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Aller au sommaire du numéro

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Résumé de l'article

Le constitutionnalisme « non écrit » ou de « common law » ne date pas d'hier au Canada. À ce jour, la littérature académique s'est concentrée sur la question de savoir si et quand il est approprié pour les cours d'invoquer des principes constitutionnels non écrits. Moins d'attention a cependant été accordée à la façon dont ces principes peuvent influencer la prise de décision politique. Dans cet article, nous suggérons que de se concentrer sur les circonstances dans lesquelles ces principes opèrent de manière particulièrement visible et interventionniste — pour annuler une loi ou invalider une action gouvernementale — met l'accent sur leurs applications moins importantes, bien que plus spectaculaires. Nous soutenons que c'est dans l'application au quotidien de ces principes par les pouvoirs exécutif et législatif que les principes constitutionnels non écrits performent leur rôle le plus fondamental.

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Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making

Vanessa A. MacDonnell[*]

"Unwritten" or "common law" constitutionalism has a long history in Canada. To date, the scholarship has tended to focus on the question of when, if ever, it is appropriate for courts to invoke unwritten constitutional principles. Less attention has been paid to how these principles shape political decision-making. In this paper, I suggest that focusing on the situations in which unwritten constitutional principles operate at their most visible and interventionist—to provide a warrant for courts to strike down laws or invalidate government action—emphasizes their less important, if more dramatic, applications. Rather, it is in the day-to-day application of these principles by the executive and the legislature that unwritten constitutional principles perform their most important role.

Le constitutionnalisme « non écrit » ou de « common law » ne date pas d'hier au Canada. À ce jour, la littérature académique s'est concentrée sur la question de savoir si et quand il est approprié pour les cours d'invoquer des principes constitutionnels non écrits. Moins d'attention a cependant été accordée à la façon dont ces principes peuvent influencer la prise de décision politique. Dans cet article, nous suggérons que de se concentrer sur les circonstances dans lesquelles ces principes opèrent de manière particulièrement visible et interventionniste — pour annuler une loi ou invalider une action gouvernementale — met l'accent sur leurs applications moins importantes, bien que plus spectaculaires. Nous soutenons que c'est dans l'application au quotidien de ces principes par les pouvoirs exécutif et législatif que les principes constitutionnels non écrits performent leur rôle le plus fondamental.

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Introduction

"Unwritten" or "common law" constitutionalism has a long history in Canada.[1] The *British North America Act*, enacted in 1867, proclaimed that Canada was to have a "Constitution similar in Principle to that of the United Kingdom".[2] Then, as now, the UK constitution was primarily an unwritten one.[3] Its legal (as distinct from political) rules were for the most part articulated by judges following the common law method.[4] Since that time, the unwritten constitution has subsisted alongside the written one in Canada, sometimes assisting in its interpretation, and sometimes playing a more direct role.[5] In the 1959 decision of *Roncarelli v. Duplessis*,[6] for example, a majority of the Supreme Court of Canada concluded that, in directing the manager of the Quebec Liquor Commission not to renew Frank Roncarelli's liquor licence on the ground that he had posted bond for Jehovah's Witnesses, Quebec Premier and Attorney General Maurice Duplessis had violated the rule of law. Justice Rand referred to the rule of law—a principle not then articulated in the constitutional text—as a "fundamental postulate of our constitutional structure."[7] The ripples of this decision were felt throughout the legal system.[8]

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1 See Mark D Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51:2 UTLJ 91 at 91–95 [Walters, "*Lex Non Scripta*"]; The Right Honourable Beverley McLachlin, "Unwritten Constitutional Principles: What Is Going On?" (Lord Cooke of Thorndon Lecture delivered at the Victoria University of Wellington Law School, 1 December 2005), (2006) New Zealand J Public & Intl L 147 at 149–50. By "Canada" I mean the Dominion of Canada from 1867 onward. By "common law constitution" I mean legal rules promulgated by courts rather than legislatures which are treated as being constitutional in nature. Constitutional conventions, while part of the constitution, are not part of the common law constitution.

2 Now the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See Warren J Newman, "Writing the Unwritten Constitution: Some Introductory Remarks" in Richard Albert, Kate Glover Berger, Michael Pal & Wade Wright, eds, *Rewriting the Canadian Constitution* [forthcoming] [Newman, "Unwritten Constitution"].

3 See Newman, "Unwritten Constitution", *supra* note 2.

4 See generally Mark D Walters, "The Unwritten Constitution as a Legal Concept" in David Dyzenhaus & Malcolm Thorburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 33 [Walters, "Legal Concept"].

5 See Mark D Walters, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008) 245 [Walters, "Unwritten Constitutionalism"]; Jula Hughes, Vanessa MacDonnell & Karen Pearlston, "Equality & Incrementalism: The Role of Common Law Reasoning in Constitutional Rights Cases" (2014) 44:3 Ottawa L Rev 467.

6 [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli*].

7 *Ibid* at 142. For a more detailed account, see Geneviève Cartier, "L'héritage de l'affaire *Roncarelli c. Duplessis* 1959–2009" (2010) 55:3 McGill LJ 375.

8 See Cartier, *supra* note 7 at 375.

The enactment of the *Canadian Bill of Rights* in 1960 and the *Canadian Charter of Rights and Freedoms* in 1982 created uncertainty about the continued significance of unwritten constitutionalism. The "implied bill of rights" cases,[9] in which some members of the Court formally ruled on federalism grounds but seemed to give effect to individual rights protected by the common law,[10] were now of little practical consequence given that the rights they secured were codified.[11] Indeed, the nature of the 1982 reforms seemed to suggest that many of the legal aspects of Canada's unwritten constitution had assumed a written form.

Since the early 1980s, however, the Supreme Court has carved out a jurisprudence of "unwritten constitutional principles." In a series of decisions dealing with constitutional questions in contexts ranging from patriation[12] to secession,[13] the Court has recognized several unwritten principles as constitutional, including parliamentary sovereignty,[14] federalism,[15] democracy,[16] constitutionalism,[17] the rule of law,[18] the separation of powers,[19]

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9 See *Reference re Alberta Statutes*, [1938] SCR 100, 2 DLR 81; *Saumur v Quebec (City of)*, [1953] 2 SCR 299, 45 DLR (2d) 627; *Switzman v Elbling*, [1957] SCR 285, 7 DLR (2d) 337.

10 See McLachlin, *supra* note 1 at 152–53.

11 See Walters, "*Lex Non Scripta*", *supra* note 1 at 99, n 36; David Mullan, "The Role for Underlying Constitutional Principles in a Bill of Rights World" (2004) 1 NZLR 9. But see Roger Masterman & Se-shauna Wheatle, "A Common Law Resurgence in Rights Protection?" (2015) 25:1 Eur HRL Rev 57. See also *Ontario (AG) v OPSEU*, [1987] 2 SCR 2 at 56–57, 41 DLR (4th) 1 [*OPSEU*].

12 See *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753, (*sub nom Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)*) 125 DLR (3d) 1 [*Patriation Reference* cited to SCR].

13 See *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference* cited to SCR].

14 See *Babcock v Canada (AG)*, 2002 SCC 57 [*Babcock*]. See generally Vincent Kazmierski, "Draconian but Not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada" (2010) 41:2 Ottawa L Rev 245.

15 *Secession Reference*, *supra* note 13.

16 See *ibid*.

17 See *ibid*.

18 See *Roncarelli*, *supra* note 6; *Patriation Reference*, *supra* note 12; *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1 [*Manitoba Language Reference* cited to SCR]; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 [*Imperial Tobacco*]; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*].

19 See *Babcock*, *supra* note 14; *Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3, 150 DLR (4th) 577 [*Judges Remuneration Reference* cited to SCR]*; Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66.

judicial independence,[20] the protection of minorities,[21] parliamentary privilege,[22] the honour of the Crown,[23] the duty to consult,[24] and the doctrine of paramountcy.[25] The Supreme Court has explained that unwritten constitutional principles find their source in "the general object and purpose of the Constitution,"[26] the preambles of the *Constitution Act, 1867* and *1982*,[27] the operative provisions of the Constitution,[28] the Constitution's architecture,[29] the United Kingdom's and Canada's constitutional history,[30] the common law,[31] practice,[32] and logic.[33] Unwritten constitutional principles

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20 See *Judges Remuneration Reference*, *supra* note 19; *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13; *Provincial Court Judges' Association of New Brunswick v New Brunswick (Minister of Justice)*, 2005 SCC 44.

21 See *Secession Reference*, *supra* note 13.

22 See *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 100 DLR (4th) 212 [*New Brunswick Broadcasting* cited to SCR].

23 See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*]; Richard Stacey, "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?" (2018) 68:3 UTLJ 405; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 42 (Karakatsanis J) [*Mikisew Cree*]; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42.

24 See *Haida Nation*, *supra* note 23; Stacey, *supra* note 23.

25 See *Judges Remuneration Reference*, *supra* note 19 at para 98; Warren J Newman, "'Grand Entrance Hall,' Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada" (2001) 14 SCLR (2d) 197 at 216 [Newman, "Grand Entrance Hall"]. Scholars have also proposed other principles. On public service neutrality, see *ibid*; Dale Gibson, "Constitutional Vibes: Reflections on the *Secession Reference* and the Unwritten Constitution" (1999–2000) 11 NJCL 49 at 62. On the inherent jurisdiction of the superior courts, interprovincial comity, the economic union, the integrity of the constitution, and the integrity of the nation-state, see Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1/2 Can B Rev 67. On the independence of the bar, see Alice Woolley, "Lawyers and the Rule of Law: Independence of the Bar, the Canadian Constitution and the Law Governing Lawyers" (2015) 34:1 NJCL 49; Roy Millen, "The Independence of the Bar: An Unwritten Constitutional Principle" (2005) 84:1/2 Can B Rev 107. And on "important common law and administrative law rules relating variously to the Crown prerogative, due process, natural justice and procedural fairness; and the basic precepts and underlying tenets of most of the provisions now entrenched in the Charter of Rights itself," see Newman, "Grand Entrance Hall," *supra* note 25 at 216.

26 *Manitoba Language Reference*, *supra* note 18 at 751.

27 See *ibid* at 750; *Judges Remuneration Reference*, *supra* note 19; *New Brunswick Broadcasting*, *supra* note 22.

28 See *Judges Remuneration Reference*, *supra* note 19; *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 [*BC Trial Lawyers*].

29 See *Secession Reference*, *supra* note 13; *Judges Remuneration Reference*, *supra* note 19.

30 See *New Brunswick Broadcasting*, *supra* note 22.

31 See *ibid*.

32 See *ibid*.

33 See *ibid*.

are the foundational principles "implicit in the very nature of a Constitution."[34] As the Court put it in the *Secession Reference*, in relation to the democracy principle, these principles are "a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that [they were] not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers."[35]

To date, the scholarship has tended to focus on the question of when, if ever, it is appropriate for courts to invoke unwritten constitutional principles. Less attention has been paid to how these principles shape political decision-making.[36] In this paper, I suggest that focusing on the situations in which unwritten constitutional principles operate at their most visible and interventionist—to provide a warrant for courts to strike down laws or invalidate government action—emphasizes their less important, if more dramatic, applications. Rather, it is in the day-to-day application of these principles by the executive and the legislature that unwritten constitutional principles perform their most important role.

In Part I of this paper, I explain that scholars' approach to unwritten constitutional principles has been distinctly judicial in its focus. Part II explains that important new insights about these principles emerge when they are considered from the standpoint of the executive and the legislature. In particular, I emphasize the important role that unwritten constitutional principles play in setting minimum ethical standards for political actors.

I. The Focus on Courts

Unwritten constitutional principles form part of Canada's unwritten constitution. Unlike constitutional conventions, which are also part of the unwritten constitution, unwritten constitutional principles are *legal principles* that have been articulated by courts.[37] They are generally understood to be justiciable, though courts have occasionally concluded that they should limit themselves to recognizing these principles as opposed to enforcing them.[38]

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34 *Manitoba Language Reference*, *supra* note 18 at 750.

35 *Secession Reference*, *supra* note 13 at para 62.

36 For a notably less court-centric approach in the Australian context, see Gabrielle J Appleby & Anna Olijnyk, "Executive Policy Development and Constitutional Norms: Practice and Perceptions", Intl J Constitutional L [forthcoming in 2020].

37 See *Secession Reference*, *supra* note 13.

38 See *ibid* at paras 98–103; *New Brunswick Broadcasting*, *supra* note 22.

It is perhaps unsurprising, then, that scholars have tended to focus their attention on how unwritten constitutional principles are applied by courts. When scholars train their gaze on the courts, they tend to conclude that unwritten constitutional principles are a marginal phenomenon. When invoked successfully in litigation, they can produce dramatic results, but such instances are rare. In the *Manitoba Language Reference*, for example, the Supreme Court concluded that most of Manitoba's laws were of no force or effect because they did not comply with section 23 of the *Manitoba Act, 1870*,[39] the constitutional document that secured Manitoba's entry into Confederation. Section 23 requires that all statutes be printed in both French and English. Most of Manitoba's laws were written only in English. Rather than strike down the laws, which would have had significant and deeply problematic consequences, the Court relied on the unwritten principle of the rule of law to conclude that the statutes should continue in force until they could be brought into compliance with section 23.[40]

In the *Judges Remuneration Reference*, the Supreme Court was asked to provide an opinion on whether the Constitution permitted the executive to decrease the income of provincial court judges.[41] The majority explained that judicial independence is a core constitutional principle that is reflected in several provisions of the Constitution, including sections 96 to 100 of the *Constitution Act, 1867*, which establish and secure the independence of the superior courts,[42] and subsection 11(d) of the *Charter*, which confers a right to a trial by an independent tribunal on accused persons.[43] Although the majority formally decided the *Reference* on the basis of subsection 11(d) of the *Charter*, Chief Justice Lamer, writing for the majority, explained that "judicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*."[44]

The majority went on to conclude that the salaries of judges could be decreased, but that judicial independence required that any such measure be implemented only after salary recommendations had been sought from an independent commission. Chief Justice Lamer provided detailed guidelines on how such a commission was constitutionally required to operate,

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39 33 Vict, c 3, reprinted in RSC 1970, Appendix II, No 8.

40 See *Manitoba Language Reference*, *supra* note 18. See generally Warren J Newman, "The Rule of Law, the Separation of Powers and Judicial Independence in Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 1031; Luc B Tremblay, "Les principes constitutionnels non écrits" (2012) 17:1 Rev Const Stud 15 at 18–23.

41 See *Judges Remuneration Reference*, *supra* note 19 at para 1.

42 See *ibid* at para 85.

43 See *ibid* at para 86.

44 *Ibid* at para 83 [emphasis in original].

including its composition, the frequency with which it was required to convene, and how the government should treat its recommendations. The majority also concluded that the judiciary's independence would be compromised if it were to negotiate directly with the executive over salaries, and that there was a floor below which judicial salaries should not fall in order to preserve independence.[45] This decision has proven to be very controversial, given the inevitable perception of self-dealing.[46]

In *Lalonde v. Ontario (Commission de restructuration des services de santé)*,[47] the Ontario Court of Appeal concluded that the province's decision to close the only francophone hospital in Ottawa was inconsistent with the unwritten principle of the protection of minorities. It quashed the decision. And in the *Secession Reference*, the Court concluded that four unwritten constitutional principles taken together—federalism, democracy, constitutionalism and the rule of law, and the protection of minorities—precluded unilateral secession and mandated certain ground rules for future negotiations in relation to secession.[48]

While these cases demonstrate that unwritten constitutional principles have occasionally had a significant impact, claimants have more often been unsuccessful in advancing legal arguments grounded in unwritten constitutional principles, or else the courts have relied on competing principles to preserve the status quo. In *Babcock*, the claimant invoked the principles of judicial independence, the rule of law, and the separation of powers to challenge section 39 of the *Canada Evidence Act*,[49] which permits the executive to withhold cabinet confidences from disclosure in ongoing litigation. The majority explained that the principles raised by the applicants "must be balanced against the principle of Parliamentary sovereignty."[50] It concluded that section 39 did not interfere with judicial independence, the rule of law, or the separation of powers, and stated that "[i]t is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with

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45 See *ibid* at para 287.

46 See Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389 at 420–24 [Leclair, "Unfathomable"]. 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 at 460–61, 468, n 53 and accompanying text.

47 [2001] 56 OR (3d) 505, 208 DLR (4th) 577.

48 See *Secession Reference*, *supra* note 13 at paras 88–104. See generally Jean Leclair, "Constitutional Principles in the *Secession Reference*" in Oliver, Macklem & Des Rosiers, *supra* note 40, 1009 [Leclair, "Constitutional Principles"]; Tremblay, *supra* note 40 at 16–18.

49 RSC 1985, c C-5, s 39(1).

50 *Babcock*, *supra* note 14 at para 55.

the relationship between the courts and the other branches of government."[51]

In *British Columbia v. Imperial Tobacco*, the claimants challenged legislation enacted to assist the province in recuperating health care costs associated with tobacco consumption.[52] The legislation operated retroactively and dispensed with many of the elements of proof typically associated with civil claims.[53] The applicants challenged the legislation on the basis that it infringed the principles of judicial independence and the rule of law. The Supreme Court summarily dismissed the argument that judicial independence was threatened by legislation that required judges to apply rules of evidence other than those that typically apply in private actions.[54] On the rule of law issue, the Court stated that "it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content."[55] It explained that apart from the basic manner and form requirements imposed on legislatures, the rule of law is directed at the executive and the judiciary.[56] The Court resisted the invitation to interpret the rule of law more expansively, explaining that to do so would cast the legitimacy of judicial review into doubt.[57] Moreover, the competing constitutional principles of democracy and constitutionalism weighed against courts engaging in a robust review of legislation for compliance with the rule of law. A similar effort to invoke the rule of law to challenge aspects of the *Immigration and Refugee Protection Act*[58] in *Charkaoui* was also met with skepticism.[59]

In *Christie*, a lawyer challenged a provincial tax levied on legal fees that made it more difficult for low-income people to access legal services.[60] Christie claimed that the fees violated the right to legal representation, which was either a component of the rule of law or was grounded in the constitutional principle of access to justice. The Court unanimously rejected both claims, explaining that neither the rule of law nor the principle of access to courts conferred "a broad general right to legal counsel."[61]

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51 *Ibid* at para 57. See generally Kazmierski, *supra* note 14.

52 See *Imperial Tobacco*, *supra* note 18.

53 See *ibid* at paras 9–14.

54 See *ibid* at paras 53–54.

55 *Ibid* at para 59.

56 See *ibid* at para 60.

57 See *ibid* at para 64.

58 SC 2001, c 27.

59 See *supra* note 18 at paras 135–37.

60 *British Columbia (AG) v Christie*, 2007 SCC 21.

61 *Ibid* at para 23.

It came as somewhat of a surprise, then, when a majority of the Supreme Court concluded in the 2014 *BC Trial Lawyers* case that hearing fees levied on litigants infringed the core jurisdiction of section 96 (superior) courts by erecting barriers to access to justice.[62] Although the majority noted that there was no need to look beyond section 96 to resolve the issues before the Court, it nonetheless went on to conclude that these fees were problematic from the standpoint of the unwritten constitutional principle of the rule of law, given that "access to the courts is essential" to that principle.[63] A constitutionally sound hearing fee regime would not impose "undue hardship"[64] on individuals. The Court distinguished *Christie* on the basis that the claimants in *BC Trial Lawyers* had established a barrier to accessing the courts, whereas "on the evidence and arguments adduced," the claimant in *Christie* had not.[65]

In the 2015 *Firearms Reference*, the Government of Quebec argued that the unwritten constitutional principle of co-operative federalism prohibited the federal government from destroying data contained in the federal firearms registry.[66] A majority of the Court rejected this argument, explaining that "[t]he principle of cooperative federalism does not constrain federal legislative competence in this case"[67] and insisting that the division of powers set out in the written constitution was controlling.[68]

In *Mikisew Cree*, the claimants argued that the Crown had a duty to consult prior to enacting legislation that could have an impact on Aboriginal and treaty rights.[69] The duty to consult might be characterized as an unwritten constitutional principle, though the Court has not said this explicitly.[70] The Court's narrow holding was that the Federal Court lacked

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62 See *BC Trial Lawyers*, *supra* note 28; Hart Schwartz & Anthony Robert Sangiuliano, "The Pragmatic Limits of Access to Justice" (2016) 76 SCLR (2d) 193 at 196–97.

63 See *BC Trial Lawyers*, *supra* note 28 at para 38.

64 See *ibid* at para 46.

65 See *ibid* at para 41.

66 See *Quebec (AG) v Canada (AG)*, 2015 SCC 14 [*Firearms Reference*]. See also David Schneiderman, "Unwritten Constitutional Principles in Canada: Genuine or Strategic?" in Rosalind Dixon & Adrienne Stone, eds, *The Invisible Constitution in Comparative Perspective* (Cambridge, UK: Cambridge University Press, 2018) 517.

67 *Firearms Reference*, *supra* note 66 at para 3.

68 See *ibid* at paras 18–19.

69 See *Mikisew Cree*, *supra* note 23.

70 See *Haida Nation*, *supra* note 23; Stacey, *supra* note 23. Further work would be required to establish this point definitively, particularly since the duty to consult differs in important ways from other unwritten constitutional principles in terms of its source, its justiciability, and other factors. At the very least, the honour of the Crown, from which the duty derives, is an unwritten principle (see *supra* note 23).

jurisdiction to hear the case. In *obiter*, however, all nine judges dealt with the issue of whether the Crown owed a duty to consult. The majority concluded that the preparation of legislation is legislative rather than executive in character, and that the unwritten principles of parliamentary sovereignty, parliamentary privilege, and the separation of powers prevented the recognition of a duty to consult in this context.

The Supreme Court has explained that unwritten constitutional principles fulfill various functions. In analyzing these functions, scholars have tended to emphasize the significance of unwritten principles *for the work of courts*, even in cases where the court has stated explicitly that unwritten principles are subject to political enforcement. While a great deal has been written about the significance of the *Secession Reference* for the Quebec secession movement, constitutional law experts have tended to zero in on the paragraph in the *Reference* that says that unwritten constitutional principles have "full legal force."[71] This paragraph indicates that unwritten principles can be relied upon by courts to justify the invalidation of legislation.[72] In the *Reference*, however, the Supreme Court concluded that its role was exhausted once it had set out the constitutional rules governing secession. In other words, political actors would be responsible for working out how any subsequent negotiation would be structured.

Sometimes, unwritten constitutional principles operate to "fill out gaps" in the written constitution.[73] While it is possible to imagine political actors applying unwritten principles in this way, scholars have taken particular interest in how gap-filling is used as a tool of judicial reasoning.[74] When courts encounter a gap in the written constitution that undermines its overall coherence—as the Supreme Court did in the *Judges Remuneration Reference*—they are justified in filling that gap. How they do so, of course, is another matter.

The courts have also relied on unwritten constitutional principles to interpret both the written constitution and ordinary statutes. Using unwritten principles as aids to interpretation is generally regarded as a less contentious use of these principles; again, however, the focus is on interpretation by courts. In the *Judges Remuneration Reference*, the Court made use of the unwritten principle of judicial independence to first connect, and then round out, the provisions of the written constitution that speak in

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71 *Secession Reference*, *supra* note 13 at para 54, citing *Patriation Reference*, *supra* note 12 at 845. See also Walters, "*Lex Non Scripta*", *supra* note 1 at 99; Elliot, *supra* note 25 at 93–94.

72 See *Secession Reference*, *supra* note 13 at para 54. See also *Manitoba Language Reference*, *supra* note 18 at 752–53; *Patriation Reference*, *supra* note 12 at 844–45.

73 See *Judges Remuneration Reference*, *supra* note 19 at para 95.

74 See generally Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019) on the importance of judicial tools and techniques.

some way to judicial independence. In the 2015 *Firearms Reference*, four justices concluded in dissent that unwritten constitutional principles "infuse the analysis and interpretation of the division of powers."[75]

Consider also how the principle of democracy operated in *Opitz v. Wrzesnewskyj*.[76] There, a majority of the Supreme Court held that the failure to comply with the *Canada Elections Act*'s formal requirements for registering to vote, while an "irregularity" within the meaning of the Act, did not justify annulling the election results at issue. While the case is not a constitutional one, the majority nonetheless interpreted the *Elections Act* against the backdrop of the *Charter* right to vote and "competing democratic values."[77] Michael Pal explains that the heart of the dispute between the majority and the dissent was which approach—a formal or a functional, "substantive" approach—best advanced democratic values.[78]

Unwritten principles have also been used to describe structural features of the Constitution.[79] Thus, in the *Judges Remuneration Reference*, the Court explained that its "task" was "to ensure compliance" with the separation of powers, "one of the structural requirements of the Canadian Constitution."[80] And in the *Secession Reference*, the Court explained that "[o]ur Constitution has an internal architecture," of which unwritten constitutional principles are a part.[81]

If the focus is on what courts have said about and done with unwritten constitutional principles, then the overall impact of those principles appears to be small. Unwritten principles have rarely proven determinative on their own in constitutional litigation. They have occasionally assisted in the interpretation and application of the written constitution and other legislation. They are also sometimes used to describe structural features of

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75 *Supra* note 66 at para 144.

76 2012 SCC 55 [*Opitz*]. I am grateful to Michael Pal for pointing out this example to me.

77 *Ibid* at para 26. See Michael Pal, "Canadian Election Administration on Trial: 'Robocalls', *Opitz* and Disputed Elections in the Courts" (2017) 28:2 King's LJ 324 at 325–28, 333 [Pal, "Election Administration"].

78 See Pal, "Election Administration", *supra* note 77 at 333.

79 See Elliot, *supra* note 25; Newman, "Grand Entrance Hall," *supra* note 25 at 204.

80 *Judges Remuneration Reference*, *supra* note 19 at para 140 [internal quotation marks omitted].

81 *Secession Reference*, *supra* note 13 at para 50. See also Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*" (2014) 67 SCLR (2d) 221 at 222; Emmett Macfarlane, "The Uncertain Future of Senate Reform" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 228 at 229.

the Constitution. But they have not emerged as robust grounds for challenging legislation or government action.

In their capacity as legal principles enforced by courts, moreover, unwritten constitutional principles are vulnerable to critique. The academic critique has centred on their legitimacy,[82] their source or sources, the lack of certainty associated with the application of these principles,[83] and the way the courts address (or do not address) conflicts between competing principles.[84]

The primary critique of unwritten constitutional principles is that they lack legitimacy.[85] "The idea of unwritten constitutionalism is controversial," Mark Walters explains, "especially where there is a written constitution."[86] Grant Huscroft frames the objection in the following terms:

> Everyone agrees that the text of written constitutions reflect basic principles—whether described as unwritten or underlying—and stated at a high enough level of abstraction there is sure to be considerable agreement about the nature of those principles. The significant question is: are those principles imbued with the full authority of the written constitution—in particular, with the written constitution's supreme-law status—such that they may be invoked to strike down legislation?[87]

Some scholars who object to unwritten constitutional principles on legitimacy grounds view law in positivist terms.[88] For these scholars, invoking unwritten laws to invalidate democratically enacted legislation is regarded as particularly problematic.[89] Conversely, Sujit Choudhry and Robert Howse have argued that the positivist approach to Canadian constitutional law is at odds with the widely accepted view that certain aspects of the Canadian Constitution, including parliamentary privilege and prerogative

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82 See Leclair, "Unfathomable", *supra* note 46 at 427–40.

83 See *ibid* at 400.

84 See *ibid* at 417–26.

85 See *ibid* at 426–40; Mullan, *supra* note 11 at 19; Grant Huscroft, "Romance, Realism, and the Legitimacy of Implied Rights" (2011) 30:1 UQLJ 35 at 47; Walters, "Unwritten Constitutionalism", *supra* note 5 at 247; Sujit Choudhry & Robert Howse, "Constitutional Theory and The *Quebec Secession Reference*" (2000) 13:2 Can JL & Jur 143 at 156.

86 Walters, "Unwritten Constitutionalism", *supra* note 5 at 247.

87 See Huscroft, *supra* note 85 at 47.

88 For a description of the link between critiques of unwritten principles and a commitment to positivism, see Walters, "Unwritten Constitutionalism", *supra* note 5 at 257; Choudhry & Howse, *supra* note 85 at 152; Elliot, *supra* note 25 at 87–95.

89 See Walters, "Unwritten Constitutionalism", *supra* note 5 at 258; Huscroft, *supra* note 85 at 47.

powers, remain unwritten.[90] Similarly, Walters observes that there is a disconnect between the strongly textual approach of constitutional positivists and the common law elements of Canada's constitutional tradition.[91]

Some scholars take what might be described as an intermediate approach. Jean Leclair suggests that "the legitimacy of invoking unwritten constitutional principles will depend on the purpose they serve and on how courts use them."[92] In his view, there is some scope for courts to rely on unwritten constitutional principles, but they must do so in limited and predictable ways.[93] Leclair argues that the Supreme Court's jurisprudence on unwritten principles has achieved neither "coherence" nor "certainty."[94] He notes, for example, that the Court's approach has sometimes been to treat single principles, such as judicial independence, as virtual "trump[s]," without attempting to reconcile the competing constitutional principles at stake.[95] While the Supreme Court has spoken of the need to weigh principles in their proper context,[96] it has not always followed its own directive. In the *Judges Remuneration Reference*, for example, the Court did not refer to the principle of parliamentary sovereignty, much less balance it against the principle of judicial independence, in deciding that judicial remuneration must be the subject of recommendations by an independent commission.[97]

David Schneiderman's recent work on the "strategic" invocation of unwritten constitutional principles can also be understood as a form of legitimacy critique.[98] Schneiderman argues that when the Court has invoked unwritten constitutional principles, it has done so in "legally disingenuous" ways.[99] By this he means that the Court has used these principles to decide difficult cases, but without any intention that the principles should come to form a body of coherent rules that litigants can draw upon in future cases.[100] In other words, the principles articulated in the *Secession Reference* and other cases did not represent "novel legal developments"; instead,

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90 See Choudhry & Howse, *supra* note 85 at 152.

91 See Walters, "Unwritten Constitutionalism", *supra* note 5 at 258, 260–62.

92 See Leclair, "Unfathomable," *supra* note 46 at 431.

93 See *ibid*.

94 *Ibid* at 400–01, 433. See also Walters, "*Lex Non Scripta*", *supra* note 1 at 93.

95 See Leclair, "Unfathomable," *supra* note 46 at 421.

96 See *ibid* at 418.

97 See *ibid* at 418–21.

98 See Schneiderman, *supra* note 66.

99 *Ibid* at 519.

100 See *ibid*.

they were "strategic responses intended to get the Court out of a jam."[101] This is not a principled basis upon which to decide cases.

While some of the legitimacy critiques of unwritten constitutional principles are rooted in a positivist view of law, it is important to acknowledge the extent to which it is the application of these principles by the courts, rather than their unwrittenness, that is controversial. As I explain in the next section, the executive and the legislature are far less vulnerable to critique than courts when they rely on unwritten constitutional principles. While the unwritten nature of constitutional principles is not entirely without controversy, then, it is the compound effect of *courts* applying *unwritten* principles that generates so much of the anxiety over their use.

Another critique, which is conceptually related to the legitimacy critique, concerns the sources of unwritten constitutional principles.[102] Some of the Supreme Court's decisions have relied on the preambles of the *Constitution Act, 1867* and the *Constitution Act, 1982* as textual hooks for recognizing unwritten constitutional principles. The Court has interpreted the reference in the 1867 preamble to Canada's Constitution being "similar in Principle to that of the United Kingdom" as establishing certain features of English constitutionalism in Canada.[103] The reference to the rule of law in the *Constitution Act, 1982* has been used to shore up the Court's claim that the rule of law is an unwritten constitutional principle, the term "unwritten" being somewhat less apt here.[104]

The difficulty, Robin Elliot explains, is that these cases treat preambles as having a status they do not have in other contexts.[105] This approach does not provide a strong basis upon which to construct a jurisprudence of unwritten constitutional principles. On the contrary, it gives the impression that the Court is grasping for something in the constitutional text that will justify the recognition of these principles. The Court appears to acknowledge the weak basis of this reference to text in the *Secession Reference*, noting that

> [a]lthough these underlying principles are not explicitly made part of the Constitution by any written provision, *other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure

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101 *Ibid* at 524.

102 See Elliot, *supra* note 25 at 95.

103 See *New Brunswick Broadcasting*, *supra* note 22.

104 See *Manitoba Language Reference*, *supra* note 18. See also Walters, "Unwritten Constitutionalism", *supra* note 5 at 247.

105 See *supra* note 25 at 95.

> without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.[106]

Similar critiques also apply to the Supreme Court's decision to rely on the substantive provisions of the Constitution to ground unwritten constitutional principles, as it did in the *Judges Remuneration Reference*. Here, the question is what happens when the Court is released from the rigours of the analysis provided by individual sections of the Constitution and instead may strike down legislation based on its inconsistency with a far less defined unwritten constitutional principle.[107]

Now, some scholars are more comfortable with the Court's reliance on unwritten constitutional principles in constitutional adjudication. These scholars tend to emphasize the fact that unwritten principles are part of Canada's constitutional heritage.[108] While they may regard aspects of the Court's jurisprudence as problematic, inconsistent, or poorly or insufficiently reasoned, they still accept that these principles have a role to play in Canadian constitutional law.[109]

Walters rationalizes the role of unwritten principles in Canadian constitutional law by explaining that "the expressions 'written law' and 'unwritten law' ... are simply *metaphors* for two basic ideas about what law is—law-as-sovereign will and law-as-reason—both of which are essential for legitimate constitutional order."[110] Each type of law derives its authority and legitimacy from a distinct source. Written law is authoritative and legitimate because it was enacted through a democratic process—"what the Queen in Parliament enacts is law."[111] Unwritten law is authoritative and legitimate because it is the product of a specific form of reason and reasoning—the type of reason and reasoning that is characteristic of the common law method.[112]

Understood in this way, written and unwritten law are not merely distinct sources of law; they also signify different modes of legal analysis.[113] In answering constitutional questions, decision-makers must pay attention to

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106 *Secession Reference*, *supra* note 13 at para 51 [emphasis added].

107 See Leclair, "Unfathomable," *supra* note 46 at 431.

108 See Warren Newman, "Quelques réflexions sur la portée du principe constitutionnel de l'indépendance judiciaire au Canada," (2002–2003) 14 NJCL 319 at 320, 351–52 [Newman, "Indépendance judiciaire"]. See also *supra* notes 90–91.

109 See Newman, "Indépendance judiciaire", *supra* note 108 at 351–52; Leclair, "Unfathomable", *supra* note 46.

110 See Walters, "Unwritten Constitutionalism", *supra* note 5 at 248.

111 Vernon Bogdanor, *The New British Constitution* (Portland: Hart, 2009) at xii.

112 See Walters, "Unwritten Constitutionalism", *supra* note 5 at 273.

113 See *ibid* at 248.

written law. But text is only ever part of the matter. Constitutions are drafted at much too high a level of abstraction to provide straightforward answers to constitutional questions.[114] The reason supplied by the common law method is thus indispensable, whether the constitutional text has something to say about an issue or not.[115]

Occasionally, the written constitution is silent or speaks only partially to an issue of constitutional importance. The positivist might argue that a question can only be of constitutional importance if the written constitution has something to say about it. But the matter is not so clear-cut. As the Supreme Court explained in the *Secession Reference*, "[i]n order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government."[116] This means that to a certain degree, "formal unwritten constitutionalism is inevitable."[117] The picture that emerges, then, is of a body of constitutional law that is based in important respects on written law, but that is grounded in unwritten law and dependent upon common law reasoning for its continued development.[118]

In any event, the written constitution's democratic pedigree is often inflated. While the entrenchment of unwritten principles may cause the body of constitutional rules known as "the Constitution" to drift away from its textual moorings, this is not necessarily cause for concern.[119] While it is often suggested that "[w]ritten constitutions are made through 'reflection and choice' rather than 'accident and force,' " and that "those choices [must] be honoured,"[120] Walters shows that the reverse is often also true, "or [else] the choice made by one set of people amounted to force against another set of people."[121]

Walters also pushes back against the idea that unwritten principles are insufficiently precise. He argues that "[u]nwritten constitutionalism, if properly conceived in a common law jurisdiction, is not ... vague or abstract. Rather, it is all about identifying the practical legal implication of the

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[114] See *ibid* at 266–67. See also McLachlin, *supra* note 1 at 155–56.

[115] See Walters, "Unwritten Constitutionalism", *supra* note 5 at 260; McLachlin, *supra* note 1 at 155–56.

[116] *Secession Reference*, *supra* note 13 at para 32. See also Walters, "Unwritten Constitutionalism", *supra* note 5 at 265.

[117] See Walters, "Unwritten Constitutionalism", *supra* note 5 at 272.

[118] See generally Hughes, MacDonnell & Pearlston, *supra* note 5.

[119] Walters, "Unwritten Constitutionalism", *supra* note 5 at 273–74.

[120] *Ibid* at 273, citing Alexander Hamilton, "The Federalist No. 1" in Terence Ball, ed, *The Federalist with Letters of "Brutus"* (Cambridge, UK: Cambridge University Press, 2004) 1 at 1.

[121] Walters, "Unwritten Constitutionalism", supra note 5 at 273–74 [internal quotation marks omitted].

'spirit' of legality that pervades the forms of constitutionalism to which societies commit themselves."[122] In other words, it is about judges doing what they are accustomed to doing when they apply the common law.[123] While there may be deficiencies in the Supreme Court's jurisprudence on unwritten constitutional principles, the principles themselves are not beyond redemption. Moreover, there are notable examples of the Court engaging with these principles in appropriate and predictable ways, such as in the *Manitoba Language Reference*.

Finally, the scholarly focus on courts exists in some tension with how the courts themselves have described and made use of unwritten principles. A review of the case law suggests that unwritten principles may well be a marginal phenomenon *in courts* because a court's role is inherently limited in this context. Two trends in the Supreme Court's case law substantiate this conclusion: the trend toward partial justiciability and the use of unwritten principles as a shield rather than a sword.[124]

The Supreme Court has explained that unwritten constitutional principles, though initially recognized by courts, are not always fully justiciable. In the *Secession Reference*, for example, the Court set out the "constitutional framework within which political decisions may ultimately be made" in relation to secession,[125] but explained that the substance of those decisions would not be reviewable by the courts. "[T]he appropriate recourse in some circumstances," the Court explained, "lies through the workings of the political process rather than the courts."[126] The Court reached a similar conclusion in *New Brunswick Broadcasting*.[127] These limits on justiciability seem to originate in the Court's perception that certain decisions, such as the application of parliamentary privilege, are properly lodged with another branch of government. This was the case in the *Secession Reference* and is what led the federal government to enact the *Clarity Act*.[128]

An important but rarely discussed aspect of the recognition and application of unwritten constitutional principles is how those principles have been used as a shield rather than as a sword. In several notable instances, the Court has refused to give effect to a claim grounded in unwritten con-

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122 *Ibid* at 261.

123 See *ibid* at 273.

124 On the shield versus sword metaphor, see *Mikisew Cree*, *supra* note 23 at para 86, Abella J.

125 *Secession Reference*, *supra* note 13 at para 100.

126 *Ibid* at paras 98–103.

127 See *ibid* at para 102; *New Brunswick Broadcasting*, *supra* note 22.

128 SC 2000, c 26.

stitutional principles by invoking *another* unwritten principle or combination of principles. *Imperial Tobacco*[129] and *Mikisew Cree*[130] are two examples of this phenomenon. In these decisions, the Court relied on unwritten principles intended to protect the power of the political branches to reject claims based in unwritten principles that would have widened judicial supervision of executive action or the law-making process. When unwritten constitutional principles come into conflict, it is likely correct to say that these principles should be balanced, as Leclair suggests, or that the courts should be able to provide sound reasons why one principle must give way to the other, as Gabrielle Appleby suggests.[131] But the fact that the Court has repeatedly invoked democracy, parliamentary sovereignty, parliamentary privilege, and the separation of powers as shields is further evidence that courts view their role in the enforcement of unwritten constitutional law as minimal.

What emerges from this discussion is a mixed view of the impact and legitimacy of unwritten constitutional principles when they are applied by courts. Most of the unwritten constitutional principles articulated by the Court—the rule of law, democracy, federalism, and others—are hardly contentious as constitutional principles. No one would seriously dispute that the rule of law is a central commitment of Canada's Constitution. Rather, it is the application of unwritten principles by courts that tends to raise concerns. Occasionally, these principles have a very significant impact, as they did in the *Manitoba Language Reference*, the *Secession Reference*, and *Lalonde*. But such instances are rare.

Walters and others have made a compelling case for the view that unwritten constitutional principles have a legitimate foundation in common law reasoning. But for many of the reasons just described, their invocation by courts, particularly to invalidate legislation, is bound to be greeted with suspicion. Moreover, the outcome in many of the leading cases on unwritten principles simply cannot be reconciled with a common law approach to constitutionalism. In the *Secession Reference* and the *Judges Remuneration Reference*, for example, unwritten constitutional principles proved to be highly prescriptive, giving rise to detailed and previously unknown regimes governing secession and the remuneration of judges, respectively.

It should be apparent, however, that unwritten constitutional principles do not only exert influence through the courts. They do not lie dormant between major pieces of constitutional litigation. On the contrary, they

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129 *Supra* note 18.

130 *Supra* note 23 at para 86.

131 See Leclair, "Unfathomable," *supra* note 46 at 424; Gabrielle Appleby, "The 2018 Australian High Court Constitutional Term: Placing the Court in its Inter-institutional Context" (2019) [unpublished, copy on file with author].

have an important role to play in shaping executive and legislative action on an ongoing basis. I turn to a discussion of that role now.

II. The View from the Political Branches

As first principles of our constitutional order, unwritten constitutional principles influence the work of the executive and the legislature. In the case of the executive, much of this influence is invisible. The confidential nature of the work of the political executive and the public service means that unwritten constitutional principles generally operate out of sight. Their impact is more visible in the context of administrative decision-making and in the fulfilment of the duty to consult. Outside of this context, however, the significance of unwritten principles is often only apparent when the executive fails to comply with them, and that failure produces serious and public negative effects.

The situation is somewhat different for the legislature. Its work tends to be more public, though of course a great deal happens behind the scenes as well.[132] But the public dimensions of the work of legislators make it possible to examine legislative and committee debates for evidence that unwritten constitutional principles do or do not influence the law-making process, for example. While this article does not attempt such a review, research of this kind would be highly valuable.

In designing policies, implementing programs, drafting legislation, and making decisions, the executive must be attentive to the first principles of constitutional law. These principles surface to varying degrees as the executive carries out its functions. Certain principles, such as the rule of law, hover in the background of a great deal of discretionary decision-making.[133] Other principles, including judicial independence, arise less frequently and more discretely. In the legislature, both the process and the substance of law-making are informed by unwritten constitutional principles. While all unwritten principles have a role to play in shaping the legislative process, certain principles, such as the democracy principle and parliamentary privilege, tend to be particularly prominent.

As I explained in the previous section, unwritten constitutional principles are legal principles. This means that they place constitutional obligations on the state. But what, precisely, is the nature of the obligations unwritten constitutional principles place on the executive and the legislature?

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[132] See Meg Russell & Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford: Oxford University Press, 2017).

[133] See e.g. *Roncarelli*, *supra* note 6.

At a minimum, unwritten constitutional principles impose a negative obligation on the executive and the legislature to respect unwritten constitutional principles. This obligation can be satisfied to a significant degree by complying with the more concrete obligations contained in the written constitution and by following general good governance practices.[134] Regarding the first point, it can be useful to think of unwritten constitutional principles and the written constitution as existing on a spectrum of concreteness.[135] Unwritten constitutional principles are the overarching, "animat[ing]" principles of our constitutional system, while the written constitution is a more concrete manifestation of these principles.[136] Now, there may be instances where the written constitution provides less than full protection of these foundational principles. In those instances, the Supreme Court has explained, unwritten principles operate to fill a gap.[137] But robust compliance with the written constitution will ensure substantial compliance with unwritten constitutional principles.

Regarding the second point, unwritten constitutional principles also operate as a code of good governance and good law-making practices. As Justice Mathew put it in the decision of the Indian Supreme Court in *Gandhi v. Narain*, in reference to the separation of powers, "the doctrine of separation of governmental powers is not a mere theoretical philosophical concept. It is a practical, work-a-day principle."[138] So what does this code of good governance and good law-making practices entail? The answer lies in the fact that some practices that do not formally violate the written constitution are still harmful to our constitutional order. While it is unlikely that a court would ever conclude that the use of omnibus legislation is *unconstitutional*, its frequent use inevitably undermines the unwritten principles of democracy by preventing full consideration of legislative proposals.[139] Good law-making practices, grounded in the principle of democracy, therefore require that the use of omnibus bills be limited.

Other good governance and good law-making practices emerge when one reflects on how the executive and the legislature might seek to nurture rather than undermine democratic norms and institutions. As the Supreme Court explained in the *Secession Reference*, democracy includes majority

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134 On concreteness, see Walters, "Legal Concept", *supra* note 4 at 49.

135 See *ibid*.

136 See *Secession Reference*, *supra* note 13 at para 148.

137 See Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269 [Pal, "Democracy"].

138 (1975), [1976] 2 SCR 347 at 518.

139 See Jula Hughes & Vanessa MacDonnell, "The Art and Science of Constitutional Litigation" (2013) [unpublished, copy on file with author].

rule but is not limited to it.[140] The principle of democracy is furthered when the executive and the legislature opt not to adopt political tactics that erode democratic values, such as limiting the media's access to elected politicians;[141] failing to co-operate with independent officers of Parliament such as the parliamentary budget officer when they request information;[142] and seeking to shut down debate on a bill prematurely.[143] More broadly, it means considering the impact of decisions large and small on the integrity of our democracy.

Other principles also give rise to good governance and good law-making practices. The rule of law requires that all executive action be authorized by law.[144] It means that politicians are subject to and not above the law. It means that there is one law for all, not a different set of rules for the well-connected. It requires that the law be knowable in advance.[145] And it requires that the executive cultivate a culture of respect for the rule of law.[146]

Similarly, the executive and the legislature should seek to promote rather than to undermine judicial independence. An example of such promotion is the 2019 accord between the chief justice of Canada and the minister of justice and Attorney General aimed at securing the financial security and administrative independence of the Court through the adoption of a range of procedures.[147] A notable violation of this principle occurred in 2014 when Prime Minister Stephen Harper and Justice Minister Peter MacKay

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[140] *Secession Reference*, *supra* note 13 at paras 63–64. See also *Vriend v Alberta*, [1998] 1 SCR 493 at para 140, 156 DLR (4th) 385.

[141] See e.g. Travis Dhanraj, "Doug Ford Government Launches 'Ontario News Now' While Limiting Questions from Reporters", *Global News* (31 July 2018), online: <globalnews.ca> [perma.cc/M3BK-HBT9]. For a discussion of the connection between democracy and the media, see Jamal Greene, "Trump as a Constitutional Failure" (2018) 93:1 Ind LJ 93.

[142] See Greene, *supra* note 141 at 97, 106. See also Kevin Page with Vern Stenlund, *Unaccountable: Truth and Lies on Parliament Hill* (Toronto: Penguin Canada, 2016).

[143] See e.g. "Quebec Government to Sit Through Weekend to Ram Through Immigration, Religious Symbols Bills", *CBC News* (13 June 2019), online: <www.cbc.ca> [perma.cc/CN5H-2EZY].

[144] See *Roncarelli*, *supra* note 6.

[145] See *Imperial Tobacco*, *supra* note 18 at para 58.

[146] On the idea of a "culture of rights," see Janet L Hiebert, "Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?" (2006) 4:1 Intl J Constitutional L 1; Janet L Hiebert, "Governing like Judges?" in Tom Campbell, KD Ewing & Adam Tomkins, eds, *The Legal Protection of Human Rights: Sceptical Essays* (New York: Oxford University Press, 2011) 40 at 52, citing Jack Straw, "Building a Human Rights Culture" (Address to Civil Service College Seminar, 9 December 1999) [unpublished]. See also Greene, *supra* note 141.

[147] See *Accord to Strengthen the Independence of the Supreme Court of Canada*, 22 July 2019, online (pdf): *Supreme Court of Canada* <scc-csc.ca> [perma.cc/844U-WB6R].

levelled dubious allegations of interference against Chief Justice Beverley McLachlin in the context of the selection of a new Supreme Court of Canada justice.[148] There is a well-established practice of chiefs justice consulting with the executive on new Supreme Court of Canada appointments. McLachlin warned the executive that several of the appointees on the short list, including Federal Court of Appeal Justice Marc Nadon, might not meet the eligibility criteria set out in the *Supreme Court Act*. The prime minister appointed Nadon anyway. MacKay and Harper later sought to politicize the chief justice's advice by suggesting that it was inappropriate. In the *Supreme Court Act Reference*, a majority of the Supreme Court concluded that Nadon was indeed ineligible.[149]

When governments fail to respect constitutional *rights*, courts provide an important backstop. But the same cannot be said of unwritten constitutional principles, particularly in their capacity as good governance and good law-making practices. Courts are limited in their ability to redress failures to uphold unwritten constitutional principles. In part, they are limited because the various ways that the executive might undermine unwritten constitutional principles are often invisible or do not easily lend themselves to litigation. It is difficult to imagine the cumulative effect of many small-scale intrusions on federalism or democracy being satisfactorily resolved through litigation, for example.[150] The more frequent form of recourse is political. Courts are also limited for legitimacy reasons. Unwritten constitutional principles are simply too abstract for courts to make use of them as a legitimate basis for invalidating legislation or government action with any frequency.[151] In addition, the separation of powers and parliamentary sovereignty have to date provided strong protection against judicial review of governance and law-making practices.[152]

The Supreme Court has hinted at some of this in its decisions. In the *Secession Reference*, for example, the Court concluded that while it had articulated a legal standard for when secession negotiations would be required ("a clear majority on a clear question"), it was ultimately up to political actors to determine whether this standard had been met and to establish a negotiations process if required.[153] "The task of the Court has been

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148 See Leslie MacKinnon, "Beverley McLachlin, PMO Give Duelling Statements on Nadon Appointment Fight", *CBC News* (1 May 2014), online: <cbc.ca> [perma.cc/A227-HABE].

149 See *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21.

150 On the significance of these small-scale intrusions, see Greene, *supra* note 141 at 103; Jack M Balkin, "Constitutional Crisis and Constitutional Rot" (2017) 77:1 Md L Rev 147.

151 See e.g. *Imperial Tobacco*, *supra* note 18.

152 See e.g. *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, 83 DLR (4th) 297; *Mikisew Cree*, *supra* note 23.

153 *Secession Reference*, *supra* note 13 at para 153. See also Leclair, "Constitutional Principles," *supra* note 48 at 1022.

to clarify the legal framework within which political decisions are to be taken 'under the Constitution,'" the Court explained, "not to usurp the prerogatives of the political forces that operate within that framework."[154]

There are parliamentary mechanisms available to hold the executive to account when it neglects or transgresses constitutional norms, including parliamentary committee hearings, emergency debates, and the possibility of referring matters to the ethics commissioner.[155] The executive can call a public inquiry if it is under sufficient pressure.[156] The recent SNC Lavalin affair in Canada has seen all of these accountability mechanisms employed or discussed. These mechanisms may be effective for large-scale scandals, but their effectiveness at addressing ongoing, low-level disregard of constitutional norms is questionable. At a minimum, they may bring attention to these issues in a manner that ultimately has an impact on the government's electoral prospects.

Faced with evidence of democratic erosion in the United States, Jamal Greene suggests that there is a need for change in the "democratic culture."[157] He acknowledges the challenges associated with this task. But he nonetheless proposes a series of measures intended to nudge political actors toward deliberation and negotiation.[158] These measures include supermajority requirements, discouraging party discipline, increasing public financing of independent media, and creating independent institutions for the dissemination of information.[159]

The larger point is that unwritten constitutional principles play an important role in setting the ground rules for the executive and the legislature. The Supreme Court has explained that unwritten principles are foundational to the constitutional order. But the way they have been described by the courts and the relative rarity with which they appear in the case law tends to create the impression that these principles do not do much work in the day-to-day. In this section I have tried to rebut that view. Unwritten

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154 See *Secession Reference*, *supra* note 13 at para 153.

155 See Craig Forcese & Andrew Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law, 2011) at 309, 430–31; Marc Bosc & André Gagnon, eds, *House of Commons Procedure and Practice*, 3rd ed (Montréal: Yvon Blais, 2017) chs 15, 23.

156 See "Commissions of Inquiry" (last modified 18 November 2019), online: *Government of Canada* <canada.ca> [perma.cc/7TQD-RUX6].

157 *Supra* note 141 at 94–95.

158 See *ibid* at 95. See generally Richard H Thaler & Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008).

159 See Greene, *supra* note 141 at 104–08.

constitutional principles have an important role in the operation of our constitutional order. And their protection or erosion lies to a large extent in the hands of the executive and the legislature.

Unwritten constitutional principles may also impose affirmative constitutional obligations, in the sense of requiring the executive to create and maintain particular institutions or to enact legislative schemes designed to implement these principles in a meaningful way.[160] In his contribution to this special issue, Pal argues that the unwritten constitutional principle of democracy imposes a number of concrete obligations on the executive and the legislature.[161] While Pal advocates for "a 'thin' or procedural account of democracy tied to meaningful participation," his position still requires positive action to facilitate that participation, including implementing fair procedures of election administration and ensuring that individuals are able to vote.[162] While some of these obligations may also be captured by the section 3 *Charter* right to vote, the unwritten principle of democracy performs a gap-filling function—in the context of municipal elections, for example.[163]

Kate Glover Berger's contribution to this special issue also shows how unwritten principles can impose affirmative obligations on the executive and the legislature.[164] She explains that the unwritten principle of judicial independence "requires certain forms and structures of decision-making be in place" before a judge may be removed from office, quite apart from the requirements mandated by the written constitutional text.[165] Without seeking to prescribe a specific process, she explains that before a judge is removed from office, the judge has a right to be heard as part of an administrative process "that is independent, subject to judicial oversight, bound by the duty of fairness, and carried out by an actor committed to judicial independence."[166] The Canadian Judicial Council, as currently structured, satisfies some but not all of these requirements.[167]

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160 See generally Stephen Holmes & Cass R Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: WW Norton, 1999) at 53; Cass R Sunstein, "State Action Is Always Present" (2002) 3:2 Chi J Intl L 465 at 467.

161 See Pal, "Democracy", *supra* note 137.

162 *Ibid* at 274. See generally Holmes & Sunstein, *supra* note 160 at 53; Sunstein, *supra* note 160 at 467.

163 See Pal, "Democracy", *supra* note 137.

164 See Kate Glover Berger, "The Structural and Administrative Demands of Unwritten Constitutional Principles" (2019) 65:2 McGill LJ 305.

165 *Ibid* at 308.

166 *Ibid*. at 339.

167 See *ibid*.

The Supreme Court has explained that judicial independence has three "core characteristics": financial security, security of tenure, and administrative independence.[168] The requirements Glover Berger sets out in relation to the dismissal of judges flow from the guarantee of security of tenure. But it is not difficult to see how the two other major branches of judicial independence, financial security and administrative independence, might also require affirmative steps for their realization. The 2019 accord between the chief justice of Canada and the minister of justice and Attorney General is an example of proactive protection of these other dimensions of judicial independence.

A final example involves public service employment statutes.[169] In *OPSEU*, a majority of the Supreme Court referred to public service neutrality as "an essential prerequisite of responsible government."[170] Although the Court in both *OPSEU* and *Osborne* referred to public service neutrality as a constitutional convention rather than an unwritten constitutional principle, it is most aptly characterized as an unwritten constitutional principle.[171] It is difficult to see how it could be a constitutional convention subject only to political enforcement. It has certainly not been treated this way by the courts.

If public service neutrality is indeed an unwritten constitutional principle, it is arguably implemented by public sector employment acts. Part VII of the federal act attempts to balance public sector neutrality with the freedom of expression interests of public servants by creating a scheme for deciding whether and when public servants may engage in political activities.[172]

What emerges from these examples is a much different picture than the one that appears when we consider how unwritten constitutional principles

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168 See *Judges Remuneration Reference*, *supra* note 19 at para 326*; Valente v R*, [1985] 2 SCR 673, 24 DLR (4th) 161.

169 See e.g. *Public Service Employment Act*, SC 2003, c 22; *Public Service of Ontario Act*, SO 2006, c 35, Schedule A.

170 *OPSEU*, *supra* note 11 at 41.

171 See *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 86, 82 DLR (4th) 321 [*Osborne*]; *OPSEU*, *supra* note 11 at 44–45. Beetz J, for the majority, also concluded that "to me, the impugned provisions [of the *Public Service Act*] do not merely seem to reflect the existing convention; they clearly give it the additional force and precision of legislative effect, and they are constitutional provisions by nature and *prima facie* competent under s. 92(1) of the *Constitution Act, 1867*"(*ibid* at 45)—that is, the provisions relating to the Constitution of the Province.

172 See *Public Service Employment Act*, *supra* note 169, ss 112–14. See also *Osborne*, *supra* note 171. I am grateful to Ann Chaplin for pointing this out.

are applied by the courts. In each of the three examples above, the executive, the legislature, or both have taken or are required to take steps to ensure that the first principles of our constitutional order are secured. Far from being controversial, as the invocation of unwritten constitutional principles by courts tends to be, the reliance on unwritten constitutional principles by the executive and the legislature is a sign of the health of our constitutional democracy. In other words, the legitimacy concerns associated with relying on unwritten law largely evaporate when these principles are applied by the political branches. What is more, these principles appear to have a significantly greater impact in the political realm. They play a role in ensuring the integrity of our electoral system and the independence of our judiciary, to give just two examples.

Not all concerns dissipate when unwritten principles are in the hands of the political branches, however. It is not uncommon for multiple unwritten principles to be at stake. When this is the case, political actors, like judicial actors, must reconcile those principles, or at least be able to rationalize preferring one principle over another.[173] To date, the courts have not set out any guidelines for how unwritten constitutional principles are to be reconciled. There would be considerable value in the executive undertaking to develop such guidelines.

III. Amendment

This brings us to a final point regarding the nature and status of unwritten constitutional principles. Both Jack Balkin and Jamal Greene suggest that democratic constitutional norms can be deviated from significantly, or even replaced, without requiring a constitutional amendment.[174] This argument treats norms as the equivalent of constitutional conventions—as practices that gain their force from having been at least mostly adhered to over a period of time.[175] Unwritten constitutional principles are different: they are legal obligations.[176] Such principles may reflect or incorporate practice, but they derive their force from the common law and the mode of reasoning it supplies. Furthermore, they are constitutionally entrenched.

At first glance, it may appear odd that principles discovered by courts—that is, common law principles—are beyond incorporation or amendment by simple legislation. Characterizing these features of the Constitution as "principles" adds to the perception that they are somehow different than the text of the Constitution. But as the Supreme Court has made clear,

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[173] See generally Appleby, *supra* note 131.

[174] See Greene, *supra* note 141 at 103; Balkin, *supra* note 150 at 150–55.

[175] See Greene, *supra* note 141 at 103.

[176] See Forcese & Freeman, *supra* note 155 at 17.

unwritten constitutional principles possess "full legal force."[177] Once a legal rule is determined to be constitutional, it cannot be modified in the same way as ordinary legal rules. It must be treated like other constitutional rules, which can only be altered by invoking the constitutional amendment process.[178]

One might be inclined to go even further: the cases suggest that unwritten constitutional principles play a central role in establishing Canada's constitutional structure. As the Court explained in the *Secession Reference*, "[t]he principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."[179] This statement suggests that a change to an unwritten constitutional principle "would fundamentally change Canada's constitutional structure."[180] This is arguably the case with other kinds of changes permitted by the amendment formula, such as changes to the Senate.[181] But such changes are contemplated by the amending formula, and they require unanimous consent—that is, the consent of Parliament and all provincial legislatures.[182] Unwritten constitutional principles are not referred to explicitly in Part V (they might cease to be considered "unwritten" if they were). It would be unusual if changes to these principles were to be governed by the less exacting general amending formula, which requires the consent of Parliament and two thirds of the provinces comprising at least 50 per cent of the population. Modifications to the principles of the rule of law, democracy, or judicial independence seem to require something more, not less. In some jurisdictions, these types of constitutional amendments are prohibited entirely: they are referred to as "unconstitutional constitutional amendments."

Yaniv Roznai explains that "the theory of constitutional unamendability restricts the amending authorities from amending certain constitutional fundamentals. Underlying it rests the understanding that a constitution is built upon certain principles that grant it its identity and fill it with essence."[183] Bringing about a change to these fundamental aspects of

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177 See *Secession Reference*, *supra* note 13 at para 54, citing *Patriation Reference*, *supra* note 12 at 845.

178 See Leclair, "Unfathomable", *supra* note 46 at 429.

179 *Secession Reference*, *supra* note 13 at para 51.

180 *Reference re Senate Reform*, 2014 SCC 32 at para 3 [*Senate Reference*].

181 See generally Kate Glover, "Hard Amendment Cases in Canada" in Richard Albert, Xenophon Contiades & Alkmene Fotiadou, eds, *The Foundations and Traditions of Constitutional Amendment* (Portland: Hart, 2017) 273.

182 See *Senate Reference*, *supra* note 180 at paras 40–41.

183 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (New York: Oxford University Press, 2017) at 228–29 [Roznai, *Limits of Amendment Powers*].

the constitution cannot occur from within the existing constitutional system.[184] David Landau, Rosalind Dixon, and Yaniv Roznai explain the justification for this state of affairs: "[O]nly constitution-makers (the 'original or primary constituent power') can change any aspect of the constitution, while constitutional amenders (the 'derived or secondary constituent power') are limited to making changes that do not alter the basic choices made by the constitution-makers."[185]

Structural analysis figures prominently in discussions of unconstitutional constitutional amendments.[186] Roznai's theory of unconstitutional constitutional amendments places the "foundations underlying the constitutional structure" beyond the reach of the constitutional amendment process.[187] This approach draws upon the jurisprudence of courts such as the Indian Supreme Court, which has concluded that the Indian Constitution has a "basic structure" that cannot be the subject of constitutional amendment.[188] Included among the features that members of the Court have suggested comprise the basic structure of the Indian Constitution are constitutional supremacy, democracy, the separation of powers, the rule of law, federalism, and secularism.[189]

It is easy to see the parallels between the concepts that are considered "unamendable" under India's basic structure doctrine and unwritten constitutional principles.[190] Without suggesting the precise boundaries of the "unamendable core"[191] of Canada's Constitution, if there is one, there is a strong argument to be made that any such core would include unwritten constitutional principles. The argument is not that it is impossible for the

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184 See Yaniv Roznai, "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea" (2013) 61:3 Am J Comp L 657 [Roznai, "Migration"]; *Kesavananda Bharati v Kerala (State of)*, [1973] INSC 258, 4 SCC 225 (India Sup Ct) [*Kesavananda Bharati*].

185 David Landau, Rosalind Dixon & Yaniv Roznai, "From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras" (2019) 8:1 Global Constitutionalism 40 at 46. See also Roznai, *Limits of Amendment Powers*, *supra* note 183 at 227.

186 See generally Roznai, *Limits of Amendment Powers*, *supra* note 183; Richard Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada" (2015) 41:1 Queen's LJ 143 [Albert, "Theory and Doctrine"].

187 Roznai, *Limits of Amendment Powers*, *supra* note 183 at 229.

188 See *ibid* at 42–47; *Kesavananda Bharati*, *supra* note 184; *Gandhi v Narain*, *supra* note 138; Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford: Oxford University Press, 2011) introduction.

189 See Roznai, *Limits of Amendment Powers*, *supra* note 183 at 46–47; *Kesavananda Bharati*, *supra* note 184; *Gandhi v Narain*, *supra* note 138 at 658.

190 See generally Albert, "Theory and Doctrine", *supra* note 186 at 157, 192.

191 Richard Albert, "The Unamendable Core of the United States Constitution" in András Koltay, ed, *Comparative Perspectives on the Fundamental Freedom of Expression* (Budapest: Wolters Kluwer, 2015) 13.

Constitution to change in ways that roll back the animating principles of our constitutional order; rather, it is that if such changes are made successfully, a new constitutional order has been created. In the *Secession Reference*, the Court appeared to treat the unwritten constitutional principles that governed the issues in that appeal as standing apart from or above the amendment process. These were the principles that structured the secession negotiations and any constitutional amendments that flowed from those negotiations.[192]

Conclusion

There is some value, then, to rethinking the significance of Canada's "invisible" constitution.[193] Unwritten constitutional principles have traditionally been regarded as invisible by virtue of their unwrittenness. But they are also invisible because so much of the work they do occurs out of the public eye. When this work is rendered visible, its significance becomes apparent. Far from being a marginal phenomenon, as the study of the cases on unwritten constitutional principles would have us believe, unwritten principles play an important role in the processes of law-making and governing. They do so by limiting the powers of the executive and the legislature in much the same way that constitutional rights and the division of powers do, by prescribing good governance and good law-making practices, and by imposing affirmative obligations on the executive and the legislature to create institutions and legal regimes that help realize these first principles of our legal order.

One challenge that arises is that the mechanisms available to ensure compliance with unwritten constitutional principles are largely political. These mechanisms can be effective, but they only tend to kick in when the alleged violation of constitutional principles is sufficiently serious and public. This means that there is no meaningful recourse for small but sustained incursions on constitutional principles.[194] There should be little doubt that the damage that even small incursions cause can be substantial. For, as Greene explains, "[t]he ... Constitution lives less in its sparse text than in the connective tissue its normative order forms and reinforces."[195] Greene is likely correct to say that the best way of addressing these incursions is to take steps to actively strengthen the "democratic culture" both inside

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192 See Albert, "Theory and Doctrine", *supra* note 186 at 191–92.

193 See Laurence H Tribe, *The Invisible Constitution* (Oxford: Oxford University Press, 2008).

194 On the significance of these small-scale intrusions, see Greene, *supra* note 141 at 103; Balkin, *supra* note 150.

195 Greene, *supra* note 141 at 94, 103.

and outside the political branches.[196] But this means that we must break the habit of regarding courts as the only branch of state with a stake in securing the constitutional order.[197]

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[196] See Greene, *supra* note 141.

[197] I am grateful to Janet Hiebert for pointing this out to me.