purposive view, positive rights impose two constraints on legislative bodies. The first is that wherever a positive right is present, the legislature enjoys no discretion to refrain from acting. The second constraint concerns the kind of legislative action that a positive right demands. Legislative specification must fulfill the purpose of the right. Thus, a positive right is infringed by both legislative inaction and legislative action that fails to secure the right’s purpose. Taking these constraints together, the right to vote requires a legislative scheme that fulfills the purpose of the right by enabling citizens to meaningfully participate in democratic life.

There is an opposing understanding of legislative specification. Its fundamental idea is that rights are indeterminate. Accordingly, reasonable disagreements arise in response to questions about the protections that rights afford.⁶⁹ Because rights generate disputes that cannot be “fully settled by reason”,⁷⁰ an agent is required to establish what rights demand. For democratic reasons, this agent must be the legislature.⁷¹ Given the indeterminacy of rights, “the legislature is not best understood as infringing” rights, but “seeking to specify the scope and content” of rights.⁷² For example, in an area prone to earthquakes, a legislative body might

⁶⁶ Dieter Grimm, “The Protective Function of the State” in Georg Nolte, ed., *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 137, at 150 [emphasis added].

⁶⁷ Dieter Grimm, “The Protective Function of the State” in Georg Nolte, ed., *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 137, at 150.

⁶⁸ BVerfGE 125, 175 (2010) [138].

⁶⁹ Grégoire Webber & Paul Yowell, “Introduction: Securing Human Rights Through Legislation” in Grégoire Webber *et al.*, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018) 1, at 11.

⁷⁰ Grégoire Webber & Paul Yowell, “Introduction: Securing Human Rights Through Legislation” in Grégoire Webber *et al.*, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018) 1, at 11.

⁷¹ Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009), 147.

⁷² Grégoire Webber & Paul Yowell, “Introduction: Securing Human Rights Through Legislation” in Grégoire Webber *et al.*, *Legislated Rights: Securing Human Rights Through*

specify the scope of the right to life by enacting building codes that set out requirements concerning soil, building height, weight, use, and so forth. The resulting legislation plays a meaningful role in securing the right to life.⁷³ This conception of legislative specification is associated with the constitutional theory of Grégoire Webber, Richard Ekins and Bradley Miller, among others.⁷⁴

This view of legislative specification involves both an uncontroversial and a radical claim about constitutional rights. The uncontroversial claim is that certain rights claims can be secured only through detailed legislation.⁷⁵ That much is common ground with the purposive view. The radical claim is that the scope of a constitutional right is determined through a legislative choice. Whereas the purposive view of legislative specification rejects this claim, what I call the *radical view* accepts it.

The radical view of legislative specification breaks from its purposive counterpart in two respects.

The first concerns the kinds of claims to which each view applies. On the purposive view, the positive dimension of a constitutional right alone requires legislative specification. In the case of a broadly formulated positive right, different administrative schemes are capable of fulfilling its demands. A negative right does not require legislative specification because the restraint that its purpose demands is the sole means of the right's fulfillment. In contrast, on the radical view, the distinction between positive and negative rights plays no role. Legislative specification is required not because the underlying purpose of a positive right can be satisfied through different schemes, but because open-ended rights are subject to disputes that reason generates but is powerless to resolve. All broadly formulated rights, regardless of whether they impose positive or negative duties, demand legislative specification.⁷⁶

A further divergence concerns the constitutional parameters in which legislative specification is to occur. The purposive view maintains that the role of legislative

Legislation (Cambridge: Cambridge University Press, 2018) 1, at 11.

⁷³ Grégoire Webber & Paul Yowell, "Introduction: Securing Human Rights Through Legislation" in Grégoire Webber *et al.*, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018) 1, at 16-17.

⁷⁴ Each of these authors contributed a chapter to Grégoire Webber *et al.*, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018). And each relies on the conception of legislative specification sketched above.

⁷⁵ Richard Ekins, "Legislation as Reasoned Action" in Grégoire Webber *et al.*, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018) 86, at 94.

⁷⁶ Grégoire Webber & Paul Yowell, "Introduction: Securing Human Rights Through Legislation" in Grégoire Webber *et al.*, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018) 1, at 19.

specification is to fulfill the purpose of the right. The radical view rejects that purposive interpretation can play this role. Because rights are underdetermined, reasonable disagreements arise with respect to the protections that rights afford. A democracy resolves such disagreements through a legislative choice that specifies what falls within a right's scope. As one proponent of the radical view observes, "very little is determined by the constitutional charter of rights itself. The legislature's construction of a right's limitation is always contingent" and may be "revisited by the legislature at any time that a majority of legislators see fit".⁷⁷ Rights are subject to the "circumstances of politics and the legislature's role therein effectively leaves 'everything up for grabs'".⁷⁸ Within the radical view, Charter rights are not constitutional standards to which legislation must conform, but legislative standards established through majoritarian politics.

Adopting the radical view would drastically diminish the capacity of rights to protect their bearers. The problem with the radical view is not that legislative bodies will invariably hollow out the protections that constitutional rights afford. This is a contingent matter. The problem is that if the scope of a right is determined through legislative choice, individuals will be incapable of constraining legislative activity through their rights.⁷⁹ As a critic of the radical view explains: "[E]ven if a bill of rights stated that we have a right to a fair trial, legislation that gravely restricted the rights of the defence would have to be regarded as necessarily compatible with and indeed *defining* what our rights to a fair trial are."⁸⁰ The "person deprived of knowing the case against him . . . could not validly appeal to the fact of his right to a fair trial having been infringed".⁸¹ The same point applies to the earlier example of a building code that specifies what the right to life requires in a region susceptible to earthquakes. Suppose that the legislature chooses to replace a stringent code with a lax one that imperils human life. From the standpoint of the radical view, that code would not necessarily infringe the right to life but would instead define the protections that the right currently provides. Of course, a proponent of the radical view might maintain that the legislative specification of the right must still be justified, but this underscores the fact that, on the radical view, constitutional rights

⁷⁷ Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009), at 175.

⁷⁸ Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009), at 175.

⁷⁹ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012), at 494.

⁸⁰ Tom Hickman, "Negotiable Rights, What Rights?", Book Review of *The Negotiable Constitution: On the Limitation of Rights* by Grégoire C.N. Webber, (2012) 75(3) Mod. L. Rev. 437, at 440 [Emphasis in original].

⁸¹ Tom Hickman, "Negotiable Rights, What Rights?", Book Review of *The Negotiable Constitution: On the Limitation of Rights* by Grégoire C.N. Webber, (2012) 75(3) Mod. L. Rev. 437, at 446.

themselves impose no direct constraint on legislative specification. If the constitution offers individuals any protection, that protection stems not from the rights but from the justification analysis. I explore the ramifications of the radical view's approach to justification in the next section. Presently, it is sufficient to observe that the radical view diminishes rights-protection by empowering legislative bodies to determine not only the mode in which their constitutional obligations may be fulfilled, but the nature of the obligations themselves.

While the *Frank* dissent does not distinguish the purposive view of legislative specification from its radical counterpart, there are multiple indications that the dissent affirms the radical view. The dissent neither refers to purposive interpretation in general nor to the particular purpose of the right to vote. If the dissent's view was that the point of legislative specification is to fulfill the purpose of the right to vote, then one would expect that purpose to play some role in its account. Further, when the dissent expounds the idea of legislative specification, it explicitly relies on the constitutional theory of the leading proponents of the radical view — Webber, Ekins and Miller.⁸² Most significantly, if the dissent was committed to purposive interpretation (or some other method of conceptualizing a constitutional standard that issued from broad rights), one could determine whether a right was infringed *prior* to engaging in a section 1 justification. However, this is exactly what the dissent denies. On its view, a limit constitutes an infringement only if the ensuing section 1 justification fails.

For the dissenters, the boundary of a broad constitutional right is determined not by the purpose of the right but by a legislative choice. However, the dissent maintains that this does not mean that *any* choice is constitutional. The choice must be justified under section 1. However, as I will now argue, the dissent's distinctive approach to justification retains the terminology of *Oakes* but discards the constraints to which this terminology refers. In the resulting framework, legislative activity is constrained by neither broad Charter rights nor by the justification analysis.

IV. JUSTIFICATION DIMINISHED

What does it mean to *justify* the limitation of a Charter right?

Chief Justice Dickson's landmark opinion in *Oakes* offers a familiar answer to this question. Because Charter rights and freedoms "are part of the supreme law of Canada", justification "must be premised on an understanding" that the infringement is presumptively unconstitutional.⁸³ Justification is the form of legal reasoning appropriate to the rebuttal of that presumption. Justification is *possible* when the reason for limiting the right rests in the realization of a competing constitutional principle, or what Dickson C.J.C. terms, a pressing and substantial objective. In turn, justification is *actual* when government can establish that the realization of this

⁸² *Frank*, at paras. 120, 122, 126, 142, 146.

⁸³ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 63 (S.C.C.).

principle is furthered by infringing the right (rational connection), that this principle cannot be realized to the relevant extent through means that are less injurious of the right (minimal impairment), and, finally, that the severity of the infringement is justified by the “commonality of values” that underwrite both the right and the countervailing principle.⁸⁴

The guiding idea of *Oakes* is that justification operates to protect rights rather than to negate or deny them. The purpose of justification is not to take back whatever protections that rights afford and thereby resurrect the plenary legislative power that preceded the entrenchment of the Charter. Rather, section 1 protects rights by constraining the kinds of justifications that government may invoke to uphold infringements. These constraints encompass both the end for which and the means through which rights may be infringed. Section 1 protects rights by limiting the limits to which rights are subject.⁸⁵

The *Frank* dissent invokes the terminology of *Oakes* but offers an opposing vision of justification. This vision follows earlier judgments that substitute the rigor of *Oakes* with deference,⁸⁶ but it also goes further by disavowing the very notion of justification that *Oakes* expounds. This disavowal concerns both the precondition for and the nature of justification under section 1.

In *Oakes*, the precondition of justification is that a supreme law right has been infringed.⁸⁷ Accordingly, the infringement is presumptively unconstitutional and demands a justification in which the loss to the constitutional right is offset by a proportional gain to a competing constitutional principle. The *Frank* dissent does not share this understanding. As we have seen, its organizing idea is that the finding of an infringement is not what calls for justification but what follows from its failure. Thus, the dissent's approach to section 1 proceeds on the basis that nothing of constitutional value has been lost.

These diverging presuppositions affect the nature of the justification that follows. In *Oakes*, the extent to which the constitutional right is infringed must be

⁸⁴ *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 736 (S.C.C.).

⁸⁵ John P. Humphrey, “The Just Requirements of Morality, Public Order and the General Welfare in a Democratic Society” in R. St. J. Macdonald & John P. Humphrey, eds., *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworths, 1979) 137, at 147.

⁸⁶ For diluted approaches, see *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.); *Irwin Toy v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.); *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2004] S.C.J. No. 61, 2004 SCC 66 (S.C.C.); *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.), Sopinka J.; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.), La Forest J., dissenting; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 (S.C.C.), Gonthier J., dissenting.

⁸⁷ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 63 (S.C.C.).

compensated by the extent to which the competing principle is realized. Accordingly, the subject matter of justification is the rightful relationship between constitutional principles. In contrast, the *Frank* dissent insists that the specification of the right constitutes an infringement only if it is unjustified. This means that the justification analysis proceeds on the basis that the constitutional right has merely been defined or shaped rather than infringed or impaired.⁸⁸ Since the constitutional right remains intact, it is not the case that the law that limits it is presumptively unconstitutional and that this presumption can be rebutted only if the state provides “special justification”.⁸⁹ What the *Frank* dissenters call justification consists in the admonishment that courts “afford due respect to Parliament’s policy-making expertise and to the full range of its law-making capacity”.⁹⁰

While the dissent employs the term “pressing and substantial objective”,⁹¹ no reference is made to the idea that certain kinds of considerations are capable of denying a right but incapable of justifiably limiting one. The dissent explains that statutes that limit rights need not target “an identifiable ‘problem’ or ‘mischief’”.⁹² Further, the dissent states that it is “undeniable” that “Parliament can constitutionally legislate in pursuit of, or in response to, considerations of political morality or philosophy”.⁹³ Similarly, Parliament “can legislate in pursuit of normative conceptions of what the Canadian political community is, and how it can best be protected and made to flourish”.⁹⁴ Just as the dissent imposes no constraints on the kinds of moral or philosophic considerations that might be invoked to limit a right, so too it imposes no constraints on what counts as normative or conducive to flourishing. The same point applies to the dissent’s claim that the objective of legislative authority is the common good, conceived of as “a moral choice made in response to reasons”.⁹⁵ No limits on the kinds of moral claims or reasons are introduced.

The *Frank* dissent’s understanding of the pressing and substantial objective requirement is worrying. Consider its similarity to the dissent issued by Belzil J.A. of the Alberta Court of Appeal in *Big M*. Having eschewed a purposive interpretation of section 2(a) of the Charter, he denied that the *Lord’s Day Act* infringed

⁸⁸ *Frank*, at paras. 113, 120, 122.

⁸⁹ Tom Hickman, “Negotiable Rights, What Rights?”, Book Review of *The Negotiable Constitution: On the Limitation of Rights* by Grégoire C.N. Webber, (2012) 75(3) Mod. L. Rev. 437, at 447.

⁹⁰ *Frank*, at para. 126.

⁹¹ *Frank*, at paras. 127, 138-139, 147, 151, 158.

⁹² *Frank*, at para. 139.

⁹³ *Frank*, at para. 126.

⁹⁴ *Frank*, at para. 139.

⁹⁵ *Frank*, at para. 146, citing Richard Ekins, “Legislation as Reasoned Action” in Grégoire Webber *et al.*, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018) 86, at 99.

freedom of religion. Turning to the legislative objective, he recognized that the legislation was the product of “pressure from religious groups”, but maintained that its objective was to recognize “the *moral value* of a day of rest. That [the civil authority] should have selected the day of the week regarded as holy by the great majority of Canadians is not inconsistent with the basic principles of democracy.”⁹⁶ These conclusions resonate with the *Frank* dissent’s framework. On the one hand, the *Lord’s Day Act* would be regarded as a democratic choice specifying the limit of (rather than infringing) freedom of religion. On the other, the legislative objective would be regarded not as denying the right, but as pursuing a moral or normative objective relevant to notions of communal flourishing. Of course, I do not claim that the *Frank* dissenters regard the *Lord’s Day Act* as constitutional. However, what is at issue is not their personal views but the ramifications of the framework that they defend. To avoid Belzil J.A.’s conclusion, the *Frank* dissent would have to commit itself to employing purposive interpretation and identifying legislative objectives that are not susceptible to justification.⁹⁷

The *Frank* dissent’s understanding of the legislative ends for which rights may be limited has ramifications for the ensuing analysis of legislative means. If the ends for which rights may be limited are open-ended, then rational connection considers not whether the means advance a competing constitutional principle, but whether they advance whatever objective underwrites the limitation. The minimal impairment requirement too is transformed in the hands of the dissent. With respect to minimal impairment, *Oakes* asks whether there is a means of achieving the pressing and substantial objective that is less injurious of the Charter right.⁹⁸ Because the dissent’s section 1 analysis proceeds on the basis that a right has not been infringed, the question of whether there is a less injurious way of realizing the objective cannot arise. Of course, one could still ask whether the right could be *limited* to a lesser degree while still realizing the objective. But, as we have seen, the dissent holds that the question of what the scope of a broadly formulated right encompasses is determined by legislative policy rather than purposive interpretation. If the scope of section 3 of the Charter is determined in this way, the right would be equally served by legislation that denies the voting eligibility of certain adult citizens as by legislation that recognizes the eligibility of all. Thus, the dissent concludes that the residency requirement fell “within the range of reasonable options that were open to Parliament” and insists that courts must not “second-guess” Parliamentary exercises

⁹⁶ *R. v. Big M Drug Mart Ltd.*, [1983] A.J. No. 766, 5 D.L.R. (4th) 121, at para. 118 (Alta. C.A.) [emphasis added].

⁹⁷ See, for example, *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at para. 115 (S.C.C.), in which Iacobucci J. held, for a unanimous Court, that “it is difficult to accept” that a discriminatory distinction could be justified by alluding to “‘moral’ considerations that likely informed the legislature’s choice”.

⁹⁸ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 70 (S.C.C.).

in line-drawing.⁹⁹

In the final stage of its section 1 analysis, the dissent engages in balancing. In *Oakes*, balancing concerns the relationship between constitutional principles that cannot be jointly realized undiminished. The crucial feature of the dissent's balancing analysis is not the weights that it attributes to competing constitutional principles, but the absence of constitutional principles. On the one hand, as we have seen, the residency requirement forfeits nothing of constitutional value. While the requirement prevents certain citizens from voting, it does not infringe their right to vote. On the other, the right may be limited on the basis of "policy objectives"¹⁰⁰ that are philosophical, normative, moral or tied to notions of communal flourishing. Having emptied the justification analysis of all constitutional content, the dissent insists that deference is appropriate: "[W]e must exercise caution to avoid usurping Parliament's policy-making function."¹⁰¹

The dissent's normative claim is that its approach alone takes rights seriously by denying that the infringement of a right may be justified. Far from enhancing rights-protection, the dissent's proposal drastically diminishes it. Rights-protection is not enhanced by rendering rights immune from infringement if the scope of a right is the product of policy choices. In turn, the insistence that such choices must be justified does not enhance rights-protection if justification proceeds on the basis that the right has merely been limited (as opposed to infringed) and that limit is to be regarded as a policy choice to which courts must defer. On the framework that the *Frank* dissent elaborates, persons have access to judicial review to enforce their rights, but their rights are largely bereft of constitutional standards for judges to enforce. In this strange constitutional world, the rhetoric of constitutional rights persists, but protection from legislative bodies evaporates.

V. CONCLUSION

The central problem in the *Frank* dissent can be explicated in the terms of a section 1 analysis. The dissent's objective of introducing a framework that is both faithful to constitutional text and committed to clarifying our understanding of how Charter rights protect persons from state power is pressing and substantial. However, the framework that the dissent elaborates is not rationally connected to this objective. The proposal is not faithful to constitutional text because its inconclusive claims about section 1 commit it to ignoring text found in section 24. As for the normative argument, the proposal fails to enhance rights-protection because it conceives of the boundary of rights as reflecting policy choices to which courts must defer rather than constitutional standards that courts must enforce. Within such a framework, rights may not be infringed, but they offer their bearers no more protection than legislative bodies happen to confer. Far from enhancing

⁹⁹ *Frank*, at para. 172.

¹⁰⁰ *Frank*, at para. 141.

¹⁰¹ *Frank*, at para. 159.

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rights-protection, the dissent's proposal would resurrect the very problem that the entrenchment of the Charter was designed to address.