

Law, Faith, and Canada's Unwritten Constitution

*Howard Kislowicz**

This article posits that judicial attachment to the unwritten Canadian Constitution is faith-like. The faith-like aspects of the jurisprudence include the following explicit and implicit commitments:

- 1) The Constitution is incompletely and imperfectly stated by the constitutional text;*
- 2) The Constitution is revealed through the act of interpretation in glimpses over time to authoritative interpreters;*
- 3) The unwritten Constitution has provided and will provide reliable and morally good guidance for action, sometimes overtaking the written text of the Constitution; and*
- 4) The precise nature and location of the Constitution eludes description, leading to reliance on metaphors and references to tradition.*

This faith-like attachment matters because the Canadian Constitution is often called upon, through the courts, to settle disputes involving religious practices. In resolving such disputes, the law must claim some form of authority over religion. I claim that the Supreme Court normatively justifies this assertion of authority by implicitly contrasting its own rationality with religion's faith-based way of encountering the world. This claim is unstable because of the faith-like aspects of the law, but it is not a reason to overhaul the case law. It is instead a reason for judicial humility.

L'auteur de cet article soutient que l'attachement de la magistrature canadienne à la Constitution non écrite ressemble à de la foi. Les aspects analogues à la foi de cette jurisprudence comprennent les engagements explicites et implicites suivants :

- 1) La Constitution est exposée incomplètement et imparfaitement par le texte constitutionnel;*
- 2) La Constitution est révélée grâce à l'acte d'interprétation, à coups d'aperçus au fil du temps, à des interprètes faisant autorité;*
- 3) La Constitution non écrite a fourni et fournira un encadrement fiable et conforme à la morale pour l'action, devançant parfois le texte écrit de la Constitution; et*
- 4) La nature et l'emplacement exacts de la Constitution échappent à la description, entraînant la dépendance de métaphores et de références à la tradition.*

Cela importe car on invoque souvent la Constitution canadienne, par le biais des tribunaux, afin de régler des différends liés à des pratiques religieuses. En réglant ces différends, la loi doit prétendre une certaine autorité sur la religion. L'auteur affirme que la Cour suprême justifie cette revendication d'autorité de façon normative en opposant implicitement sa propre rationalité à l'habitude fondée sur la foi de la religion à rencontrer le monde. Cette affirmation est instable en raison des aspects analogues à foi de la loi, mais il ne s'agit pas d'une raison de restructurer la jurisprudence. Il s'agit plutôt d'une raison d'humilité judiciaire.

* Wade Wright, Professor, Faculty of Law, University of Calgary. Sincere thanks to Benjamin Berger, Kathryn Chan, Noura Karazivan, Dwight Newman, Peter Oliver, Richard Stacey, Han-Ru Zhou, and two anonymous reviewers for comments on earlier drafts that much improved this essay. Thanks as well to Rabbi Barry Kislowicz for sharing his insights and knowledge on Midrashic stories and Jewish law. Special thanks, as always, to Dr Naomi Lear and Gabriel Kislowicz. Mistakes are mine.

“Et ta valeur, de foi trempée, “And your valour, steeped in faith
Protégera nos foyers et nos droits.” Will protect our homes and our rights.”

—O Canada, French Lyrics

I. Introduction

There is a Midrashic story recounted in the Talmud about an encounter between the biblical figure Moses and the first century scholar Rabbi Akiva. When Moses ascends Mount Sinai, he sees God “tying crowns on the letters of the Torah.”¹ When Moses asks why God would delay the giving of the Torah for the sake of these embellishments, God replies “[t]here is a man who is destined to be born after several generations, and Akiva ben Yosef is his name; he is destined to derive from each and every thorn of these crowns mounds upon mounds of halakhot [laws].”² Moses asks God to show him this man, and is transported to Rabbi Akiva’s study hall. Moses finds himself confused, and troubled because he does not understand the lesson. But when a student asks Rabbi Akiva the source of a particular halakha, Rabbi Akiva answers: “It is a halakha transmitted to Moses from Sinai.”³ Moses was put at ease. He could have faith that the Torah he was to receive would contain the seeds, planted by God, of the laws later worked out through the expert interpretation of the faithful.

In this article I argue that the Supreme Court of Canada’s (the Court’s) faith in the unwritten principles of Canada’s Constitution works in a similar way. The whole of the unwritten Constitution underlies its text, but the full meaning of the Constitution is revealed slowly over time. It takes human intermediaries — scholars like Rabbi Akiva on one hand, and Supreme Court justices on the other — to do the difficult work of interpretation, but the wisdom is ultimately attributed to the source. And despite not having full knowledge of the Constitution at any one point in time, the Court maintains faith that the Constitution will reliably provide good guidance in the resolution of legal controversies, just as traditional Judaism maintains faith in the moral guidance of the Torah.

This faith in the unwritten Constitution, I argue, is an aspect of Canadian constitutional law that can help resituate law’s encounter with religion. In

1 Babylonian Talmud, *Menachot*, 29b (The William Davidson Digital Edition).

2 *Ibid.*

3 *Ibid.*

Law's Religion,⁴ Benjamin Berger persuasively lays out the claim that, though Canadian courts frequently see Canadian constitutional law as above or without culture, it can be understood as a culture of its own. It has its own understandings of space and time, its own particular understanding of religion, and its own culturally infused boundaries for tolerable deviations from dominant practices. My aim in this article is to build on Berger's account by considering the culture of Canadian constitutionalism from a somewhat different vantage point: by searching for the ways in which the law is not only cultural, but faith-like. I build this argument through a close consideration of the case law on the Canadian Constitution's unwritten principles. I adopt a view of faith as an ethical approach, as articulated by Steven Smith.⁵ While this approach is certainly distinct from rationality, I argue in Part Two that the Court's approach to the Constitution's unwritten principles displays the attributes of this ethics of faith. In particular, the faith-like aspects of the jurisprudence include the following explicit and implicit commitments:

- 1) The Constitution is incompletely and imperfectly stated by the constitutional text;
- 2) The Constitution is revealed through the act of interpretation in glimpses over time to a defined set of authoritative interpreters;
- 3) The unwritten Constitution has provided and will continue to provide reliable and morally good guidance for action, sometimes overtaking the written text of the Constitution; and
- 4) The precise nature and location of the Constitution eludes description, leading to reliance on metaphors and references to tradition.

My aim here is *not* to claim that the Court's analysis is unstable, incoherent, or in some other respect problematic. I do not advocate here an alternative approach to unwritten principles. Rather, I aim to present the reasoning in these cases as one facet of the culture of Canadian constitutionalism and demonstrate the parallels between this way of thinking and the reasoning of faith-based traditions.

In Part Three, I explain why the faith-like aspects of law matter for litigation involving religious practices. The Canadian Constitution is often called upon, through the courts, to settle disputes surrounding religious practices.

4 Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015).

5 Of the University of California, San Diego — there are several legal academics with the same name.

In resolving such disputes, the law must claim some form of authority over religion. If the Court is to tell a person that they must act contrary to a religious conviction, or that they may not do something inspired by their religious conviction, it effectively asserts its authority over those practices. My claim is that the Court normatively justifies this assertion of authority by implicitly contrasting its own rationality with religion's non-rational, faith-based way of encountering the world.

Following Berger, I argue in Part Four that these faith-like aspects of law are not reasons to overhaul the case law, despite some skepticism about unwritten principles from judges and commentators. They are, however, reasons for judicial humility. As Berger explains, this means that courts ought to be explicit in acknowledging the value commitments of the law, and ought to expand the realm of "tolerable" religious difference. In addition, following the analysis in this article, judicial humility means avoiding the assertion of law's relative rationality with respect to religion, as well as being transparent about the role judicial interpretation plays in shaping the law of the unwritten Constitution.

II. The Unwritten Constitution as an Object of Faith

1. What Do I Mean by Faith?

The understanding of faith relied on in this article has been developed by Steven Smith. Like Smith, I start by rejecting the opposition of faith and reason;⁶ faith systems develop internal forms of rationality and people of faith may adjust their religious practices through the influence of reason or science.⁷ As Smith notes, faith can nevertheless be understood "as an ethical concept" that is "the principal ethical alternative to 'rationalism.'"⁸ According to Smith, an ethics of faith differs from an ethics of rationalism in five ways. An ethics of faith:

- 1) Includes "the sense of an overarching reality that is not directly perceived."⁹
- 2) Ascribes "normative authority [to] the unseen." The basic ethical question of how a person should live their life is answered by

6 Steven D Smith, "Believing Like a Lawyer" (1999) 40:5 Boston College L Rev 1041 at 1098.

7 *Ibid* at 1100; See also Stephen L Carter, "The Religiously Devout Judge" (1989) 64:5 Notre Dame L Rev 932; Perry Dane, "Spirited Debate: A Comment on Edward B. Foley's Jurisprudence and Theology" (1998) 66:4 Fordham L Rev 1213 at 1217.

8 Smith, *supra* note 6 at 1100.

9 *Ibid*.

reference to an “ultimate reality” rather than through instrumental reasoning.¹⁰

- 3) Recognizes “that the ultimate truth or reality is largely inaccessible to human comprehension.”¹¹
- 4) Recognizes “signals or directions for guiding human conduct” in place of knowledge of the ultimate truth or reality.¹²
- 5) Includes an element of “[t]rustful resignation” that the ethical signals humans can detect will guide their behaviour for good.¹³

This definition of faith does not encompass all religious practices and orientations. I employ it here because, (a) it captures a range of religious orientations, (b) it excludes some uses of the term “faith” such as faith that the sun will rise tomorrow, or that my rear-view mirror will provide an accurate image of what is behind me;¹⁴ and (c) it is the kind of orientation that legal actors and theorists would likely reject as applying to law. Of principal interest here is how, despite (c), it might actually capture some of what is done in legal practice.

For Smith, “[c]entral features of legal practice that seem inexplicable from a rationalist perspective ... come to seem entirely natural and appropriate from the standpoint of a certain kind of faith, or from what we might call ‘legal faith.’”¹⁵ The key signifier of this legal faith is the sense in judicial opinions that “the law” somehow exists as a “less visible but overarching reality” that “cannot be seen directly” and “cannot be fully reduced to human comprehension.”¹⁶ So instead of a full statement of the law, the way in which cases are decided suggests that “‘the law’ reveals itself in small, incremental glimpses or intimations.”¹⁷ That the holdings of common law courts are applied retroactively is, for Smith, “the starkest manifestation of this lawyerly presupposition of an independently existing ‘law’” because “the ruling merely declares what ‘the law’ is and has been,” even if the legal subjects did not know it when they began their litigation.¹⁸

10 *Ibid* at 1103-04.

11 *Ibid* at 1104.

12 *Ibid* at 1106.

13 *Ibid* at 1107.

14 See Iain T Benson, “Notes Towards a (Re)Definition of the ‘Secular’” (2000) 33:3 UBC L Rev 519.

15 Smith, *supra* note 6 at 1113.

16 *Ibid* at 1114.

17 *Ibid* at 1115.

18 *Ibid* at 1054.

Though the law is always stated incompletely by courts (there will always be more to discover), even the part of the law that was unknown is treated as binding. The law is authoritative, a normative rule that should and does provide directions for the behaviour of its subjects.¹⁹ The reason for the authority of this always incomplete law is rarely, if ever, explained.²⁰ In Canadian judicial accounts, it rests on a claim of the basic goodness of the legal order,²¹ a “leap of faith” to the constitutional “*Grundnorm*.”²² The decisions of courts are built on the belief that even if we never have a complete statement of the law, we believe that what we know of it points us in the right directions. As the the Court has said, “Our law’s claim to legitimacy ... rests [in part] on an appeal to moral values, many of which are imbedded in our constitutional structure.”²³ This “requires the linkage of law and morality even as most twentieth-century jurisprudence has emphasized their analytic separation.”²⁴ This way of legitimating the law implies that law will create “not only order but also the conditions of a social order worthy of respect.”²⁵

All this said, I do not want to overstate the similarities between the Canadian legal tradition and religious traditions. Though the Court understands Canadian constitutional law to sit atop a hierarchy of rule-making systems in individuals’ and communities’ lives,²⁶ it does not understand that law to be totalizing. It has little to say, for example, about whether individuals should refrain from eating particular foods, should engage in daily contemplative rituals, or should put their friends’ needs ahead of their own. Religious traditions are also often concerned with theological questions,²⁷ and do not always rely on a discourse of rational justification and argumentation within their own spiritual frameworks. I advance a narrower argument here. Though the Court has never laid out a clear “profession of faith,” through the study of cases invoking unwritten constitutional principles we can identify implied

19 See Michael J Perry, “The Authority of Text, Tradition, and Reason: A Theory of Constitutional ‘Interpretation’” (1985) 58:1/2 S Cal L Rev 551 at 591.

20 Smith, *supra* note 6 at 1079.

21 See Philip Soper, “Metaphors and Models of Law: The Judge as Priest” (1977) 75:5/6 Mich L Rev 1196 at 1210.

22 John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2012) at 10.

23 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 67, 161 DLR (4th) 385.

24 Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988) at 60.

25 *Ibid.*

26 See The Right Honourable Beverley McLachlin, PC, “Freedom of Religion and the Rule of Law: A Canadian Perspective” in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston, ON: McGill-Queen’s University Press, 2004) 12 at 12.

27 See Stanley Fish, “Where’s the Beef?” (2014) 51:4 San Diego L Rev 1037 at 1042.

assumptions about what law and the Constitution are in Canada that echo the ethics of faith as laid out by Smith. Before getting directly to these parallels, I briefly lay out how unwritten constitutionalism can be understood harmoniously with the common law tradition to lay the groundwork for connecting Smith's observations about the common law to the case law on the unwritten Constitution.

1.1. The Unwritten Constitution

The idea that unwritten law can have compelling force is not new to the common law. Mark Walters' careful historical work tracks the concept of *lex non scripta* back to Blackstone. Blackstone noted the parts of British law whose "original institution and authority are not set down in writing, as acts of parliament are, but ... receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom."²⁸ In Walters's view, the Court has understood unwritten constitutional rules as emerging alternatively from completely outside the written Constitution or as emerging from the constitutional text, but in both cases "their normative force is treated by the Court as deriving from custom or (in Blackstone's words) 'usage' and 'universal reception,' and not from the written or legislative materials in which they happen to be evidenced."²⁹

Responding to skepticism about unwritten law, Walters argues that the phrases "written law" and "unwritten law" are best understood metaphorically in the common law tradition. "*Written law* is a metaphor representing the sort of legal proposition that is set by a lawmaker using a linguistic formula that is to be taken as canonical by judges, and therefore as exhausting the relevant law for the matters to which it is held to apply."³⁰ Both statutes and precedents from higher courts can fit this definition. The metaphor of unwritten law is more complicated. It represents, according to Walters, the "discourse of reason" in which judges consider "specific legal propositions" as "manifestations of more abstract principles." The judge engages in an "interpretive oscillation between the specific propositions and the general principles they presuppose," all the while aspiring to apply the same general principles to all relevant circumstances, in order to derive new "specific legal propositions."³¹ The process is both induc-

28 Mark D Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51:2 UTLJ 91 at 95.

29 *Ibid* at 98.

30 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 at 253 [emphasis in original].

31 *Ibid* at 254.

tive and deductive: the specific propositions from older cases lead to the general principles inductively; from these the judge deduces new rules or rights that apply in the new case.

For Walters, the insight gleaned from the common law for constitutional interpretation “is that the expressions *written law* and *unwritten law* are not references ... but *metaphors* that symbolize distinctive approaches to constitutional interpretation.”³² Judges who are faithful to this common law method are not off in “constitutional cloudland”;³³ they are not concerned with “natural law or political morality in any indefinite or detached sense.”³⁴ Instead, they are attempting to identify the essence of the Constitution by investigating its specific rules, and they generate new rules on that basis. They are “identifying the practical legal implications of the ‘spirit’ of legality that pervades the forms of constitutionalism to which societies commit themselves ... The discourse of reason about what ‘law’ is for their society evidences commitment to the minimal standards of equality and due process that make law possible.”³⁵

While Walters is right to label this as a process of reasoning, it still presumes that the unwritten principles have an independent existence. And this is how the Court speaks of them. Even if courts might understand themselves to be doing the work of constitutional interpretation, they are not engaged in acts of authorship but in acts of inference and deduction based on principles that are said to have an “existence”,³⁶ courts engage in their “recognition”³⁷ rather than their creation.³⁸ Unwritten principles and rules are said to “*emerge* from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.”³⁹ This understanding is gleaned by looking for the principles “[*b*]ehind the written word”; these

32 *Ibid* [emphasis in original].

33 *Ibid* at 258.

34 *Ibid* at 261.

35 *Ibid*.

36 *Reference re Secession of Quebec*, *supra* note 23 at para 53.

37 See also *Ref re Remuneration of Judges of the Prov Court of PEI*; *Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 at para 53, 155 DLR (4th) 1 [*Judges Reference*]. To quote, at para 83: “Notwithstanding the presence of s. 11(d) of the *Charter*, and ss. 96-100 of the *Constitution Act, 1867*, I am of the view 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*. The existence of that principle, whose origins can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*. The specific provisions of the *Constitution Acts, 1867 to 1982*, merely ‘elaborate that principle in the institutional apparatus which they create or contemplate.’”

38 *Ibid* at paras 97-98.

39 *Reference re Secession of Quebec*, *supra* note 23 at para 32 [emphasis added].

in turn stem from “an historical lineage stretching back through the ages.”⁴⁰ How, for example, did the law of judicial independence come such “a long way from what [the written] provisions actually say”? By “reference to a deeper set of unwritten understandings which are not found on the face of the document itself.”⁴¹

The independent existence of the principles has reverberations in how courts dispose of cases. It is possible, for example, for a court to overturn a previous court’s identification or application of an underlying principle. But when it does, we would expect it to present itself not as *changing* the underlying law, but rather as *correcting* an erroneous interpretation of the principles. The underlying law is constant; human understanding of that law is improved over time.

Though not based on any unwritten principles, the Supreme Court’s evolving interpretation of section 7 of the *Charter* is illustrative. Section 7 prohibits government deprivations of life, liberty, or security of the person that are inconsistent with the principles of fundamental justice. The principles of fundamental justice are somewhat analogous to unwritten principles as they emerge from “the basic tenets of our legal system,”⁴² and so share some common ground with the way that unwritten principles are understood to be the essence of the Constitution. Most recently, the analysis of principles of fundamental justice has centred on rules against arbitrariness, overbreadth, and gross disproportionality.⁴³ Principally on the basis of this development, in the 2015 *Carter* case,⁴⁴ the Court invalidated the criminal prohibition of medical assistance in dying (MAID) despite previously holding in *Rodriguez*⁴⁵ that the same provision was consistent with the principles of fundamental justice. The principles of fundamental justice themselves did not change; the previous Court had not fully understood the “basic tenets of our legal system.” The court in *Rodriguez* was not wrong as of the date of the decision in *Carter*, it was wrong for as long as the *Charter* has been part of the Constitution. We see this reflected in the remedy: when the provision was ultimately struck down, it was treated as void

40 *Ibid* at para 49 [emphasis added]; see also Benjamin L Berger, “White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution behind the Text” (2008) 3:1 J Comparative L 249.

41 *Judges Reference*, *supra* note 37 at para 89 [emphasis added].

42 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 503, 24 DLR (4th) 536.

43 See *Bedford v Canada (Attorney General)*, 2013 SCC 72; *Carter v Canada (Attorney General)*, 2015 SCC 5; *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35.

44 *Carter v Canada (Attorney General)*, *supra* note 43.

45 *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342.

ab initio.⁴⁶ Of course, this is the standard remedy, but if the Court understood itself to be *changing* the law, one might expect the remedy to treat the law as invalid as of the date the law was changed. Admittedly, the Court in *Carter* made reference to the ongoing societal and international debate on MAID in the years following *Rodriguez*, as well as the legalization of MAID in several jurisdictions outside Canada.⁴⁷ But the point of these references is not to say that the constitutionality of MAID's prohibition had changed, only that the Court and society in general now understand it more clearly.⁴⁸

This is precisely how we might expect things to go if the Court ever changes course on the requirements of an unwritten principle. If, for example, the Court were to hold that the principle of judicial independence did not require the interposition of an "independent body ... between the judiciary and the other branches of government" as held in the *Judges Reference*,⁴⁹ it would be holding that such a body was *never* required. While this may seem like a typical overturning of precedent, it nevertheless implies that the unwritten principles have a kind of eternity and reveal themselves over time in glimpses through the process of judicial interpretation. The principles cannot be discovered in nature or contained in a single text, and we cannot see the whole of any of them at any given time. And yet, courts look to them to prescribe action. There is a strong parallel here to the ethics of faith described by Smith. Though the unwritten constitutional principles are not said to have a divine or supernatural origin, we can observe significant faith-like metaphysical assumptions when courts engage with them. As I argue below, the Court has adopted an interpretive position that, in some cases, foregrounds unwritten constitutional norms, showing the power of that faith.

1.1.1 The Written Constitution is Incomplete

Writing in the American context, Thomas Grey argued that a fundamental difference between constitutional and scriptural interpretation was that "[t]here is no ultimate mystery in what the Constitution is about ... and so [it] is in

46 This is complicated by the temporary suspension of the declaration of invalidity, but once the provision is struck down, it is treated as always having been invalid.

47 *Carter v Canada (Attorney General)*, *supra* note 43 at paras 6-8.

48 One might also bring into this discussion the SCC's decision in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 3, where the majority gave "constitutional benediction" to the right to strike. Though the Court clearly recognizes it is giving the right to strike constitutional status for the first time, the narrative of the development of labour rights suggests that it should always have been so. We see this in the majority's reasoning that the "right to strike is essential" to realizing the values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" (at paras 53-54).

49 *Judges Reference*, *supra* note 37 at para 147.

principle subject to human understanding.” In contrast, religious scriptures are often imagined by their interpreters “as the effort to express indirectly what in principle cannot be said directly.”⁵⁰ I want to suggest that, when the Court has identified unwritten principles in the Canadian Constitution, the overall pattern is one that more closely resembles Grey’s description of scriptural interpretation. The now dominant judicial position that unwritten principles “imbue the constitutional text”⁵¹ puts courts on the hunt for those things the Constitution did not, and perhaps could not, say directly. In so doing, on this theory, courts understand themselves not to be creating new principles but to be discovering them; judgments are “*means of knowing* the rule or principle . . . not *acts of producing* law.”⁵² While the claim that courts discover law is hardly new (and has long been derided by legal realists), it is of particular interest in the context of unwritten constitutional principles. In contrast to when courts “discover” common law principles, which can be changed by legislation, unwritten constitutional principles can operate as limits on legislative sovereignty.

We see the Court searching for unwritten principles in some decisions of the last 40 or so years. For instance, in the 1997 *Judges Reference*, the majority of the Court held 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*.”⁵³ The majority reached this conclusion in part because of the “serious limitations to the view that the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence.”⁵⁴ These limitations included the “gaps” in judicial independence left by a plainer interpretation of the text itself. Such an interpretation would mean that the principle of judicial independence did not apply to provincial courts except in criminal cases, and would apply security of tenure only to superior court judges, not district or county court judges. Perhaps more to the point, a plain reading of the constitutional provisions related to judges does “not speak to the objective” of protecting judicial independence, and would not “safeguard the judiciary against political interference through economic manipulation.”⁵⁵ Nevertheless, judicial interpretation of these provi-

50 Thomas C Grey, “The Constitution as Scripture” (1984) 37:1 *Stan L Rev* 1 at 16-17.

51 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 203.

52 Hugo Cyr, “L’absurdité du Critère Scriptural pour Qualifier la Constitution” (2012) 6 *JPL* 293 at 305 [translated by the author]. Original: “le jugement ne serait en quelque sorte que le moyen de connaître la règle ou le principe de droit . . . et non un acte de production du droit.”

53 *Judges Reference*, *supra* note 37 at para 83 [emphasis in original].

54 *Ibid* at para 85.

55 *Ibid* at para 87.

sions has evolved to include protections from such manipulation; the majority concluded that the “only way to explain the interpretation of sections 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself.”⁵⁶

These unwritten principles are the “underlying logic” of the Constitution and can be used to fill the “gaps” of its express provisions.⁵⁷ In the majority’s view, though the full power of these unwritten principles had not been previously spelled out, they had in practice been applied to develop rules of constitutional law in Canada. These include:

the doctrines of full faith and credit and paramountcy, the remedial innovation of suspended declarations of invalidity, the recognition of the constitutional status of the privileges of provincial legislatures, the vesting of the power to regulate political speech within federal jurisdiction, and the inferral of implied limits on legislative sovereignty with respect to political speech.⁵⁸

None of these is found expressly in the text, yet courts had relied upon them to limit legislative power. Walters provides a more fully fleshed out theoretical account of this manoeuvre. He explains the supremacy of unwritten principles by claiming “that the unwritten foundational rule of recognition in Canada acknowledges that certain substantive unwritten norms are, on rare occasions, supreme over legislation, and that this supremacy is not derived from the written constitutional texts that, on all other occasions, are supreme.”⁵⁹ Constitutional texts are “evidence of supreme law, rather than ... a single canonical statement of supreme law.”⁶⁰ “[T]he constitutional text is not just supplemented by unwritten principles; it rests upon them.”⁶¹

Another example of an unwritten constitutional principle that is imperfectly expressed in the text of the Constitution is the “protection of minorities.”⁶² The Supreme Court held that this principle was “one of the key considerations motivating the enactment of the *Charter*” and also “had a long history before,”⁶³ nodding to the federal structure that allowed national minorities

56 *Ibid* at para 89 [emphasis in original].

57 *Ibid* at paras 93-95.

58 *Ibid* at para 104.

59 Walters, *supra* note 28 at 104.

60 Walters, *supra* note 30 at 273.

61 *Ibid* at 265; see also (Alyn) James Johnson, “The Judges Reference and the Secession Reference At Twenty: Reassessing the Supreme Court of Canada’s Unfinished Unwritten Constitutional Principles Project” (2019) 56:4 *Alta L Rev* 1077 at 1092.

62 *Reference re Secession of Quebec*, *supra* note 23 at paras 79-82.

63 *Ibid* at para 81.

autonomy through provincial self-government and the mechanisms like the Senate that guaranteed regional representation in federal lawmaking. While it is true that minority protection can be identified as a theme in the main written documents of the Constitution and some of its precursors,⁶⁴ the Court recognized that “Canada’s record of upholding the rights of minorities is not a spotless one.”⁶⁵ From the perspective of Indigenous groups and other minority groups who were the victims of legally sanctioned discrimination at the hands of the state,⁶⁶ this is a significant understatement. Indeed, subsection 91(24) of the *Constitution Act, 1867* gives Parliament jurisdiction over “Indians, and Lands reserved for the Indians,” pursuant to which many deeply harmful state policies were enacted, including the Indian Residential School system that took children from their families, resulted in generations of trauma,⁶⁷ and has been described by the former Chief Justice of Canada as an act of “cultural genocide.”⁶⁸ The point for present purposes is that, in identifying the protection of minorities as an underlying principle of the Constitution, the Court implies that laws and policies of the federal legislative and executive branches undertaken pursuant to constitutionally granted authority were contrary the Constitution’s underlying logic. But the implications of that logic have become clearer over time, according to the Court; the “goal” of minority protection “is one towards which Canadians have been striving since Confederation, and the process has not been without successes.”⁶⁹ In other words, even if the written Constitution seemed to point the federal government to dominating Indigenous groups through the assumption of jurisdiction, the true underlying principle of minority protection has always been there; it has just revealed itself more over time as Canada comes to better understand its Constitution. This evolution of understanding is reflected not only in changes in case law over time, but also in how the text of the Constitution has come to more fully reflect the principle, especially since 1982.

64 See also *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 at s 93, reprinted in RSC 1985, Appendix II, No 5 [1867 Act]; *Quebec Act 1774*, 14 Geo III c 83.

65 *Reference re Secession of Quebec*, *supra* note 23 at para 81.

66 See e.g. Eric M Adams, “Constitutional Stories: Japanese Canadians and the Constitution of Canada” (2018) 35:1/2 *Australasian Can Studies* 1; David Dyzenhaus & Mayo Moran, “Mack v Attorney General of Canada: Equality, History, and Reparation” in David Dyzenhaus & Mayo Moran, eds, *Calling Power to Account: Law, Reparations, and the Chinese Canadian Head Tax Case* (Toronto: University of Toronto Press, 2005) 3; *Walter et al v Attorney General of Alberta et al*, [1969] SCR 383, 3 DLR (3d) 1.

67 See “National Commission for Truth and Reconciliation: Reports” online: *National Centre for Truth and Reconciliation* <<http://nctr.ca/reports.php>>.

68 Sean Fine, “Chief Justice says Canada attempted ‘cultural genocide’ on aboriginals” (28 May 2015), online: *The Globe and Mail* <<https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>>.

69 *Reference re Secession of Quebec*, *supra* note 23 at para 81.

1.1.2. The Counter-Textual Unwritten Constitution

In addition to the notion that unwritten principles cannot be contained by the written word, there is a strand in the case law that allows unwritten constitutional rules to supersede the text of the Constitution. We see this in some post-1982 cases, which are focused on how courts might rely on unwritten principles to limit legislative action. As Robin Elliot notes, in identifying federalism as one of four underlying constitutional principles in the *Secession Reference*, the Court “makes no attempt to derive support for that interpretation from the text of the Constitution ... presumably because that text, as the Court itself recognized, seems clearly to prefer unity at the expense of diversity.”⁷⁰ For example, the text of the Constitution provides the Governor General the power to disallow provincial legislation.⁷¹ Combined with the convention that the Governor General only acts on the advice of the federal cabinet (more on this convention below), this power implies a far more centralized federal system than the courts have imagined over the years. Such a system would be at odds with the underlying principle of federalism. It remains to be seen whether the underlying principle of federalism attaches conditions (or makes impossible) the exercise of the power of disallowance.⁷² In a similar vein, in the *Manitoba Language Rights Reference* the Court held that nearly all of Manitoba's laws were unconstitutional because they had not been passed bilingually. The Court recognized that “the express terms of s. 52(1) of the *Constitution Act, 1982*, that unconstitutional laws are ‘of no force or effect’ ... [suggest] ... that declarations of invalidity can only be given immediate effect.”⁷³ Yet, the court temporarily

70 Robin Elliot, “References, Structural Argumentation and the Organizing Principles of Canada's Constitution” (2001) 80:1/2 Can Bar Rev 67 at 107; but see Peter W Hogg & Wade K Wright, “Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism” (2005) 38:2 UBC L Rev 329 at 333-339, for an argument that the historical record and text of the 1867 Act is more ambiguous. Hogg and Wright point to the expansive provincial power over property and civil rights and the “less conventional” view that there is a provincial residuary power in addition to the federal residuary power more readily identified from the text.

71 *Constitution Act, 1867*, *supra* note 64, ss 90, 56.

72 In *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 802, 125 DLR (3d) 1 [*Patriation Reference*], the Court noted that “reservation and disallowance of provincial legislation, although in law still open, have, to all intents and purposes, fallen into disuse.” It is not entirely clear whether the Court implied that the power had been overtaken by convention of disuse, or was merely making a factual observation. Richard Albert has argued that the power of disallowance has become “politically invalid as a result of constitutional desuetude.” Richard Albert, “Constitutional Amendment by Constitutional Desuetude” (2014) 62:3 Am J Comp L 641 at 662. The most recent SCC pronouncement on the matter was in 1938, when the validity of the power was confirmed: *Reference re The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province*, [1938] SCR 71, 2 DLR 8. If Albert is right, this shows the power of unwritten constitutional conventions to mandate behaviour contrary to the Constitution's text.

73 *Judges Reference*, *supra* note 37 at para 99.

suspended its declaration of invalidity based on the unwritten principle of the rule of law, which requires the maintenance of a body of positive laws in each jurisdiction.

If we look further back in time, much of the case law on unwritten principles generally focused on “what we now call political constitutionalism, or the idea that constitutional questions should generally be resolved by democratically-elected institutions.”⁷⁴ In this period, the unwritten Constitution was invoked in relation to “[c]oncepts such as ‘parliamentary sovereignty’, ‘parliamentary privilege’, and the many ‘constitutional conventions’ that filled out the essentially uncodified Constitution.”⁷⁵ Rather than viewing the preamble’s “similar in principle” language as an invitation to fill gaps in the written text, the Court was more likely to use the British sense of the term “Constitution,” which denotes the “set of rules, principles and practices that constitute original public authority.”⁷⁶ In this view of the Constitution, “many important topics are left beyond the reach of law ... Rather, their regulation is governed by non-legal norms, principally political ones.”⁷⁷

Often, unwritten constitutional conventions are left completely in the realm of politics, and judges do not pronounce on them. Even when they are brought to courts, the courts may opine on them but will not enforce them.⁷⁸ And yet, conventions are “rules [that] have an historical origin and bind ... the actors in constitutional matters in Canada ... No one can doubt their operative force or the reality of their existence as an effective part of the Canadian [C]onstitution.”⁷⁹ Of note for the present discussion is how conventions, which are unwritten rules of the Constitution, can operate in a way that apparently contradicts the text of the written Constitution. Consider some oft-cited examples. With respect to legislation, the *Constitution Act, 1867* provides that the Queen is part of Parliament;⁸⁰ “[c]onvention dictates, however, that the monarchy plays no substantive role in the workings of Parliament.”⁸¹ Similarly, the *Constitution Act, 1867* gives the Governor General the power to provide or withhold the

74 Peter C Oliver, “‘A Constitution Similar in Principle to that of the United Kingdom’: The Preamble, Constitutional Principles and a Sustainable Jurisprudence” McGill LJ [forthcoming].

75 *Ibid.*

76 Cyr, *supra* note 52 at 307 [translated by author]. Original: “l’ensemble des règles, principes et pratiques qui constituent l’autorité publique originelle.”

77 Oliver, *supra* note 74.

78 *Patriation Reference*, *supra* note 72 at 880.

79 *Ibid* at 858.

80 *Constitution Act, 1867*, *supra* note 64, s 17: “There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.”

81 Berger, *supra* note 40 at 255.

Queen's assent to a Bill passed by Parliament.⁸² Nonetheless, a Governor General who withholds assent "acts unconstitutionally"⁸³ because such an action violates the convention that assent is not withheld from duly passed legislation.

Conventions like these lay bare the tension between a commitment to the constitutional text and evolving preferences for how the polity should operate in practice. Adherence to such conventions provides a way for constitutional subjects to distance themselves from the text of the Constitution without denying their faith in the Constitution. In this respect, constitutional conventions echo the Talmudic response to the biblical text regarding the "stubborn and rebellious child." In Deuteronomy, the text requires a person with a child who does not obey when disciplined to "take hold of him and bring him out to the elders of his town," announce the child's disobedience, and proclaim the child a "glutton and a drunkard." The men of the town are then required to stone the child to death.⁸⁴ The Talmud, which records much of the Jewish oral tradition, tells of the rabbinic interpretive efforts to add a great number of conditions to prevent this process from ever being carried out. For instance, the word son "was limited to one who was thirteen and thus sufficiently mature to bear criminal responsibility, but not yet old enough to be a 'man,' the period of indictment was limited to three months following the thirteenth birthday."⁸⁵ In addition,

a complaint of rebelliousness was precluded if the parents were not 'alike in voice' when they admonished their son. This can be interpreted to mean that if the mother and father gave the son inconsistent directions, they were failing to provide him with a cohesive and disciplined home life, and that this parental shortcoming could be a defense to the charge that he was stubborn and rebellious.⁸⁶

As Rosenthal and Rosenthal note, due to these and other limitations, "[t]here appears to be no recorded instance of the execution of a stubborn and rebellious son."⁸⁷ As with constitutional conventions, the oral part of the tradition rescues the legal subject from either having to do something they regard as wrong or breaking faith with the tradition. Instead of saying "this text is distasteful," they can say, "the tradition, viewed as a whole, remains true and good."

82 *Constitution Act, 1867*, *supra* note 64, s 55.

83 Cyr, *supra* note 52 at 294 [translated by author].

84 Deut 21:18-21 (NRSV).

85 Irene Merker Rosenberg & Yale L Rosenberg, "The Legacy of the Stubborn and Rebellious Son" (1976) 74:6 Mich L Rev 1097 at 1164.

86 *Ibid* at 1165.

87 *Ibid*.

1.1.3 *The Unwritten Constitution Answers all Questions Over Time*

The Court was faced with deep questions about the nature of Canada's Constitution in the *Secession Reference*, in which the federal government asked the Court to advise on the constitutionality of a province's unilateral secession. There is nothing specific in the text of the Constitution to answer this question. So, while the Court held that the written elements of the Constitution "have a primary place in determining constitutional rules, they are not exhaustive." Quoting the *Judges Reference*, the Court affirmed that "[t]he Constitution ... 'embraces unwritten, as well as written rules.'"⁸⁸ As noted above, the Court held that these unwritten principles and rules "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."⁸⁹ Here, we see that the idea of the *emergence* of unwritten principles implies not only that the principles have an independent existence, but also that the more carefully courts scrutinize the text of the Constitution, the more they understand about its history, and the longer courts participate in the inter-generational tradition of constitutional exegesis, the more answers the Constitution contains.

This faith that the unwritten Constitution can provide answers, and that courts are duty bound to find them, treats the Constitution analogously to a sacred tradition.⁹⁰ Why do courts believe that solutions to previously unimagined constitutional crises can be found in the Constitution's underlying principles? Is it possible that the answers are not there, that the tradition to date does not in fact provide the resources to answer a question like whether a province can unilaterally secede? The Canadian constitutional order reliably answers no, even if believing otherwise requires a faith in the capacities of the Constitution and its associated tradition that is not fully rationalizable. One might argue that the faith courts display here is actually in the tradition of interpretation itself, rather than in some external thing or being, and that this is a key distinguishing feature between the Canadian legal tradition and faith-based traditions. While this is a compelling response, it does not fully account for why courts continue to present themselves as discovering law and connecting it to the unwritten Constitution, rather than claiming participation in a multi-generational process of authorship. Something drives courts to speak as

88 *Reference re Secession of Quebec*, *supra* note 23 at para 32.

89 *Ibid.*

90 At least one commentator noted similarities between the identification of unwritten rights in the US context and the rabbinical tradition of identifying unwritten obligations. Samuel J Levine, "Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics" (1998) 15:3 Const Commentary 511.

if the unwritten principles were always there; judges seem to believe, at least, that such decisions will be treated as more legitimate.

Kate Glover Berger articulates a different view of what it means to treat the Constitution as “gapless.” For her, treating the Constitution this way “is not to say that the unwritten [C]onstitution holds within it a coherent, complete vision of the constitutional order or a pool of ‘answers’ to the problems that arise in public life.” And the Constitution is, in her view, decidedly not “a product of omniscience, beneficence, or coherence.”⁹¹ Instead, the Constitution is gapless because it contains “an expansive and dynamic set of rules, principles, institutions, frameworks, and practices that can be looked to ... for guidance, insight, or possible routes forward.”⁹²

Two responses are possible here. First, the Court would, I think, balk at the suggestion that the Constitution is not coherent. It consistently presents its decisions as flowing from past decisions and practices, and in this sense argues that the Constitution is in fact stable and coherent. When it deviates from past decisions, or identifies a new unwritten principle, it goes to great pains to signal continuity with tradition. And my argument here is principally about how the Court displays its faith in the Constitution, not in presenting any empirical or ontological view about what the Constitution is or how it works. So one might agree with Glover Berger’s account, and still say that the decisions lean more towards presenting the Constitution as a product of “coherence” and “omniscience.” The claim of coherence can be heard in the Court’s description of how unwritten principles “function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.”⁹³ The principles are mutually supporting and interdependent, arranged with sufficient wisdom to help keep the federation in balance if they are properly understood and applied. The echoes of omniscience can be heard in the Court’s description that unwritten principles “infuse our Constitution and breathe life into it.”⁹⁴ How they got there, and how they animate our political institutions, is something of a mystery.

Second, Glover Berger’s claim that “we are never constitutionally unmoored” continues to signal a faith that our Constitution will provide us with good guidance. In other words, even if the Constitution is not the product of

91 Kate Glover Berger, “The Administrative Demands of Unwritten Constitutional Principles” McGill LJ [forthcoming].

92 *Ibid.*

93 *Reference re Secession of Quebec*, *supra* note 23 at para 49.

94 *Ibid* at para 50.

omniscience and answers questions only indirectly, it is still a reliable repository of all the raw materials we will ever need to answer our questions of governance. It would certainly be possible to take another view, particularly if one is disenchanted with the Constitution's assertion of sovereignty over Indigenous peoples, and with Canada's deplorable treatment of those groups over time. One might reasonably say, on this view, that the answers that the unwritten Constitution might provide to questions of Indigenous self-governance, for example, are likely to be morally bad or suspect answers given Canada's colonial origins. The point here is that taking the view that the unwritten Constitution will provide any morally worthy answers is an act of faith, given especially that one cannot examine the unwritten principles in their entirety in order to come to a moral judgment.

1.1.4 Use of Metaphor

In addition to the discussion above, a striking feature of the case law on the Constitution's unwritten principles is its use of metaphorical language. Metaphors are relatively common in judicial decisions. The type of metaphors used in the description of unwritten principles, however, suggests that unlike other metaphors that rely on common sense analogies to make a complex concept understood, unwritten principles metaphors are more likely to express views about the relationship between the people and their Constitution. They are less about achieving clarity and more about articulating some basic claims regarding how the legal system works. Thus, according to the Court, the *Constitution Act, 1867*'s "reference to 'a Constitution similar in Principle to that of the United Kingdom' ... points to the nature of the legal order that *envelops and sustains* Canadian society."⁹⁵ The same preambular language is "the grand entrance hall to the castle of the Constitution."⁹⁶ This castle has an "internal architecture," but is in some metaphorical sense alive because the unwritten principles are the "lifeblood" of the "constitutional structure."⁹⁷

Finn Makela helpfully distinguishes between "metaphors *in law*," where "metaphors are used to illustrate points within legal texts,"⁹⁸ and "meta-

95 *Judges Reference*, *supra* note 37 at para 99 [emphasis added].

96 *Ibid* at para 109.

97 *Reference re Secession of Quebec*, *supra* note 23 at paras 50-51; Berger extends the metaphor: "If the text is the skeleton of the constitution, and conventions are its flesh, principles are the 'lifeblood.' They 'inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.' On this view, the prescriptive and moral force of the constitution cannot be explained by reference to the text alone; instead, the underlying, animating principles that sustain the text are the ultimate source of its normative pull." Berger, *supra* note 40 at 262.

98 Finn Makela, "Metaphors and Models in Legal Theory" (2011) 52:3/4 C de D 397.

phors *about the law*.” “A metaphor about the law is a way of making claims regarding law (or a part of the law) as a phenomenon *per se*.”⁹⁹ Drawing on Marx, Makela argues:

The metaphor of foundation and superstructure makes a substantive claim about the law. Marx posits an ontology of the law: the legal and the political are not like a superstructure, they are a superstructure. We can thus say that the metaphor does not merely fulfill an aesthetic function, but also an epistemic one in so far as it serves to generate knowledge about the world.¹⁰⁰

Relying on the work of cognitive theorists Lakoff and Johnson, John Witte calls such metaphors about law *ontological metaphors*. In Lakoff and Johnson's definition, ontological metaphors “involve the projection of entity or substance status on something that does not have that status inherently.”¹⁰¹ Ontological metaphors can reflect “more fundamental beliefs, values, and ideals that shape not only our thought and language but our whole intellectual and institutional orientation.”¹⁰² Such metaphors “can become veritable articles of faith, which we cherish, even adore, which we fight for, even to death.”¹⁰³

On the basis of this distinction, we might see that the metaphors of the unwritten Constitution are different than those in our jurisprudence that identify the Constitution as a “living tree,” or the presumption of innocence as “the golden thread” of the criminal law.¹⁰⁴ The metaphor of living architecture may help clarify the Court's meaning, and certainly may “bridge the concrete and conceptual worlds.”¹⁰⁵ But it lacks the appeal to “common sense” characteristic of other legal metaphors.¹⁰⁶ Instead, it shows an imaginative description of how the Constitution relates to its subjects.¹⁰⁷ The Constitution envelops and sustains its subjects; they cannot escape it. It is the source of life for our system of government. How the Constitution does these things is somewhat mysterious, but this is at the heart of the faith at work in these cases. Indeed, Witte argues that an ontological metaphor can take on the character of faith if it is “based

99 *Ibid* at 400.

100 *Ibid* at 403.

101 George Lakoff & Mark Johnson, “The Metaphorical Structure of the Human Conceptual System” (1980) 4:2 *Cognitive Science* 195 at 196.

102 John Witte Jr, “The Metaphorical Bridge Between Law and Religion” (2020) 47:2 *Pepp L Rev* 435 at 445-46.

103 *Ibid* at 446.

104 See Benjamin L Berger, “Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text” (2002) 39 *Court Review* 30.

105 *Ibid* at 34.

106 *Ibid* at 35.

107 *Ibid* at 34.

on subjective beliefs and assumptions about the underlying features of experience and reality, and if it involves a cognitive leap, an act of trust or reliance that goes beyond immediate sense experience or the experimentally replicable procedures of science.”¹⁰⁸ Witte emphasizes, however, that labelling “these ontological metaphors ‘religious’ or ‘quasi-religious’ is not to deprecate or defame them. It is rather to show that they shape persons’ and communities’ attitudes and actions, allegiances and alliances much like religious metaphors.”¹⁰⁹

1.1.5 Concluding Thoughts on the Unwritten Constitution

To be sure, the Supreme Court has tempered its reliance on unwritten principles. It has emphasized the primacy of the written text and rejected some arguments advanced on the basis of unwritten principles such as the rule of law.¹¹⁰ It has expressed the concern “that unwritten concepts not be freely imported into a constitutional regime which has culminated in a written constitution.”¹¹¹ In its strongest language, the Court has held that:

in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.¹¹²

Further, minority and dissenting judgments find fault in over-reliance on unwritten principles,¹¹³ with La Forest J’s dissent in the *Judges Reference* standing out as a strong critique of imputing too much to unwritten principles lest the legitimacy of judicial review be compromised.¹¹⁴ There are also scholars more critical of the dominant position who emphasize need for courts to anchor their analyses of unwritten principles in the textual provisions.¹¹⁵ Some go further and are intensely sceptical of unwritten principles and courts’ reliance upon them to invalidate legislation.¹¹⁶

108 Witte, *supra* note 102 at 448.

109 *Ibid.*

110 *Reference re Secession of Quebec*, *supra* note 23 at para 49; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49.

111 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 376, 100 DLR (4th) 212 (McLachlin J, majority).

112 *British Columbia v Imperial Tobacco Canada Ltd*, *supra* note 110 at para 66.

113 See e.g. Lamer CJ’s judgment in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, *supra* note 111.

114 *Judges Reference*, *supra* note 37 at para 315; see also Elliot, *supra* note 70 at 92.

115 See Johnson, *supra* note 61 at 1092; Elliot, *supra* note 70 at 141-42.

116 Jeffrey Goldsworthy, “The Preamble, Judicial Independence and Judicial Integrity” (2000) 11:2 Const Forum Const 60; Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27:2 Queen’s LJ 389.

Despite these caveats and reservations, however, what distinguishes the unwritten principles in case law “is the assertion that unwritten law is not only foundational but also, occasionally, fundamental.”¹¹⁷ Indeed, in a recent significant decision on administrative law, the Court has reaffirmed that “[t]he Constitution — both written and unwritten — dictates the limits of all state action.”¹¹⁸ In other words, these principles have the power to limit legislative sovereignty.

In sum, the view of the Constitution advanced by the Supreme Court, and explained by scholars like Walters is that the real Constitution resists being confined to text, but at the same time can provide guidance to resolve constitutional crises and questions. The unwritten principles of the Constitution are (1) not fully containable in the Constitution’s text, (2) sometimes supreme over the Constitution’s text, (3) discoverable slowly over time, (4) sufficient to answer all potential constitutional crises,¹¹⁹ and (5) articulated as ontological metaphors.¹²⁰ In the next section, I take up how we might respond to this.

III. Law’s Claimed Authority over Religion: The Law is Rational and Religion is Faith-based

If I am correct that the Supreme Court’s jurisprudence on unwritten constitutional principles displays a faith-like commitment to the Constitution, why might this matter? Consider *B (R)*,¹²¹ a heartbreaking case about a baby born with severe ailments who, in the opinion of her attending physicians, required blood transfusions as part of her treatment. Her parents, Jehovah’s Witnesses, objected to these transfusions based on their religious convictions.¹²² The Children’s Aid Society obtained a temporary wardship order over the baby in order to consent to the transfusions on her behalf. The issues in the case were whether the granting of the order was consistent with (a) the parents’ *Charter*

117 Walters, *supra* note 28 at 99.

118 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 56. There was no argument in the case about unwritten principles, and yet the majority of the Court highlighted the unwritten principles.

119 One prominent public law scholar has argued that a contemporary court risks losing “credibility if it shirks in its duty to provide an answer to a question that is larger than the text.” David J Mullan, “Underlying Constitutional Principles: The Legacy of Justice Rand” (2010) 34:1/2 *Man LJ* 73 at 93.

120 For similar arguments about the US Constitution, sometimes held out as the paragon of the written constitutional culture, see Thomas C Grey, “Do We Have an Unwritten Constitution?” (1975) 27:3 *Stan L Rev* 703; see also Berger, *supra* note 40.

121 *B (R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1.

122 For a thorough and thoughtful dissection of the case, see Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2008).

rights under section 7 (the right not to be deprived of life, liberty, or security of the person in a manner contrary to the principles of fundamental justice), and (b) section 2(a) (freedom of conscience and religion). The Court's answer on the first issue was that, while the parents had suffered a deprivation of liberty, it was consistent with the principles of fundamental justice because the state has a justifiable role in child protection and the process through which wardship orders were determined was fair, giving adequate notice and an adversarial proceeding before a judge. On the second issue, while the parents' religious freedom had been infringed, the infringement was reasonable, essentially for the same reasons as it was consistent with the principles of fundamental justice.

There is a tacit comparison at work in *B(R)* between law and religion that serves to justify the state's use (or threat) of force. It treats the religious views of the parents as non-rational, or at least not fully rational. That the state's actions are justified because they are fair and reasonable (in other words, rational) suggests that this is key to their claim to normative priority. This tacit comparison — the law is rational, religion is not — is often at work when the law encounters religious practices. Take, for example, the Court's definition of religion in a leading case on religious freedom:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.¹²³

This definition¹²⁴ implies that religion is non-rational. The emphasis here is on what Rafael Domingo calls "suprarationality," "a mode of thinking that goes beyond, without necessarily contradicting, the conclusions of natural reason."¹²⁵

123 *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 39 [*Amselem*]. Based in part on this definition and its implications, Berger has argued persuasively that law treats religion as choice-based, private, and individualized: Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45:2 *Osgoode Hall LJ* 277.

124 Some religious studies scholars have observed that defining "religion" is a near impossible task; definitions are either over- or under-inclusive, and distinguishing between religious and non-religious behaviour may be an elusive goal. The task of arriving at a legal definition is better understood as a political project than a taxonomic one. Winnifred Sullivan, "Religion" in Mark Tushnet, Mark A Graber & Sanford Levinson, eds, *The Oxford Handbook of the US Constitution* (Oxford: Oxford University Press, 2015) 607 at 609-10; Michael Stausberg & Mark Q Gardiner, "Definition" in Michael Stausberg & Steven Engler, eds, *The Oxford Handbook of the Study of Religion* (Oxford: Oxford University Press, 2016) 9 at 17-18, 26.

125 Rafael Domingo, "Restoring Freedom of Conscience" (2015) 30:2 *JL & Religion* 176 at 185.

For this reason, the Court highlights *faith*, *beliefs*, and *spiritual* fulfillment. While there is a direct recognition of the importance of these, there is also an implicit contrast with actions and views based in empirical fact and reason; the realm of religion is the realm of the non-falsifiable metaphysical claim.¹²⁶ This is in part why the Court takes a subjective approach to religion,¹²⁷ and supports its rule that the state should not be the “arbiter of religious dogma.”¹²⁸ Courts leave the individual to define their own religious views in part because they are not susceptible, on this account, to rational scrutiny. They are, instead, private preferences.¹²⁹ The United Kingdom’s Supreme Court has held, even more clearly, that religions are belief systems that go “beyond that which can be perceived by the senses or ascertained by the application of science.”¹³⁰ Both these approaches can be taken to imply that religious practices cannot be subject to the kind of rational scrutiny courts habitually employ.¹³¹ In Timothy Macklem’s formulation,

faith exists as a type of rival to reason. When we say that we believe in something as a matter of faith ... we express a commitment to that which cannot be established by reason, or to that which can be established by reason but is not believed for reason’s sake. The rivalry between the two concepts is real, but not complete. Faith and reason are modes of belief with different sources and different characters, but not necessarily different consequences.¹³²

Many religious adherents would likely find no problem in the assertion that religion involves a strong element of faith or suprarationality. My interest here is in the contrast between this aspect of courts’ views of religion and their views of state law. I note that this view of religion does not appear in all cases, and not all legal decision-makers rely on such a view. Some legal decision-makers, such as the Ontario Human Rights Tribunal, are content to operate without an explicit definition of religion, preferring to reason by analogy and without

126 For a critique of how courts in the United Kingdom view religion as a matter of faith propositions rather than as a matter of descent, see Aaron R Petty, “‘Faith, However Defined’: Reassessing JFS and the Judicial Conception of ‘Religion’” (2014) 6:1 *Elon L Rev* 117; see also Lori G Beaman, “Is Religious Freedom Impossible in Canada?” (2012) 8:2 *L Culture & Humanities* 266.

127 *Anselem*, *supra* note 123 at para 42.

128 *Ibid* at para 50; see also Dia Dabby, “An Inevitable ‘Marriage March’? A Survey of the ‘Arbiter of Religious Dogma’ in Canadian Case Law” (2016) 45:2 *Studies in Religion/Sciences Religieuses* 127.

129 Berger, *supra* note 4 at Chapter Two.

130 *Hodkin & Anor, R (on the application of) v Registrar-General of Births, Deaths and Marriages*, [2013] UKSC 77, at para 57.

131 For an argument that US courts should adopt an even clearer position that religions are based on unprovable beliefs (in addition to a belief in a higher power), see Andrew W Austin, “Faith and the Constitutional Definition of Religion” (1991) 22:1 *Cumb L Rev* 1; see also Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ & Oxford: Princeton University Press, 2014).

132 Timothy Macklem, “Faith as a Secular Value” (2000) 45:1 *McGill LJ* 1 at 33.

reference to the rationality or non-rationality of the claims.¹³³ I make the more limited claim that the theme of religions as non-rational is a recurring one in contemporary Canadian and British jurisprudence.

In contrast to this depiction of religion, courts often extol the virtues of reasoned judicial decision-making,¹³⁴ and may invalidate decisions that rely on defective reasoning.¹³⁵ Further, appellate courts might overturn decisions that fail to adequately explain the supporting reasoning.¹³⁶ In other words, judicial decisions must usually be correctly and demonstrably reasoned in order to stand; they can and should be overturned if they rely on a false premise of fact or law. In addition, the proposition that laws should not be arbitrary — that there should be at least a rational connection between a law’s object and its effect — is considered a principle of fundamental justice.¹³⁷ More generally in constitutional analysis, government actions that infringe *Charter* rights (including religious freedom) must be rationally connected to a valid objective.¹³⁸ To take a more specific example, in the field of workplace accommodation, employers seeking to deny accommodation must show, among other things, the rational connection between the occupational requirement and the job.¹³⁹ Rationality is a frequent theme, held out as a condition for law’s legitimacy in multiple fields. Indeed, some have argued that, when law engages with religious claims, law’s understanding of itself as rational gives rise to a distrust of and presumed superiority to transcendent or metaphysical claims.¹⁴⁰

133 See *Heintz v Christian Horizons*, 2008 HRTO 22 varied on other grounds (*Ontario Human Rights Commission v Christian Horizons*, 2010 ONSC 2105); *Huang v 1233065 Ontario*, 2011 HRTO 825; Howard Kislowicz, “Trying to Put an Ocean in a Paper Cup: An Argument for the Un-Definition of Religion” (2012) 9:3 *Can Diversity* 29; for an argument that analogous reasoning of this kind disadvantages newer religions, see Peter W Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law International, 2002) at 7-9; see also Russell Sandberg, *Law and Religion* (Cambridge, UK: Cambridge University Press, 2011) at 39.

134 *R v Sheppard*, 2002 SCC 26.

135 *Ibid* at para 31.

136 *Barbieri v Mastronardi*, 2014 ONCA 416.

137 *Canada (Attorney General) v Bedford*, *supra* note 43 at paras 98-100.

138 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200; but see Sujit Choudhry, “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1” (2006) 35:2 *SCLR* 501, on the shifting meaning of the rational connection test with respect to the government’s evidentiary burden.

139 *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1; Faisal Bhabha, “R v NS: What is Fair in a Trial? The Supreme Court of Canada’s Divided Opinion on the Niqab in the Courtroom” (2013) 50:4 *Alta L Rev* 871 at 881.

140 Mark Witten, “Rationalist Influences in the Adjudication of Religious Freedoms in Canada” (2012) 32 *Windsor Rev Legal Soc Issues* 91 at 120; see also Paul Horwitz, “The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond” (1996) 54:1 *UT Fac L Rev* 1; Berger, *supra* note 123.

The analysis of unwritten constitutional principles in Part Two demonstrates that law is not as rational as it holds itself out to be, at least not all the way down. If the law's authority over religious practices is to be justified, it should not (and I think probably cannot) be as the outcome of a rationality contest.

IV. Responding to the Faith-like Jurisprudence

If one is convinced by my account of the faith-like aspects of Canadian constitutional law presented above, how might one respond? One option would be to make efforts to further rationalize the law and rid it of all faith-like or metaphysical elements; this has been the thrust of much contemporary jurisprudence.¹⁴¹ A second option is to accept the faith-like aspects. I think the first option is unlikely to be successful, and the second contains implications for how courts ought to approach disputes involving religious practices.

I think it unlikely that constitutional law can fully rid itself of its faith-like aspects in part because “[c]onstitutionalism, like religion, represents an attempt to render an otherwise chaotic order coherent, to supply a set of beliefs capable of channeling our conduct.”¹⁴² And, as Sanford Levinson noted some 30 years ago, once we start down this path, we wind up wanting to believe that not only does the Constitution provide answers, but that they are morally good answers:

Constitutional faith requires the linkage of law and morality even as most twentieth-century jurisprudence has emphasized their analytic separation. All calls for renewed faith in the rule of law and renewal of the constitutional covenant imply that submission to the Constitution will create not only order but also the conditions of a social order worthy of respect.¹⁴³

In this way, citizens' identity as Canadians and members of a morally worthy political community reinforces their faith in the Constitution. One may expect this to be amplified for at least some judges, legislators, and actors in the state executive, who derive part of their sense of self from the work they do.

If we want to keep believing that the Constitution will always be able to guide the behaviour of political actors and institutions, we have to ascribe to it some extraordinary qualities. Whether this is located in the moments of con-

141 Smith, *supra* note 6 at 1070.

142 Levinson, *supra* note 24 at 36.

143 *Ibid* at 60.

stitutional framing or in a near-eternal tradition,¹⁴⁴ “some kind of transcendent origin of the Constitution”¹⁴⁵ will have to be imagined. Devotion to the Constitution and belief in its transcendence operate in a mutually supportive cycle. I want to believe that the Constitution will guide me, so I imagine the Constitution as transcendent; I believe the Constitution is transcendent, so my devotion to it is reinforced. And this may be a good part of what holds the country together.¹⁴⁶

If we are left in the position that some faith-like attachment to the Constitution is very likely to persist, and perhaps inevitable, what are the implications? In Berger’s consideration of the ways in which Canadian constitutionalism can be seen as cultural, he lands on the conclusion that judges ought to develop the virtue of *fidelity* to Canadian constitutional culture.¹⁴⁷ Quoting Alexander Bickel, Berger argues that the judge must be a “defender of the faith” with respect to law;¹⁴⁸ “the judge has a special role in cultivating and caring for the public gifts of a liberal constitutional culture, of which there are many.”¹⁴⁹ The judge, however, should leave behind the conceit that law is above or without culture, and speak openly about its informing commitments. The passage from the Court quoted earlier in this essay, recognizing that “[o]ur law’s claim to legitimacy . . . rests [in part] on an appeal to moral values,”¹⁵⁰ is an example of this kind of fidelity. Another example is found in the Court’s *Loyola* decision, in which a majority of the Court identifies “equality, human rights and democracy” as “core national values” that “the state always has a legitimate interest in promoting and protecting.”¹⁵¹ It follows, in my view, that judges should be open about their faith in the unwritten Constitution. This faith is an aspect of the culture of Canadian constitutionalism that has developed from the basic commitment that Canada’s constitutional structure is one worth preserving and perpetuating.

However, fidelity on its own is not enough, lest courts end up imposing all their normative commitments on legal subjects. This would be counter to

144 See Cyr, *supra* note 52 at 318: “nos normes constitutionnelles — qu’elles relèvent de la constitution formelle, matérielle ou des deux — sont parfois le produit d’actes de volonté de forces Constituantes, ces normes et pratiques sont parfois le fruit contingent d’une série de développements guidés par la raison pratique, et parfois, elles relèvent de ces deux logiques.”

145 Levinson, *supra* note 24 at 14.

146 *Ibid* at 73.

147 Berger, *supra* note 4 at 177-78.

148 *Ibid* at 170.

149 *Ibid* at 171.

150 *Reference re Secession of Quebec*, *supra* note 23 at para 67.

151 *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12.

some of the liberal commitments that inform Canada's constitutional culture. More to the point, says Berger, understanding "Canadian constitutionalism as a cultural form also means seeing that the constitutional rule of law is always in competition with other cultures, other compelling and rich ways of generating meaning and giving structure to experience."¹⁵² Recognizing the parallel roles that law and religion can play in generating meaning for individuals and communities should induce in judges an ethic of *humility* to counterbalance their ethic of fidelity.¹⁵³ A more humble court is more likely to "[stay] the violent hand of the law," expanding the array of religious practices to which law is indifferent, marking them as "not intolerable."¹⁵⁴

Likewise, the recognition that Canadian constitutionalism includes some faith-like commitments, should induce a similar humility. The specific point revealed by this recognition is the instability of law's reliance on its superior rationality to justify its authority. The law is less different from religious traditions than it sometimes imagines itself to be; in Berger's formulations, both are cultures. To this I add that both include some faith-like commitments. This does not mean that courts should throw the law out; their role is to keep faith with the legal tradition. But, crucially, the presumed superiority of law to religion based in the implicit claim that law is rational while religion is not, is not sustainable, at least not all the way down. Moreover, the ethics of faith and humility encourage courts to be more transparent in their reasoning. In the context of unwritten principles, this might mean that courts should be more explicit about the interpretive work they are doing in naming new unwritten principles and working out their implications.

There is reason to hope that courts can achieve commitments to these twin ethics. Berger identifies several examples of judgments displaying them in the religious freedom context. He points, for instance, to the dissenting judgment in *AC v Manitoba (Director of Child and Family Services)*,¹⁵⁵ a case about a teenage patient who wished to refuse a blood transfusion because of her Jehovah's Witness faith. Justice Binnie's dissent, says Berger, displays fidelity by speaking "clearly and powerfully about the constitutional commitments" at play, the "sanctity of life and the sacrality of individual autonomy."¹⁵⁶ But he also displays humility in his "overt attempt to under-

152 Berger, *supra* note 4 at 172.

153 *Ibid* at 173; see also Benjamin L Berger, "What Humility Isn't: Responsibility and the Judicial Role" (2018) 87 SCLR (2d) 277.

154 Berger, *supra* note 4 at 177-78.

155 *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

156 Berger, *supra* note 4 at 176.

stand”¹⁵⁷ the position of a teenaged patient who wished to refuse a blood transfusion. We might also add the more recent example of Chief Justice McLachlin’s concurring minority opinion in *Law Society of British Columbia v Trinity Western University*.¹⁵⁸ The case concerned the denial of accreditation to Trinity Western University’s proposed law school because of the University’s mandatory Community Covenant which prohibited sex outside of a marriage between a man and a woman. Chief Justice McLachlin demonstrates fidelity to the constitutional value of equality/anti-discrimination in discussing the law society’s motivation for denying accreditation.¹⁵⁹ She also demonstrates humility by spending several paragraphs explaining how the denial of accreditation impacts Trinity Western’s religious community. The decision, in her view, “precludes members of the TWU community from engaging in the practice of providing legal education in an environment that conforms to their religious beliefs, deprives them of the ability to express those beliefs in institutional form, and prevents them from associating in the manner they believe their faith requires.”¹⁶⁰ The judicial ethics of humility and fidelity have already found expression in Canadian law, showing the possibility of their fuller development going forward.

V. Conclusion

In the discussion of the Midrashic story referred to in this article’s introduction, Amnon Bazak raises another Midrashic story on the topic of unwritten law.¹⁶¹ In this second story, there was a king with two beloved servants. He gave each of them a bundle of wheat and a bundle of flax. One servant wove the flax into cloth; he planted the wheat, processed it into flour, and baked a loaf of bread. The other servant put the gifts in a box for safekeeping. When the king returned, he praised the first servant, and told the second he should be ashamed. The first servant represents the community that develops an oral tradition from the initial written law; he has shown both wisdom and devotion to his king. The second has squandered the king’s gift by failing to realize its potential.

As in the Canadian judicial engagement with unwritten principles, there is much emphasis here on the importance of the interpretation and elaboration of

157 *Ibid.*

158 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

159 *Ibid* at paras 146-48.

160 *Ibid* at para 134.

161 Amnon Bazak, *Nitshuni banai* [Fundamental Questions in the Study of the Oral Law] (Rishon le-Tsiyon: Yedi’ot aḥaronot: Sifre Hemed, 2020) at 49-50, citing Seder Eliahu Zuta, Chapter Two.

legal tradition. But crucial in both this Midrashic account and the Canadian judicial account of unwritten law is the initial gift, the original materials with which the law must keep faith. In the Midrashic account, this role is filled by the divinely authored Torah. In the Canadian judicial account, what fills this role is not a text, but the principles on which the text is based. While some unwritten law is developed by expounding upon the written Constitution, the written elements of the Canadian Constitution are often treated as the imperfect expression of deeper principles. In dominant judicial accounts, these, rather than the texts, are the bundles of flax and wheat from which Canadian constitutional law is woven and harvested.

Though the Canadian tradition does not give a theistic account of the origins of these principles, its faith in their existence, in their revelation to courts over time in response to legal problems, and in their capacity to give good guidance imperfectly mirrors some religious traditions' faith in their divine law. One might argue that what courts say is different from what courts do, and the professed belief in unwritten principles is cover for judicial lawmaking that might be seen as illegitimate. But even if we assume that Supreme Court justices do not actually believe in the independent existence of unwritten principles, there is something compelling them to present the principles in this way. Even on this more critical account, judges sense that their decisions will be more legitimate if they are presented as inevitable and consistent with tradition. And unlike decisions that are based more directly on written instruments, the unwritten elements of the tradition with which they are keeping faith resist direct descriptions, prompting the use of ontological metaphors. In the end, I have argued, this means that when Canadian courts engage with religion, they should recognize law and religion's commonalities, and do so with a good dose of humility.