Denying & Reckoning with Implicit Law: The Case of the City of Toronto v Ontario (AG)*

Thomas McMorrow**

This article explores the role of implicit normativity in the Canadian constitutional order, in light of the City of Toronto's constitutional challenge to the province of Ontario's Better Local Government Act. *The Act was passed by the recently elected provincial legislature during the municipality's 2018 election, reducing the number of wards and revising electoral boundaries. The law was initially struck down when the City and some candidates challenged its constitutionality before the Superior Court of Ontario, but the Ontario Court of Appeal granted a stay of that order and the election proceeded under the new format. In a 3:2 decision, the Ontario Court of Appeal subsequently dismissed the constitutional challenge after a full hearing of the merits. The Supreme Court of Canada then heard an appeal of that ruling in March 2021, and its judgment is forthcoming.*

The purpose of this case study is to identify what the arguments over the constitutionality of the Better Local Government Act *reveal about the nature of implicit constitutional*

Cet article explore le rôle de la normativité implicite dans l'ordre constitutionnel canadien à l'aune du recours constitutionnel de la Ville de Toronto à l'encontre de la Loi sur l'amélioration des administrations locales *de l'Ontario. La loi, adoptée pendant l'élection municipale de 2018 par la législature provinciale récemment élue, réduit le nombre de quartiers électoraux municipaux et les redécoupe. Après avoir été d'abord invalidée par la Cour supérieure de l'Ontario dans le cadre du recours intenté par la Ville et certains candidats, la Cour d'appel de l'Ontario a accepté de surseoir l'exécution de cette décision et d'ordonner que l'élection municipale ait lieu selon les nouvelles modalités. Dans une décision partagée 3-2, la Cour a ultérieurement rejeté le recours constitutionnel après avoir entendu la cause au fond. La Cour suprême du Canada a ensuite entendu l'appel de cette décision en mars 2021 et son jugement est attendu prochainement.*

La présente étude de cas cherche à identifier ce que les arguments relatifs à la constitutionnalité de

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** Associate Professor of Legal Studies, Ontario Tech University.

constraints on the exercise of political power. The article argues that the implicit dimensions to Canada's constitutional order are not reducible to discrete doctrinal questions, such as the judicial enforceability of unwritten constitutional principles or the justiciability of constitutional conventions. Its central claim is that the vitality of Canada's constitutional order depends on the public and their political representatives expressing commitment to the ideals the Constitution has the capacity to serve. Whatever the Court's answer turns out to be to the constitutionality question in the City of Toronto v Ontario (Attorney General)*, though, the decision by itself is not going to yield better local government. Defining explicit constitutional limits on governing is a necessary but not sufficient condition for lawmakers to demonstrate the kinds of implicit normative commitments governing well demands, including the commitment to justifying their exercise of formal authority in a substantively reasonable way.*

la Loi sur l'amélioration des administrations locales *révèlent quant à la nature des limites constitutionnelles implicites à l'exercice du pouvoir politique. L'article soutient que les dimensions implicites de l'ordre constitutionnel canadien ne sont pas réductibles à un ensemble de questions doctrinales ponctuelles, comme l'application judiciaire des principes constitutionnels non écrits ou la justiciabilité des conventions constitutionnelles. La proposition principale de l'article est que la vitalité de l'ordre constitutionnel canadien dépend de l'engagement dont font preuve le public et leur représentants politiques en faveur des idéaux que la constitution soutend. Indépendamment de la réponse que la Cour donnera aux questions de validité constitutionnelle soulevées dans* Ville de Toronto c. Ontario (Procureur général)*, la décision elle-même ne produira pas une meilleure administration locale. Pour que les législateurs rendent manifestes les engagements normatifs implicites essentiels pour bien gouverner, notamment celui de justifier de manière substantiellement raisonnable l'exercice des pouvoirs formellement conférés au gouvernement, déterminer simplement des limites à ces pouvoirs n'est pas suffisant.*

Contents

I. Introduction

The present article explores the problem of government leaders deploying state legal power in defiance of implicit normative constraints on their exercise of authority. The *City of Toronto v Ontario (Attorney General)* case, arising from the Ontario provincial government flouting the City of Toronto's expectations around the integrity of its municipal election, raises certain questions about the role of implicit law in Canada's constitutional order.[1] The Ontario legislature enacted the *Better Local Government Act* in August 2018, altering the city of Toronto's governance structure in the middle of a municipal election.[2] The Ontario Superior Court struck down the legislation as unconstitutional, describing it as "hurriedly enacted … without much thought at all, more out of pique than principle."[3] In response, Ontario Premier Doug Ford vowed to invoke the notwithstanding clause to sidestep what he decried as judicial obstruction of his democratic mandate, saying the courts had made him feel like "I'm sitting here handcuffed, with a piece of tape over my mouth, watching what I say."[4] Since the Ontario Court of Appeal subsequently granted a stay of the lower court's order, the election proceeded in October 2018, in accordance with the new electoral boundaries laid out in the *Act*.[5] Upon a full hearing of the merits, the Ontario Court of Appeal, in a 3:2 decision, ultimately dismissed the constitutional challenge.[6] In March 2021, an appeal of that ruling reached the Supreme Court of Canada, which is expected to render its decision by December 2021.

Understandably, the passage of time has seen the pitched rhetoric and intense media interest in the case fade. The election at issue is some three years

1 See *City of Toronto et al v Ontario (AG)*, 2018 ONSC 5151 (CanLII) [*City of Toronto SC*]; *Toronto (City of) v Ontario (AG)*, 2018 ONCA 761 (CanLII) [*City of Toronto CA I*]; *Toronto (City of) v Ontario (AG)*, 2019 ONCA 732 (CanLII) [*City of Toronto CA II*].

2 *Better Local Government Act*, 2018 SO 2018, c 11 [*Bill 5*].

3 See *City of Toronto SC*, *supra* note 1 at para 70.

4 The Premier also said: ""I was elected. The judge was appointed. He was appointed by one person, (former Liberal premier) Dalton McGuinty"…though his aides later clarified that Belobaba was in fact named by former prime minister Paul Martin because Superior Court justices are federal appointments." Jennifer Pagliaro & Robert Benzie, "Ford plans to invoke notwithstanding clause for first time in province's history and will call back legislature on Bill 5", *Toronto Star* (10 September 2018), online: <https://www.thestar.com/news/toronto-election/2018/09/10/superior-court-judge-strikes-down-legislation-cutting-the-size-of-toronto-city-council.html>.

5 *City of Toronto CA*, *supra* note 1.

6 *City of Toronto CA II*, *supra* note 1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

past and no one is asking the Supreme Court to overturn the results. The constitutionality of the legislation remains a live question before the Court, though, and the range of interveners speaks to the breadth of argument involved.[7] In exploring this case to discuss implicit law in Canada's constitutional order, this article refers specifically to unwritten constitutional principles and constitutional conventions but also to the collection of social norms, conventions, principles, and values informing the authoritative exercise of legal and constitutional power. For clarity's sake, the article specifies where it is referring to implicit law in this broader sense by referring to the implicit normativity of Canada's constitutional order.[8]

Implicit law is an evidently ambiguous term. For example, according to Joseph Raz, implicit law signals the "familiar fact that the law says more than it explicitly states" and thus refers to that which authoritative legal texts imply.[9] Meanwhile, Lon Fuller's work suggests implicit law refers to principles and values that law, legal institutions, and processes, by their nature, imply.[10] In its constitutional jurisprudence on unwritten (or underlying) constitu-

7 See e.g. *Toronto (City of) v Ontario (AG)*, Ottawa 38921 (SCC) [*City of Toronto SCC*] (Factum of the Intervener, Durham Community Legal Clinic, at para 3) (arguing that "[l]ow-income and historically marginalized populations have a greater reliance on municipal services than the general population, and…have less ability to engage in the political process, and are disproportionately impacted by changes in that process mid-way"); *City of Toronto SCC*, *ibid* (Factum of the Interveners, Métis Nation of Ontario and Métis Nation of Alberta, at para 2) (arguing that "[o]ne of these unwritten principles — the honour of the Crown — now acts as a workhorse in advancing reconciliation with Indigenous peoples"). See Thomas McMorrow, "Upholding the Honour of the Crown" (2018) 34:4 Windsor Yearbook of Access to Justice 311.

8 Given the taken-for-granted quality of implicit normativity, it is no surprise that more explicit attention would be paid to the various threads in the implicit normative fabric of a given constitutional order when they are perceived as under strain. See the legal scholarly studies provoked in part by the actions of former US president Donald Trump. For example, Neil Siegel highlights norms and conventions binding holders of public office when referring to Trump's violation of "norms of transparency, conflict of interest, civil discourse, respect for the opposition and freedom of the press, and equal treatment of citizens". Neil S Siegel, "Political Norms, Constitutional Conventions, and President Donald Trump" (2018) 93:1 Ind LJ 177 at 205. Meanwhile, Nicola Lacey describes, "Trump's brazen flouting of the long-established conventions about conflicts of interest and nepotism, by failing effectively to separate himself from his business interests; his incontinent invective on Twitter; and his decision to move a large part of his family into the White House in positions of very significant executive power." Nicola Lacey "Populism and the Rule of Law" (2019) 15 Annual Review of Law and Social Science 79 at 80.

9 Joseph Raz, "Dworkin: A New Link in the Chain" (1986) 74:3 Cal L Rev 1103 at 1105-1106.

10 See Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969). See generally Kenneth Winston, ed, *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham, NC: Duke University Press, 1981) (offering a comprehensive and revealing picture of Fuller's legal theory). For the most influential and developed legal scholarly treatments of the role of principles in a positive legal order and constitutional rights adjudication specifically, see Ronald Dworkin, *Law's Empire* (Cambridge: The Belknap Press of Harvard University Press, 1986); Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978).

tional principles, the Supreme Court of Canada has expressed both conceptual approaches, describing such principles as "the vital unstated assumptions upon which the text is based"[11] and as "clearly implicit in the very nature of a Constitution."[12] At the same time, what the Court identifies as constitutional conventions[13] resonates with another aspect of Fuller's legal thought — his account of implicit law as "custom."[14] By this, Fuller means legal norms that arise over time from social interaction, rather than due to deliberate enactment through legislation. In this sense, implicit law reflects the rules people respect as obligatory, as inferred from how they act. Consequently, what legal subjects treat as normative in fact is as central to such an account of implicit law as institutional pedigree and formal sanction are to explicit law.[15]

Denying implicit law — by equating law with explicit, official rule making and formal, institutionalized enforcement — suggests that absent explicit, formal prescription, those exercising legal and constitutional authority may do so in any manner they please.[16] Reckoning with implicit law means reckoning

11 *Reference Re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 at para 49 [*Secession Reference*].

12 *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 SCR 721 at 750.

13 See *Reference re Amendment of Constitution of Canada*, 1981 CanLII 25 (SCC), [1981] 1 SCR 753 [*Patriation Reference*].

14 Lon Fuller, "Human Interaction and the Law" (1969) 14 Am J Juris 1 at 1. See Gerald Postema, "Implicit Law" (1994) 13:3 Law & Phil 361 at 363-64.

15 Although the "legal" status of constitutional conventions is more contentious than that of underlying constitutional principles, both are doctrinally acknowledged as integral to Canada's constitutional order. The labelling of the implicit normativity of Canada's constitutional order, in the broad sense, as law is even more contentious, of course, than the designation of constitutional conventions as such. There are values, concepts and principles too general and vague to be properly called customary norms. Furthermore, contending that certain norms should be understood as legal, and/or constitutional in nature, but not necessarily the proper object of judicial enforcement in the circumstances, may sound confusing to ears accustomed to hearing legal or constitutional arguments addressed to courts. To foreground the facilitation of human agency in a purposive conception of law is to resist an automatic conflation of law with state, system or formal written proposition — not because such institutions, frames or symbolic expressions have nothing to do with law but because these forms do not exhaustively capture the complex, interactional endeavour law is. One need not subscribe to such a radically pluralistic conception of law, however, to recognize that the banalization of implicit normativity within the constitutional order is an issue of concern and cannot be meaningfully counteracted absent public recognition and support.

16 Geneviève Cartier discusses what she calls "discretion as power", according to which "[a]bsent legislative indications to the contrary, the decision maker endowed with the ability to decide on a discretionary basis is controlled by political and policy considerations that do not form part of the domain of law or that cannot be the subject of legal control." Geneviève Cartier, "Administrative Discretion and the Spirit of Legality: From Theory to Practice" (2009) 24:3 CJLS 313 at 315, 17. Whereas Cartier's study primarily concerns judicial review of administrative action, where the issue is the legal basis of executive authority, the present article focuses on judicial review of the constitutionality of legislation, which involves the constitutional limits on lawmaking. The present article also underscores that there is a

with the fact that law exists in implicit as well as explicit forms.[17] It means acknowledging the difference between asserting the legal authority to exercise power and justifying the specific manner of its use. Reckoning with implicit law also means, however, acknowledging that courts provide a necessary but not sufficient forum and audience for this justificatory exercise. That is because defining the explicit constitutional limits on governing is a necessary but not sufficient condition for lawmakers to govern well.

Evaluative statements about a government's practices — claiming they are governing better or worse, badly or well — reflect subjective judgments. Defining good governance as, say, "congruence with the law and its underlying principles," attempts to establish a more objective basis for such evaluations.[18] This definition suggests there are limits on the proper exercise of governing authority but limits that governments, through the implementation of law reform, can themselves alter, thus transforming these evaluative standards. Insofar as a constitution establishes parameters on such an undertaking, constitutions themselves are, of course, subject to change in myriad ways. All this points to the fact that in a liberal constitutional democracy, meaningful reasoned justification behind the exercise of public authority depends on an inclusive, interactive process of deliberative engagement, to which the subjective judgments of individual members of society matter.

The deliberate or unconscious denial of implicit normativity as extra- or non-legal, based on a formal pedigree test, can provide warrant to a cynical, self-serving, instrumentalist approach to law and the Constitution. To operators adopting this perspective, all that matters is "what I can get away with." When it comes to the broader challenge of defending Canada's constitutional order against the degradation that results when those responsible for governing conceive the Constitution as simply a legal encumbrance on their exercise of

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spectrum between the two extremes Cartier identifies and that the domain of law is not reducible to judicial control.

17 See Roderick Macdonald, "Pour la reconnaissance d'une normativité juridique implicite et ' inférentielle'" (1986) 18:1 Sociologie et Sociétés 47; Roderick Macdonald, "Les Veilles Gardes : hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives" in Jean-Guy Belley, ed, *Le droit soluble : contributions québécoises à l'étude de l'internormativité* (Paris: LGDJ Montchrestien-Gualino, 1996) 233; Roderick Macdonald, "Office Politics" (1990) 40:3 UTLJ 419 at 456-460 (with an abridged, English translation of the typology Macdonald offers in the French-language articles).

18 I thank one of the anonymous reviewers for their formulation of this definition. Compare the discussion of governance in Thomas McMorrow, "Inspiring Governance Through Law: Rod Macdonald's Jurisprudence of Hope" in Richard Janda, Daniel Jutras & Rosalie Jukier, eds, *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (Montréal, Quebec & Kingston, Ontario: McGill-Queen's University Press, 2015) 211.

political power, the capacity of the courts is limited. Simply complying with constitutional minimums falls short of an aspirational standard of constitutionalism, a standard that Kent Roach refers to as an "older sense that power must be restrained by decency, prudence, and tradition, not just the legal limits that lawyers and courts impose on us."[19] Despite Roach's invocation of a British constitutional past, calling for the virtuous exercise of legal authority should not be mistaken for a paean to the *noblesse oblige* of an aristocratic social order.[20] Rather, it is a reflection of the reality Philippe Lagassé describes when he writes that "[w]e expect our highest officeholders to exercise their powers and authorities honourably … [because] the proper functioning of our system depends on it."[21]

Conscious public political engagement, as well as effective and legitimate judicial review of administrative and legislative action, is necessary to uphold the ideals whose realization formal constitutional rules ought to facilitate. Citizens themselves help define and realize those ideals through civic engagement, electoral politics, and social judgement. The most insidious impact of those in power denying the existence or authority of implicit law would be to make the rest of us think we must do without it.

Consequently, no matter the specific outcome, the Supreme Court of Canada's decision in the *City of Toronto et al v Ontario (Attorney General)* is not going to yield the kind of reckoning with implicit normativity that better government demands. In fact, it may be that by refusing the temptation to invalidate this piece of legislation — no matter how unfair, obtuse, or provocative its enactment may have been — the Supreme Court could actually help

19 Kent Roach, *September 11: Consequences for Canada* (Montréal, Quebec & Kingston, Ontario: McGill-Queen's University Press, 2003) at 99. "Constitutionalism in Canada before the Charter was built on the notion that those in power should not exercise their legal powers to the fullest extent possible even in times of perceived crisis. It was fundamental to British constitutionalism that what was legal might nevertheless be improper and unconstitutional."

20 Although at first blush, it may seem as though Roach is invoking the "conservative variant of normativism", which Martin Loughlin traces in his periodization of British public law thought, his overall argument reflects elements in the functional and liberal normative perspectives Loughlin moots also. Loughlin describes the "conservative variant of normativism" reflected in the late 19th/ early 20th Century British trust in the common law method and the unwritten constitution. According to Loughlin, the functional method subsequently gains prominence from the 1920s up to the 1970s, in response to the rise in democracy and belief in the capacity of the administrative state to address social problems. In Loughlin's history, the functional approach in turn succumbs to the liberal variant of normativism (liberal or legal constitutionalism) — with the latter providing a refuge for those who have lost faith in the capacity of democratic politics and parliamentarianism to achieve pro social ends. See Martin Loughlin, "The Political Constitution Revisited" (2019) 30:1 King's Law Journal 5 at 11-14.

21 Philippe Lagassé, "The Crown and Government Formation: Conventions, Practices, Customs, and Norms" (2019) 28:3 Const Forum Const 1 at 3.

precipitate the kind of political mobilization that a more robust, participatory, and exacting politics involves. Or maybe not: upholding the constitutionality of the statute could deflate such efforts, while emboldening a government that does not value the process of justifying their decisions to the public on the basis of implicit constitutional standards.

Part II of this article examines how right-wing populist politics problematize the very idea of implicit law, while exposing just how essential implicit normativity is to fostering a constitutional order capable of sustaining effective and legitimate governance. Part III focuses on Canada's unwritten constitution, elaborating on this particular dimension of implicit normativity in the constitutional order. Part IV analyzes arguments over the *Better Local Government Act*'s constitutional validity in order to demonstrate that being alive to the unwritten, implicit dimensions of Canada's constitutional order does not deliver prescriptive answers to questions about how constitutional claims based, at least in part, on underlying, unwritten principles ought to be adjudicated. At the same time as courts have a duty to signal the constitutional limits on the exercise of parliamentary and executive power, they also have an obligation to make space for these constitutional actors to do their work. Part IV also aims to shed light on that dynamic. Part V then acknowledges that defining the constitutional limits on governing is by no means all there is to establishing the conditions for lawmakers to govern well. Certainly, whatever the Supreme Court's answer turns out to be to the constitutional validity question in *City of Toronto v Ontario (Attorney General)*, it will not provide the reckoning with implicit normativity that better government demands. Nevertheless, the reasoning the Court advances, and the forum for debate the litigation process affords, can help to cultivate a wider culture of justification for political decision-making — one that integrates (while extending beyond) the micro-culture of formal legal constitutionalism.

II. Right-wing Populism and the Problems for Implicit Law

Doug Ford splashed onto the provincial political leadership scene during an ascending global wave of right-wing populism.[22] Like other populist leaders, Ford was elected not only despite — but in part, due to — his repudiation of certain behavioral norms. Significantly, his decisions reflect Nichola Lacey's observa-

22 See Mark A Graber, Sanford Levinson, & Mark Tushnet, eds, *Constitutional Democracy in Crisis* (Oxford: Oxford University Press, 2018) (surveying "the apparent weakening of many constitutional democracies around the world").

tion that "[p]opulist attitudes are … impatient of constraints."[23] Growing evidence of such impatience with constitutional tradition, convention, and principle led to a corresponding intensification of scholarly interest in the role of constitutional law in responding to elected politicians heedless of such fetters on their political will.[24]

If populism is an "ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the *volonté générale* (general will) of the people," Ford's rhetoric on the campaign trail and in government, trumpeting his "government for the people," is consistent with this broad definition.[25] And yet, other aspects of what he has said and done, especially after the first several months following the 2018 election, suggest that his approach is not strictly defined by populism either. Ford's *modus operandi* has never been as programmatic or ideologically committed as that of right-wing populist leaders engaged in what Paul Blokker describes as "populism as a constitutional project."[26] Moreover, Ford's record of reversals in the face of public pushback on many, though not all, controversial appointments, policies, and legislative proposals casts doubt on just how committed a populist he is.

It is important to acknowledge that labelling a politician as a "populist" may be intended as a smear, given the stigma the term frequently connotes. In considering whether such a label is apt, however, one must also recognize that populism takes distinct forms in different contexts.[27] The illiberal and programmatic qualities rightly associated with populism under one regime may be largely absent in another. Not only is there no pure populism, purely populist politics and policies may be hard to find too. At any rate, recognizing the limited descriptive purchase that the concept of populism has, one need not discount the populist elements of Ford's government either.

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23 Lacey, *supra* note 8 at 95.

24 See e.g. the special issue on "populism and constitutionalism" in volume 20 issue 2 of the 2019 German Law Journal.

25 Cas Mudde & Cristóbal Rovira Kaltwasser, "Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America" (2013) 48:2 Government and Opposition 147 at 149-150.

26 Neither Ford's rhetoric nor policies reflect the kind of nativism and illiberalism Blocker identifies with the populist constitutional project authoritarian figures such as Viktor Orbán are taking, by rejecting "pluralism, inclusiveness, and actual civic participation in constitutionalism". Paul Blokker, "Populism as a Constitutional Project" (2019) 17:2 International Journal of Constitutional Law 536 at 552.

27 See Paul Taggart, *Populism* (Buckingham: Open University Press, 2000). See also Robert Howse, "Epilogue: In Defense of Disruptive Democracy — A Critique of Anti-Populism" (2019) 17:2 International Journal of Constitutional Law 641.

In this sense, June 2018 was not the first time that some version of right-wing political populism had triumphed at the polls in Ontario. Discussing then Ontario Premier Mike Harris' "Common Sense Revolution" in the 1990s, Harry Arthurs notes that in this genre of populist rhetoric, the "problem" is always "The Government," the answer is always "The People," and the solution is ultimately a matter of taking (spending) power back from The Government to put it back in the hands of The People.[28] Ford's "Government For the People" slogan betrays the emphasis on government purportedly *for*, but in practice seldom *by* or *of* the people. Moreover, in asserting his authority to "protect … the 2.3 million people that voted for our government"[29] — which omits the other 12 million people who did not cast their ballot for Ford's Progressive Conservative party — Ford's public remarks suggest it is actually a "government for *some of* the people."[30] Publicizing government's role in rewarding partisan supporters, without even paying lip service to the idea of serving the public, "says the quiet part aloud." It runs roughshod over certain norms of (at least, rhetorical) propriety, reinforcing cynicism about politics and politicians, which right-wing populists are so adept at fomenting and leveraging.

Of course, the point is not that all constraints on political action are to be suffered patiently. Not all norms, conventions, and practices are created equal. Some do indeed, depending on the norm and the context, warrant breaking, revision, or replacement. Criticizing the breach of unwritten rules or implicit normativity risks sounding fusty, even fanciful, ignoring the pathologies and grave injustices every previous age has known. Implicit norms, be they political conventions or moral values, can frustrate legitimate, pressingly necessary political action.

At the same time, implicit normativity — comprising customs arising over time through purposive social interaction and the tacit understandings that ground the application of formal and informal rules — is necessary to accomplish things in the world. Moreover, being sensitive and respectful to implicit law is crucial to exercising legally authorized political power legitimately and

28 On Ontario's so-called "Common Sense Revolution" in the 1990s and the constitutional repercussions, see Harry Arthurs, "Vox Populi: Populism, the Legislative Process, and the Canadian Constitution" in Richard Bauman & Tsvi Kahana, eds, *The Least Examined Branch: the Role of Legislatures in the Constitutional State* (Cambridge; New York: Cambridge University Press, 2006) 155 at 156-57.

29 Ryan Flanagan & Daniel Otis, "Ford says he'll use notwithstanding clause in attempt to force cuts to Toronto council", *CTV News* (10 September 2018), online: <https://www.ctvnews.ca/canada/ford-says-he-ll-use-notwithstanding-clause-in-attempt-to-force-cuts-to-toronto-council-1.4086779>.

30 According to Statistics Canada, the population of Ontario as of July 1 2017 was estimated at 14,193,384. See "Canada at a Glance 2018" (last modified 27 March 2018), online: *Statistics Canada*, <https://www150.statcan.gc.ca/n1/pub/12-581-x/2018000/pop-eng.htm>.

effectively. This is so if, following Joseph Raz, implicit law refers to "what is implied by legislation and precedent" insofar as it is "acts of legislation and … the rendering of binding judicial decisions … [that] create law."[31] It is even more so if, following Lon Fuller, implicit law does not just consist in inferences about what "enacted or authoritatively declared law" implies[32] but also includes inferences based on the way people act.

One of the obstacles that the very idea of implicit law comes up against is the expectation that law, *qua* law, is formulated canonically and enforced by courts. For Fuller, legislation and judicial decisions are forms of law because, like custom and contract, they give rise to rules that serve as baselines for self-directed human interaction. His account of law reflects what he sees as the special morality attaching to the office of lawgiver and law-applier.[33] To Fuller, "definitions of 'what law really is' are not mere images of some datum of experience, but direction posts for the application of human energies."[34] Still, a crucial insight of legal positivism is that far from disciplining its power, associating law with morality can serve as a means of concealing and abetting injustices effected in the name of the law.[35] Bearing both points of view in mind, it is evi-

31 *Raz*, *supra* note 9 at 1107.

32 Lon Fuller, "Human Interaction and the Law" (1969) 14 Am J Juris 1 at 1. For a concise summary, see Gerald Postema, "Implicit Law" (1994) 13:3 Law & Philosophy 361 at 363-64.

33 See Lon Fuller, "A Reply to Professors Cohen and Dworkin" (1965) 10 Vill L Rev 655 at 660.

34 See Lon Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630 at 632; Lon Fuller, "Freedom as A Problem of Allocating Choice" (1968) 112:2 Proceedings of the American Philosophical Society 101; Lon Fuller, "Freedom: A Suggested Analysis" (1955) 68:8 Harv L Rev 1305; Fuller, "*Human Interaction and the Law*", *supra* note 32. See also Kenneth Winston, "The Ideal Element in a Definition of Law" (1986) 5:1 Law and Philosophy 89; Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Hart Publishing, 2013).

35 See Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge: Cambridge University Press, 2017) at 34-35 (where the author cites numerous instances of scholars making this argument, including, HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593 at 617-618 and Roscoe Pound, "The End of Law as Developed in Juristic Thought" (1914) 27 Harv L Rev 605 at 610 34-35. Indeed, Tamanaha notes, even proponents of natural law have acknowledged its deployment in the service of nefarious purposes; see Jacques Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951) at 81. Contemporary legal positivism eschews talk of the separation of law and morality in favour of stressing the role of "source" rather than "merit" in arguments for the validity of legal norms. Gardner writes that, "in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it." John Gardner, "Legal Positivism: 5 ½ Myths" (2001) 46 Am J Juris 199 at 200. Who qualifies as relevant agents and what qualifies as engaging with a norm would seem to indicate whether such a capacious account of positive law actually does encompass custom. For an argument it would, see Oran Doyle, "Law and Justice in Community: the Significance of the Living Law" (2011) 6:2 Nordicum-Mediterraneum (Icelandic E-Journal of Nordic and Mediterranean Studies 19). Notably, Gardner acknowledges that "[l]egal positivism is not a whole theory of law's nature…It is a thesis about legal validity, which is compatible with any number of further theses about law's nature." Gardner, *ibid* at 210.

dent that perspectives on divorcing the concept of law from the notion of what is right or the idea of the good may depend on what one views as the rhetorical purposes and political effects of such a move.[36] If one imagines circumstances in which conflation of law and justice is used to promote unthinking conformity to formal rule, the ramifications of the conceptual distinction appears differently than if one is attending to a context in which ethical consideration and moral argument appear to have been banished from a cynical power politics.[37]

Perspective profoundly shapes how one conceives law. Thus, Oliver Wendell Holmes wrote: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[38] Holmes commends adoption of the bad man's perspective, not for its own sake, but as a heuristic for "right study and mastery of the law as a business with well understood limits."[39] He endorses this method for learning and understanding the law, even though he also attests that "[t]he law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."[40]

Granted the variety of personal motivations, worldviews, and commitments, it is possible to imagine a situation where any individual acts badly, not because they happen to belong to a predetermined category of bad individuals but because, in that moment, the only significance the law has for them lies in their calculation of what they can get away with. Every person has the capacity

36 See Nicola Lacey, "Out of the 'Witches' Cauldron'? Reinterpreting the Context and Re-assessing the Significance of the Hart-Fuller Debate" in Peter Cane, ed, *The Hart-Fuller Debate in the Twenty-First Century: Fifty Years On* (London: Hart Publishing, 2010) 1 at 32-35. See also Martin Stone, "Legal Positivism as an Idea About Morality" (2011) 61:2 UTLJ 313 at 319 (arguing that the self-assurance of utilitarian philosophy about the nature of critical morality and its transcendence of specific social institutions (at note 25) enabled the early legal positivists to rescue law, in Andrew Amos' words, "from the dead body of morality that still clung to it". Andrew Amos, *The Science of Law*, 5th ed (1881), cited in Hart, *ibid* at 599-600, cited in Stone, *ibid* at 321.

37 Hans Kelsen argued that natural law was inept at formulating, let alone resolving the nebulous and competing claims floated under the banner of justice: Hans Kelsen, "The Natural-Law Doctrine Before the Tribunal of Science" (1949) 2 The Western Political Science Quarterly 481. *Cf* Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (1946)", translated by Bonnie Litschewski Paulson & Stanley L Paulson (2006) 26:1 Oxford J Leg Stud 1 at 7: "Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law."

38 Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harv L Rev 457 at 459.

39 *Ibid*.

40 *Ibid*. See Marco Jimenez, "Finding the Good in Holmes's Bad Man" (2011) 79:5 Fordham L Rev 2069 (elaborating on the moral reasoning behind Holmes' separation of law and morals).

to think only of their own, short-term private interest, with zero regard to others or the shared institutions and expectations that bind them in relationship to a wider community and a sense of the public good. Hence, Holmes argues, in learning the law, one must not only be mindful of this perspective but adopt it as one's own.

At the same time, Holmes' admonishment to think purely of material consequences speaks, perhaps, to an awareness that not everyone subscribes to the same ethical commitments or social expectations. "If you want to know the law and nothing else," then do not presume the law reflects your own sense of what it should be. Looking at the law as a bad man is important — whether your objective is to use the law to stop him or to come to his defence.

The limitations of such a perspective become evident, however, if in looking at law, one has other purposes in mind. Attending to judicial outcomes because they capture "all the law that matters to the client" has its utility, but such an approach is limited, especially if it means dismissing law's normative dimensions as "psychological and sociological facts about persons."[41] There are many pressing and worthwhile activities to pursue through and with law — beyond punishing wrongdoers or curtailing abuses of authority. Finding ways to design and administer institutions, rules, and processes that facilitate creative, just, and constructive interactions between human beings, for example, recasts law in aspirational terms. In this register, law has a capacity to build on and reflect, while drawing from and shaping, social expectations and individual commitments.

As HLA Hart demonstrates, feeling an obligation to follow a legal rule is different from fearing the consequences of failing to comply.[42] Only by attending to the internal perspective of people who treat legal rules as reasons for action does one appreciate this normative dimension. In this way, law is not just the command, backed up by the threat of sanction, of the sovereign.[43] Rather, law is an affair of rules — conduct rules and rules for rulemaking. On Hart's account, for a legal system to exist, at the very least, legal officials must subscribe to this internal perspective.

41 Brian Leiter, "Legal Positivism as a Realist Theory of Law" in Patricia Mindus & Torben Spaak, eds, *The Cambridge Companion to Legal Positivism* (Cambridge University Press, forthcoming), at 12, 3, online (pdf): *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304243>.

42 HLA Hart, *The Concept of Law,* 2nd ed (Oxford: Oxford University Press, 1997) at 82-91 (discussing the nature of legal obligation).

43 *Ibid* at 6-8, 16-21 (critiquing Austin's account).

When elected political leaders fail to acknowledge or refuse to respect implicit normative constraints on the exercise of executive and legislative power, the challenge is what to do when the Holmesian "bad man" is in fact in charge. Witnessing elected office holders either ignore or defy implicit normative constraints on their exercise of authority — and ostensibly do so with impunity — may make any invocation of implicit normativity sound naïve, even reckless. After all, disregard for customs, norms, and values associated with good governance and responsible political leadership appears to scream out for more explicit rules — ones with sharper teeth. Sometimes establishing and enforcing such bright line limits is necessary, but without an internalized sense of commitment to acting in accordance with the standards such parameters are meant to reflect, their efficacy is limited. External, episodic, *ex post facto* judicial assessments of constitutionality may prompt, at best, consequentialist, risk-averse decision-making, and, at worst, superficial compliance — unless political and administrative actors regard such decisions as a normative guide when deliberating over how to act. Governing implies an ethos — a method, a way of doing things — that denotes more than mere avoidance of expressly proscribed conduct.

The most deleterious effect of ignoring implicit normativity — of only attending to rules, customs, conventions, and principles if they are canonically formulated and going to be enforced with a sanction — is to undermine belief in the possibility of rule-governed decision-making and the capacity for human agency it presupposes. Seeking refuge under the principle-based, law-governed, independence and impartiality of the judicial branch is understandable. Its insulation from democratic disruption may even make it more attractive when faith in politicians and the electorate itself is low. But courts are not designed or operated to perform the range of complex, interconnected governance functions societies need. Even the strongest judiciary cannot bear all the burdens of governance by itself. Enforcing constitutional limits is a parameter-setting exercise that helps define but in itself does not meet the set of governance challenges societies face.

III. Unwritten Underlying Principles and Constitutional Contestability

In a constitutional democracy like Canada, where the legality of administrative decision-making and the constitutionality of lawmaking are subject to judicial review, the exercise of both executive and legislative authority has institutionally enforceable limits. The less explicit such constraints are, the easier it is to contest their applicability. Ignoring or denying their existence may resonate

with one's political base while driving one's opponents to distraction, but such denial is not likely to pass muster before the courts. Nevertheless, disputing a rule's meaning and challenging its relevance are standard litigation strategies even when the rules are formulated explicitly in a formal legal text, such as one of the *Constitution Acts*. The fact that a rule is codified provides a ready response to the claim no such rule exists but it does not answer the question of whether or how it should be applied. Indeed, every argument for how to apply legal rules weaves together both the rules and the arguments as to how the rules should be interpreted. What is more, "[r]arely are the facts presented in the same way by everybody who has an interest in the outcome."[44]

Where the text of the constitution and the role of judicial review are prominent in a constitutional order, arguments as to the constitution's underlying principles may be inevitable. Explicit invocation of unwritten constitutional principles in turn produces greater emphasis on the textual dimension of the constitutional order. The paradox of the judicial role in maintaining a constitutional democracy involves discerning how to best interpret the implicit and explicit dimensions of constitutional law to foster a constitutionally principled expression of democratic will. Canvassing partisan political and legal theoretical angles on implicit constitutional law, the discussion in this part of the article turns to judicial and legal academic treatments of unwritten constitutional principles. The case of constitutional conventions is then invoked to demonstrate how recognizing implicit norms as fundamental but not judicially enforceable is one (albeit contested) approach that the courts have used to manage this tension.

Partisanship is a powerful lens that can make the same set of actions appear entirely different, depending on who is performing them. Thus, Mark Tushnet writes: "I suspect that people are likely to view what I describe as instances of constitutional hardball as entirely sensible legal-political strategies when conducted by the side they favor, and as distasteful hardball only when conducted by the other side."[45] Certain features of social media in the so-called fake news era only magnify these antagonisms. Conflicting allegiances may nonetheless stem from principled commitments. There is no question, as Joseph Jaconelli observes, that "what may be optimal from the constitutional viewpoint may well prove sub-optimal when judged from the perspective of particular policy areas (economic, educational, etc.) as the rotation of parties

44 Roderick Macdonald, "But Everyone Else Is Allowed To" in *Lessons of Everyday Law* (Montreal & Kingston: McGill Queen's University Press, 2002) at 83.

45 Mark Tushnet, "Constitutional Hardball" (2004) 37:2 The John Marshall Law Review 523 at 548 n 81.

in government brings with it the potential for frequent and abrupt changes in policy direction."[46] *Bona fide* convictions that the ends are substantively justified will doubtless factor into, though not determine, whether one views the ends as justifying the means.

The idea that there are certain "'go without saying' assumptions that underpin working systems of constitutional government" reflects a commitment to democratic politics as an ongoing and collective if conflictual undertaking that with all the attendant losses, frustrations, and disappointments, is still preferable to all the alternatives. The attitude that, absent formal sanction, implicit normative constraints on the exercise of political power do not exist is itself corrosive of such underpinnings. Even if a rule's implicit or unwritten character does not foreclose the possibility of it being a legal rule, this quality does make the content and authority of the rule easier to challenge. As noted, however, the contents of Canada's written and formal Constitution — frequently invoked to invalidate legislation — are themselves subject to deep contestation. Canadian jurisprudence demonstrates just how contested the meaning of formal constitutional provisions, such as *Charter* rights and the federal and provincial heads of power, can become. Unwritten constitutional principles and constitutional conventions — as well as a range of political and social practices with constitutional ramifications — play a role in shaping how these textual provisions are interpreted, while being shaped by the readings of those texts in turn.

The difference between what is unfair and what is unconstitutional may represent a crucial analytic distinction in judicial reasoning. Still, the distinction and its utility may easily be overstated. Indeed, if there is too much daylight between unconstitutionality and unfairness, it becomes hard to see why one should bother having a constitution in the first place, let alone sticking to it. From its enactment, a constitutional text is — to varying degrees — going to fail to capture the full workings of a constitutional order. Constitutional meaning precedes as well as proceeds from text, both as a matter of chronological sequence and normative priority. That is because there is more to the meaning of the Canadian Constitution than can be gleaned from its legal texts. In a country whose evolutionary constitutionalism has been forged as much by "changing traditions and practices" as by "momentous events," political practice is a constitutive element of the constitutional order, whether it yields a formal constitutional amendment or a novel Supreme Court interpretation on a given matter.[47] Along with courts and political representatives, citizens (including

46 Joseph Jaconelli, "Do Constitutional Conventions Bind?" (2005) 64:1 Cambridge LJ 149 at 173 n 82.
47 Roderick A Macdonald, "F.R. Scott's Constitution" (1997) 42:1 McGill LJ 11 at 18.

those who lack the formal legal status of Canadian citizen) inform the direction and character of Canadian constitutionalism. If the "real constitution" of Canada turns on what is really constitutive of social, political, and economic practices, then — argue Macdonald and Robert Wolfe — the explicit, formal or written constitution is actually "epiphenomenal."[48] Policy practice defines the substantive constitutive commitments of a political community.[49] One may have a country's written constitution committed to memory but know little of the nature of its constitutional order, unless one sees how its government acts. Looking to where the rubber hits the road leads Harry Arthurs to underscore the economic forces that define and motivate such policy choices, arguing that nothing constitutes — for nothing constrains — the horizon of possibilities for law and policy like "economic realities."[50] To illustrate, consider the statement that "today the Canadian powers of disallowance and reservation are politically invalid as a result of constitutional desuetude."[51] Taking a cue from Macdonald and Wolfe, and Arthurs, one would counter that it was actually the growing strength of democratic practice, and the weight of public expectations around it, that rendered the explicit, formal powers of disallowance and reservation — enshrined in the text of the Constitution as they are today — unconstitutional in the real sense.

Attending to the political, social, and economic dimensions of the constitutional order presents constitutionalism as a way of framing multiple overlapping projects through time, featuring courts, politicians, and citizens. Supreme Court of Canada Justice Malcolm Rowe argues, in a recent article co-authored with his former clerk, that constitutional conventions and unwritten constitutional principles provide the means of ensuring "[o]ur constitutional order can

48 Roderick Macdonald & Robert Wolfe, "Canada's Third National Policy: The Epiphenomenal or the Real Constitution?" (2009) 59:4 UTLJ 469 at 470.

49 *Ibid*.

50 Harry Arthurs, "Labour and the Real Constitution" (2007) 48:1/2 Les Cahiers du Droit 43 at 61. Arthur's functionalist and instrumental account of the constitution presents parallels to JAG Griffith, "The Political Constitution" (1979) 42:1 Mod L Rev 1. See Martin Loughlin, "The Political Constitution Revisited" (2019) 30:1 King's Law Journal 5 at 18 (contrasting functionalism with the traditional, conservative variant of normativism which Loughlin argues that contemporary advocates of political constitutionalism espouse, and liberal normativism (or legal constitutionalism) which transforms law "from precedent or instrument into a general moral concept requiring fidelity not just to rules but to the principles of fairness and justice that legal rules presuppose"). *Cf* David Dyzenhaus, "The Left and the Question of Law" (2004) 27:1 Can JL & Jur 7; Adam Tomkins, "In Defence of the Political Constitution" (2002) 22:1 Oxford J Leg Stud 157; Graham Gee & Grégoire Webber, "What Is a Political Constitution?" 30:2 (2001) Oxford J Leg Stud 273; Aileen Kavanagh, "Recasting the Political Constitution: From Rivals to Relationships" (2019) 30:1 King's Law Journal 43.

51 Richard Albert, "Constitutional Amendment by Constitutional Desuetude" (2014) 62:3 Am J Comp L 641 at 657.

adapt to changing historical circumstances."[52] While constitutional conventions provide the implements whereby political actors do this work, Rowe and Déplanche argue that "underlying constitutional principles reflect the judiciary's efforts to adapt the meaning of the constitutional text so as to give practical effect, where circumstances require, to core principles — such as democracy and the rule of law — that are recognized as foundational and inherent to our model of government."[53] In other words, when courts explicitly reference unwritten constitutional principles they are endeavouring to ensure that their interpretation of the constitutional text accords with the fundamental, underlying justificatory principles of the constitutional order itself.[54]

Although scholars often refer to the "written" versus "unwritten" constitution, much of what they designate as "unwritten" is in fact expressed in writing somewhere — statutes, court decisions, and constitutional law treatises, for example. Thus, Richard Albert contends that "the real distinction is codification: the United States is codified in a master-text constitution whereas much of the British Constitution exists in written but disaggregated form."[55] Where it is written — and by whom — makes a difference. For example, when the Supreme Court of Canada recognizes an "unwritten constitutional principle" in its written reasons, it confers a pedigree on that principle that neither descriptive nor normative legal scholarly writing does, for instance.

When the Court ruled that the Manitoba legislature's failure to pass its statutes in French and English rendered all its legislation unconstitutional, and therefore of no force or effect, it reasoned that to uphold the rule of law, it was necessary to suspend its declaration of invalidity to give the legislature an opportunity to remedy the constitutional defect.[56] Reasoning from underlying or unwritten constitutional principles also informed the Court's majority opinion in the *Judges Remuneration Reference*, where the Court described "judicial independence" as "an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*."[57] A year later, in the 1998 *Secession Reference*, the Supreme Court articulated a set of "vital unstated assumptions

52 The Honourable Malcolm Rowe and Nicholas Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020) 98:3 Can Bar Rev 430 at 448.

53 *Ibid* at 447-448.

54 See David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14:1 South African Journal on Human Rights 11.

55 Richard Albert, "How Unwritten Constitutional Norms Change Written Constitutions" (2015) 38:2 Dublin University Law Journal 387 at 388 n 1.

56 *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 SCR 721.

57 *Ibid* at paras 109-110. Strictly speaking, the remarks were obiter since Lamer CJ acknowledged that the litigants had grounded their arguments in the *Charter* instead. *Ibid* at para 110.

upon which the text [of the Constitution] is based."[58] The Court held that the unwritten constitutional principles of "federalism, democracy, constitutionalism and the rule of law, and the protection of minorities" would give rise to a duty to negotiate on behalf of Canada if a clear majority of Quebecers unambiguously expressed the wish to no longer remain in Canada."[59] The decision, based on a hypothetical (though plausible) scenario in which Canada stands on the precipice of fragmentation, responded to a uniquely challenging situation.[60]

Contemporary scholarship on unwritten constitutional principles demonstrates, however, how claims as to their content and status reflect conflicting political values, and concerns over institutional legitimacy.[61] For starters, the case law is mixed. On the one hand, the Supreme Court has declared "unwritten constitutional principles" the very "lifeblood" of the Constitution, noting that "it would be impossible to conceive of our constitutional structure without them."[62] In fact, the Court has gone so far as to say that these "[u]nderlying constitutional principles may in certain circumstances give rise to substantive

58 *Secession Reference*, *supra* note 11 at para 51.

59 *Ibid* at paras 49 and 104, respectively.

60 Ian Binnie, who served on the Court at the time, recalls the challenge this way: "In the Quebec Secession Reference the Court was asked to assume a unilateral declaration of secession by the Province of Quebec following a hypothetical unilateral declaration of independence by the government of Quebec following a hypothetical majority vote on a hypothetical referendum question. This was an eventuality neither covered by the text of any constitutional document, nor anticipated by the jurisprudence. What was the Court's answer to be?" Ian Binnie, "Charles Gonthier and the Unwritten Principles of the Canadian Constitution" (2012) 56 SCLR (2nd). See also Sujit Choudhry & Robert Howse, "Constitutional Theory and the Quebec Secession Reference" (2000) 13:2 Can JL & Jur 143. Walters notes "SCC's appeal to the unwritten constitution came in the Secession Reference where the legitimacy of the written constitution, the Constitution Act, 1982 was itself under challenge" Mark D Walters, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory (*New York: Cambridge University Press, 2008) at 274; Jean Leclair, "Constitutional Principles in the Secession Reference" in Nathalie Des Rosiers, Patrick Macklem & Peter Oliver, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) (arguing the Court's opinion proved a creative and supple exercise of statecraft that, crucially, granted the final say to the people, while valorizing the role of representative democratic institutions in the constitutional process); Jean Leclair "Canada's Unfathomable Unwritten Constitutional Principles" (2001-2002) 27 Queen's LJ 389 (distinguishing the *Secession Reference* stands out from the otherwise dubious resort to invoking unwritten constitutional principles to invalidate legislation).

61 On unwritten constitutional principles, see Vanessa MacDonnell, "Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making" (2019) 65:2 McGill LJ 175; Han-Ru Zhou, "Legal Principles, Constitutional Principles, and Judicial Review" (2019) 67:4 Am J Comp L 899; Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the Senate Reform Reference" (2014) 67:2 SCLR 221; David Mullan, "The Role for Underlying Constitutional Principles in a Bill of Rights World" (2004) NZLR 9; Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1/2 Can Bar Rev 67.

62 *Secession Reference*, *supra* note 11 at para 51.

legal obligations … which constitute substantive limitations upon government action."[63] On the other hand, despite these pronouncements, Canadian courts have also demonstrated reluctance to rely on unwritten norms or principles to constrain the other branches of government.[64] Indeed, as the Court pronounced in *Imperial Tobacco*, "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."[65]

Noting the lack of traction that unwritten principles have had in Supreme Court jurisprudence, especially in the 2015 decision involving Quebec's challenge to the federal government's destruction of the long gun registry,[66] David Schneiderman argues:

> the Court's invocation of unwritten constitutional principles in the *Secession Reference* was not intended to determine constitutional outcomes going forward. It was not meant, in other words, to harden into doctrinal precedent. In short, the justices were being legally disingenuous.[67]

Regardless of whether such a characterization of how the judges "were being" is apt, it conveys understandable frustration at the Court's refusal to rely on principles it had itself enunciated to stop the government from destroying the data on gun ownership that it had spent considerable time and resources compiling. The very next year following the *Secession Reference*, the Court declared in *Babcock v Attorney General* that "[i]t is well within the power of the legislature to enact laws, even laws some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and other branches of government."[68]

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63 *Ibid* at para 53.

64 See the synthesis of jurisprudence that Vincent Kazmierski offers in "Draconian But Not Despotic: The 'Unwritten Limits of Parliamentary Sovereignty in Canada" (2010) 41:2 Ottawa L Rev 245 and more recently, see MacDonnell, *supra* note 61.

65 *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 66.

66 *Quebec (AG) v Canada (AG)*, 2015 SCC 14 (CanLII).

67 David Schneiderman, "Unwritten Constitutional Principles in Canada: Genuine or Strategic?" in Rosalind Dixon and Adrienne Stone, eds, *The Invisible Constitution* (Cambridge: Cambridge University Press, forthcoming), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249397>.

68 *Babcock v Canada (AG)*, 1999 CanLII 5517 (BC SC), 70 BCLR (3d) 128. See Kazmierski, *supra* note 64 (arguing that where parliamentary sovereignty is itself jeopardized, through a gross abuse of the electoral process or other assault on democracy, the courts would be justified in having recourse to unwritten principles to justify constraint on such actions). But see Vanessa Macdonnell, "The New Parliamentary Sovereignty" (2016) 21:1 Rev Const Stud 13 (arguing that the proposition quoted from *Babcock* is meant to address the specific issue in the case, regarding the authority of the legislature to limit court access to cabinet confidences, rather than a comprehensive statement of the scope of parliamentary sovereignty).

Perhaps due to how high it is, the threshold for determining when unwritten constitutional principles may be successfully invoked appears rather blurry. The most persuasive critics of the Supreme Court resorting to unwritten constitutional principles do not deny their existence, but insist they should only be relied on as a last resort. For reasons of legal logic and constitutional legitimacy, they treat the constitutional text as determinative, save in circumstances where explicit language fails — or where gaps demonstrably arise — and recourse to unwritten principles becomes necessary.

To critics, the majority opinion in the *Judges Remuneration Reference*, however, is emblematic of certain frailties in judicial reasoning from unwritten constitutional principles.[69] LaForest J issued a strong dissent on this point in that case, arguing that the Court should always adopt the "usual mechanisms of constitutional interpretation" unless it wishes "to subvert the Constitution … [and] subvert the democratic foundation of judicial review."[70] Echoing LaForest J, Jamie Cameron notes that the text of the Constitution connects the Court's exercise of judgment to its institutional legitimacy. Ignoring the text undermines the legitimacy of judicial review.

For Cameron, as a matter of constitutional principle, the Court must at least try to anchor the political preferences it expresses in the text of the Constitution, since ignoring the text and its supremacy "whenever it would be convenient"[71] undermines the democratic grounding of the Court's own authority. The real danger, in Cameron's view, lies in the fact that absent the bounds of the text, "the Court's unwritten, organizing principles … are without limits."[72]

Although Mark Walters expresses his own criticisms of the Court's reasoning in the *Judges Remuneration Reference*, he rejects the proposition that what is constitutional is necessarily reducible to what is written in explicit, formal texts.[73] Likewise, he rebuts the view that a lack of formal textual footing in the

69 *Reference re Remuneration of Judges of the Provincial Court of PEI,* 1997 CanLII 317 (SCC), [1997] 3 SCR 3.

70 *Ibid* at 183-84.

71 *Ibid.*

72 *Ibid* at 113. The substance of Cameron's argument is reminiscent of the protagonist's position in Robert Bolt, *A Man for All Seasons* (London: Heinemann Educational Books Ltd., 1963) when he is chided for not circumventing the law to go after his enemies: "I'd give the devil the benefit of the law for my own safety's sake". For a far less flattering literary portrayal both of Thomas More and the ethical substance of legality, see Hilary Mantel, *Wolf Hall* (Toronto: HarperCollins Canada, 2009) (wherein, for the heretic, the benefit of the law included being burnt at the stake, and for one merely suspected of heresy, severe torture under the authority of the sainted Lord High Chancellor of England himself).

73 See Mark D Walters, "The Common Law Constitution in Canada: Return of *lex non scripta* as Fundamental Law" (2001) 51:2 UTLJ 91.

Constitution is fatal to judicial legitimacy, noting that "this is the traditional common law approach to written and unwritten law."[74] He argues 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."[75] He affirms "that there are certain legal norms that are properly regarded as unwritten … [and] within the hierarchy of legal norms in a system, supreme."[76] But he notes that that does not necessarily mean "judges may declare statutes repugnant to this unwritten law to be void and unenforceable."[77] Noticeably, when courts may invoke underlying constitutional principles to invalidate legislation is not formulated into an explicit formal proposition.

Explicit enactment in writing has nonetheless played prominently in efforts to establish the "legal" character of implicit normative constraints. Attempts at "defining or restricting the exercise of formal powers that exist in law but are circumscribed in practice"[78] is invariably contentious work, because it is always set against somebody else's political will.

For an illustration of fundamental norms that may properly be regarded as unwritten and supreme, one need look no further than constitutional conventions. Constitutional conventions are customs developed over time through political practice, to which political actors feel bound. For example, it is convention that constrains the Governor General to act on the advice of ministers who enjoy the confidence of the House of Commons. Were the Queen's representative to break this convention entirely, Canada would stop being a democracy with responsible government. Strictly following the formal law, which furnishes the Governor General with such a power, would actually mean performing a coup d'état.[79] Because conventions are not explicitly laid down through an official law-making process, the "modern Commonwealth view" is that they are best conceived as political and not legal in character:[80]

74 *Ibid* at 95.

75 Mark D Walters, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008) at 248.

76 Walters, *supra* note 73 at 96.

77 *Ibid*.

78 Adam Dodek & Lorne Sossin, "When Silence Isn't Golden: Constitutional Conventions, Constitutional Culture and the Governor General" in Peter H Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 91 at 93.

79 Andrew Heard, "Constitutional Conventions and Written Constitutions: The Rule of Law Implications in Canada" (2015) 38:2 Dublin University Law Journal 331 at 355.

80 See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, ed by Roger E Michener (Indianapolis: Liberty Fund, 1982) (identifying this "essential distinction between the 'law of the

"while courts may and should recognize conventions, they may not and should not enforce them."[81] Regardless, convention and the rest of the web of informal constitutional norms are actually essential to "transform the positive law of the Constitution into a working system of government."[82]

The day Canada's "[c]onstitutional fire extinguisher"[83] becomes an incendiary device, it may already be too late for the Supreme Court to do damage control. Besides, argues Adam Dodek, judges' restraint and circumspection when they are invited to enforce political conventions is far more prudent and may even prevent courts from leaving "latent jurisprudential IEDs that could explode at a future date."[84] He argues that given the dynamic nature of constitutional conventions as rules of political morality, courts are ill-suited to adjudicate or sanction them and "risk doing more constitutional harm than good."[85] On the other hand, when judges are seized of a constitutional question, there may be no stopping them from answering it.[86] How the courts respond in such cases has implications for other constitutional actors, too. For example, as Christa Scholtz argues, the architectural metaphor, and undergirding structuralist reasoning, that the Supreme Court deploys in the *Senate Reference*

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constitution,'…rules enforced or recognised by the Courts, mak[ing] up a body of 'laws' in the proper sense of that term, and the 'conventions of the constitution,'…consisting…of customs, practices, maxims, or precepts which are not enforced or recognised by the Courts, mak[ing] up a body not of laws, but of constitutional or political ethics").

81 Adrian Vermeule, "Conventions in Court" (2015) 38:2 Dublin University Law Journal 283. See *Patriation Reference*, *supra* note 13 at 774-75 (stressing the political character of conventions and rejecting the proposition a convention may crystallize into law). An increasing number of scholars dissent from this appraisal, arguing that not only do courts in commonwealth jurisdictions sometimes enforce conventions, indeed they should. Andrew Heard, "Constitutional Conventions and Written Constitutions: The Rule of Law Implications in Canada" (2015) 38:2 Dublin University Law Journal 331 at 352 (noting that "[p]ronouncing on the terms of conventions and incorporating unwritten values into interpretations of positive law are established practices of many courts"; see also Nicholas W Barber, *The Constitutional State* (Oxford: Oxford University Press, 2010) at Chapter 6; Farrah Ahmed, Richard Abel & Adam Perry, "Judging Constitutional Conventions" (2019) 17:3 International Journal of Constitutional Law 787 (arguing that a universal "Commonwealth approach" to the treatment of constitutional conventions does not exist and that courts in commonwealth countries sometimes can and should enforce conventions).

82 Heard, *ibid* at 356.

83 Frank MacKinnon, *The Crown in Canada* (Calgary: McClelland and Stewart West, 1976) at 122 ("Like real extinguishers, [the offices of Governor-General and Lieutenant-Governor] appear in bright colours and are strategically located. But everyone hopes their emergency powers will never be used; the fact that they are not used does not render them useless; and it is generally understood there are severe penalties for tampering with them.").

84 Adam Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference" (2011) 54:2 SCLR 117 at 119.

85 *Ibid* at 141.

86 Carissima Mathen, "'The question calls for an answer, and I propose to answer it': The Patriation Reference as Constitutional Method" 54:2 SCLR 143.

appears to displace political conventions right out of the constitutional landscape.[87] This kind of judicial gentrification of the constitutional order drives up the transaction costs for constitutional change, by placing a premium on formal amendment. It restricts an important way in which political representatives, and the people they represent, informally effect change in constitutional meaning.[88]

The substantive rationality of a legislative measure or executive decision is not the same thing as its constitutionality. But unsound political decisions can seep into the constitutional order and have a deleterious effect on the health of a constitutional democracy, just as wise and prudent policy can help it to grow in healthy ways. As Walters suggests, the unwritten constitution can reflect the role of substantive rationality in constitutional law. It is not a disembodied rationality, however. It is defined in part by the formal rationality of the written constitution, itself the product of reasoning and deliberation, as well as power imbalances and brinksmanship. The story of Canadian constitutional conventions features a constitutional text that sometimes is silent and sometimes does not say what it means. What the meaning of Canada's Constitution should be is an open question to which neither courts nor politicians nor the people can offer all the answers on their own. This speaks to the symbiotic imbrication of explicit and implicit law, the legal and political constitution, and the implication of various institutional, civic, and economic actors, including individual Canadians.

IV. *City of Toronto et al v Ontario (Attorney General)*

Emphasis on the distinction between the legal and political constitution returns with a vengeance, however, when the question arises: should the court declare the *Better Local Government Act* unconstitutional? Defining constitutional law strictly as the "Law of the Constitution" is instrumental to delimiting the field and activity of judicial review. To the ears of litigants challenging the constitutionality of a law, the claim that sustaining Canada's constitutional

87 Christa Scholtz, "The Architectural Metaphor and the Decline of Political Conventions in the Supreme Court of Canada's *Senate Reform Reference*" (2018) 68:4 UTLJ 661.

88 See Heather Gerken, "The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution" (2007) 55:4 Drake L Rev 925 at 926 (describing the "informal amendment process" in the US system as "the many ways in which the judicial and political process interact to forge constitutional meaning", while leaving the text of the constitution unaltered). See Benjamin Berger, "White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text" (2008) 3:1 Journal of Comparative Law 249 at 277 (noting it was not until the 20th century that in the US "the 'unwritten constitution' became increasingly tied to the courts and judicial interpretation… [losing] its character as something embedded in political power and structures of governance.").

order depends on the actions and beliefs of politicians and members of the public may not only sound strange, but will be unwelcome if heard as a call for judicial deference to the legislator. Highlighting the political foundations of the Constitution and the sociological conditions for its legitimacy and effectiveness will likely seem irrelevant, unless it is an effort to withhold some element of the Constitution from the court's purview and reserve it to the supervision of non-judicial actors. In that case, it will be deeply suspect, and the litigant could reasonably counter that whatever is part of the Constitution is captured under section 52 of the *Constitution Act, 1982* and is subject to the authority of the courts. To the extent that the Supreme Court has indicated that enforcing political conventions or relying on underlying constitutional principles alone to strike down legislation lies outside its remedial authority, the litigant could try to poke holes in these categorical statements, while pointing to workarounds; for example, requesting judicial "recognition" but not enforcement of a convention, re-formulating unenforceable conventions as potentially enforceable principles, and weaving unwritten principles into text-based constitutional arguments.

Such strategies reflect an awareness that the Court's reasoning in constitutional cases is refracted through a particular linguistic and conceptual prism. In this regard, doctrine punctuates judicial reasoning. No matter how much courts (sometimes with good reason) have been known to stretch and manipulate precedent and constitutional text to fit and justify their best understanding of what the Constitution requires, they do in fact bother engaging in these contortions. Questions of constitutionality courts confront are, on one level, proxies for substantive evaluations of effective and legitimate governance. As proxies, they may *really be* about that other thing, but as proxies, it means they are not identical to that thing either; accordingly, they have their own standards. Indeed, in the *Secession Reference*, the Supreme Court noted "the distinction between the legality and the legitimacy of actions taken under the Constitution."[89] To recognize there is a distinction is to acknowledge that legality may be a proxy for legitimacy, but neither one is reducible to the other.

Furthermore, the Court stated that the legality/legitimacy distinction reflects "the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations."[90] Obviously, as noted above, this was no ordinary opinion. It is fair to say, as the Court does in the *Secession Reference*,

89 *Secession Reference*, *supra* note 11 at para 90.
90 *Ibid.*

that as a matter of general principle the courts do not exercise the same supervisory function over the whole Constitution — not just because there are some "constitutional rules, such as the conventions of the Constitution, which carry only political sanctions," but because "judicial intervention, even in relation to the law of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme."[91]

Where the real complexity lies — and this was on full display at the Supreme Court hearing for the *City of Toronto* case — is in the interconnected contest over what the Court's general role is and over how that role should be exercised in the particular case before it. This is how the City of Toronto initially framed its challenge to the *Better Local Government Act*: "Never before has a Canadian government meddled with democracy like the Province of Ontario did when, without notice, it fundamentally altered the City of Toronto's governance structure in the middle of the City's election."[92] Introduced and passed in the midst of Toronto's 2018 municipal election period, the statute reduced the city's number of electoral wards and councillors from 47 to 25, while doubling the ward populations from an average of 61,000 to 111,000.[93] The decision to reduce nearly half the number of seats on city council three and a half months into the election campaign (and approximately nine weeks before the election itself) came as a surprise to many. Doug Ford and his Progressive Conservative party never mentioned any plan to do so during their 2018 election campaign. No consultation with the municipality was conducted prior to passing the law, despite legislative provision for this type of consultation. Moreover, a recent study and report commissioned by the municipality had actually recommended an increase in the number of wards.[94] The provincial government's *modus operandi* was reminiscent of the "megachutzpah" attributed to Mike Harris' Progressive Conservative government in the 1990s, when it amalgamated the municipalities comprising metropolitan Toronto into a "megacity."[95] Even if the province's approach had denied inhabitants of Metro Toronto "a real say

91 *Ibid* at para 98. As Harding and Knopff put it, "there cannot be a *constitutional* democracy unless democratic legislatures are subject to constitutional constraints, but neither can there be a constitutional *democracy* unless some important matters lie beyond the reach of the judicially enforceable Constitution." Mark S Harding & Rainer Knopff, "Constitutionalizing Everything: The Role of '*Charter* Values'" (2013) 18:2 Rev Con Stud 141 at 152. Typically, it's when appraising whether the infringement of a Charter right was justified, not in delimiting whether an infringement occurred, that the Court demonstrates deference; see *Ontario (AG) v Fraser,* 2011 SCC 20.

92 *City of Toronto SC*, *supra* note 1 (Factum of the Applicant at para 1).

93 See *City of Toronto SC*, *supra* note 1; *City of Toronto CA I*, *supra* note 1.

94 See Alexandra Flynn, "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019) 56:2 Osgoode Hall LJ 271.

95 *East York (Borough) v Ontario (AG)*, 1997 CanLII 12263 (ON SC), 34 OR (3d) 789.

in how they were to live and be governed," Justice Borins concluded that "the *Charter* does not guarantee an individual the right to live his or her life free from government chutzpah or imperiousness."[96]

At first instance, Mr Justice Belobaba concluded that the statute unjustifiably infringed section 2(b) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of expression,[97] and he ordered the election to proceed in accordance with the previous ward system. The Ontario Court of Appeal subsequently stayed that order, however, stating:

> The application judge was understandably motivated by the fact that the timing of Bill 5 [the *Better Local Government Act*] changed the rules for the election mid-campaign, which he perceived as being unfair to candidates and voters. However, unfairness alone does not establish a *Charter* breach. The question for the courts is not whether Bill 5 is unfair but whether it is unconstitutional. On that crucial question, we have concluded that there is a strong likelihood that the application judge erred in law and that the Attorney General's appeal to this court will succeed.[98]

Consequently, the election proceeded in accordance with the newly legislated ward structure. Over ten months after the votes were in and following a full hearing of the appeal, the Ontario Court of Appeal released its decision on the merits, confirming its reasoning in the decision to stay Justice Belobaba's ruling.[99] In a 3:2 decision, the Court concluded that despite the applicants' objection to the timing of the change to the composition of city council, the modification was "undeniably within the legitimate authority of the legislature."[100] The majority refused to intervene in what they characterized as "essentially a political matter."[101] They stopped short of concluding that the *Act* was inconsistent with the principles of democracy or the rule of law, but stressed that even if it were, "there would be no legitimate basis for this court to invalidate the *Act* based on this inconsistency."[102]

The dissenting judges explicitly conceded the majority's premise that "[t]he *Act* cannot be invalidated on the basis of unwritten constitutional principles — democracy and the rule of law — alone" but they agreed with the trial judge

96 *Ibid*. The Ontario government not only cites the decision as a favourable precedent, it situates itself as successor to the policy mantle of the Harris government, claiming "Bill 5…addressed what was understood to be unfinished business from the 1997 amalgamation." *City of Toronto SCC*, *supra* note 7 (Factum of the Respondent, the Attorney General of Ontario, at para 23).

97 *Canadian Charter of Rights and Freedoms, supra* note 6.

98 *City of Toronto CA I, supra* note 1 at para 11.

99 *Ibid* at para 6.

100 *City of Toronto CA II, supra* note 1.

101 *Ibid*.

102 *Ibid* at para 86.

(and the plaintiffs) that the law infringed section 2(b) of the *Charter*, which guarantees freedom of expression. According to MacPherson JA's dissenting judgment, in the context of an ongoing municipal election, s. 2(b) does not just protect the right to express one's views, it "safeguards the integrity and stability of the democratic foundation on which elections are based."[103] Not only did altering the 2018 ward structure in the middle of the election diminish the value of the expression predicated on that structure, it was deeply disruptive to the deliberative democratic process. Most importantly, according to MacPherson JA, "the Act restricted candidates, volunteers, voters, donors and commentators from continuing to express themselves within the established terms of an election then in progress."[104] Because candidates found themselves running in newly defined wards, campaign materials they had purchased and door-to-door canvasing they had conducted turned out to be for naught.

In contrast, the majority of the Court of Appeal stressed that section 2(b) (freedom of expression) does not encompass the content of section 3 (democratic rights).[105] Although the *Charter* explicitly guarantees the rights to vote and to serve as an electoral candidate, it stipulates that this is for federal and provincial — not municipal — elections. The dissenting judges thought, however, that the province's interference with freedom of expression was "extensive, profound, and seemingly without precedent in Canadian history."[106] In their view, Ontario's decision to re-structure city council "midway through an active election … blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters … *[leaving] a trail of devastation of basic democratic principles in its wake*."[107]

The main issues in the case on appeal before the Supreme Court are fourfold: first, whether the impugned legislation constitutes an infringement of section 2(b) of the *Charter*; second, whether the unwritten constitutional principle of democracy is capable of establishing (in whole or in part) a finding of legislative invalidity; third, whether the legislation lies within the constitutional authority of provincial legislatures over municipal governments; and, fourth, if a rights-infringement is proven, then whether the *Act*'s breach of the *Charter* is nevertheless proportionate.

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103 *Ibid* at para 118.

104 *Ibid* at para 128.

105 *Canadian Charter of Rights and Freedoms, supra* note 6, s 3. See *Baier v Alberta* 2007 SCC 31 at para 59 (noting nevertheless that a "finding that s. 3 does not apply does not foreclose consideration of a claim under s. 2(b)").

106 *City of Toronto CA I, supra* note 1 at para 136.

107 *Ibid.*

There are two theoretically distinct but, practically speaking, intermingled questions about the Constitution in the case. One concerns whether "the law of the Constitution, which, generally speaking, will be enforced by the courts" is applicable here.[108] The other is whether, in "appreciation of its proper role in the constitutional scheme," the Court sees it as its place to intervene.[109] The two inquiries are intermingled in the sense that the four main issues in the case all speak to the question of the Constitution's applicability to — as well as that of the Court's proper role in — deciding the case.

If the *Better Local Government Act* does not infringe section 2(b) of the *Charter* or offend the unwritten constitutional principle of democracy in a manner that gives rise to judicially enforceable obligations, the law of the Constitution does not apply.[110] Arguments over whether to apply the *Baier* or the *Irwin Toy* test to establish a section 2(b) *Charter* breach imply certain competing ideas about the proper limits of a judicially enforceable *Charter*.[111] Parties and interveners advance different interpretations of the text of the Constitution and the Court's jurisprudence with these considerations in mind. Hence, the Attorney General of British Columbia warns against permitting the "broad s[ection] 2(b) freedom … to operate as a constitutional Trojan horse" (where one can only imagine the invaders as the courts second-guessing every area of provincial lawmaking authority "infused, to some extent, with expressive activities").[112] In contrast, the intervener, Fair Voting British Columbia, presents the same broad section 2(b) freedom as a constitutional bulwark against threats to "the foundations of participatory democracy," and the very same courts as duty-bound defenders "of the integrity of this system."[113]

Perspectives on the role of courts shape arguments over the unwritten constitutional principle of democracy as well. The intervener, the Canadian

108 *Secession Reference, supra* note 11 at para 90.

109 *Ibid*.

110 Of course, strictly speaking, it is incorrect to say the Constitution does not apply since s. 32(b) of the Charter provides that "[t]his Charter applies to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." *Canadian Charter of Rights and Freedoms, supra* note 6, s 32(b). The law of the Constitution in this sense applies, it is just not claimed to impugn the validity of the legislation in question.

111 *Irwin Toy Ltd v Quebec (AG)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927 at 971-972 [*Irwin Toy*] (indicating that a law whose purpose is not to restrict freedom of expression may nonetheless have restrictive effects on it and therefore constitute a s. 2(b) breach); *Baier, supra* note 105 at para 30 (outlining the more onerous test to be applied to determine if there has been a s. 2(b) breach when a positive rights claim is being made).

112 *City of Toronto SCC*, *supra* note 7 (Factum of the Intervener, Attorney General of British Columbia, at para 4).

113 *Ibid* (Factum of the Intervener, Fair Voting British Columbia, at para 13, quoting *Sauvé v Canada (Chief Electoral Officer*), 2002 SCC 68 (CanLII) at 32, 58).

Constitutional Foundation (CCF), draws a direct line between the limited role the CCF endorses for unwritten principles in constitutional interpretation and judicial respect for what the CCF sees as the proper limits of the judicial role.[114] It is likewise evident in the Federation of Canadian Municipalities' contention that "[t]his Honourable Court's recognition that the democratic principle guides the interpretation of 92(8) leads to a necessary conclusion that the disruption of an active electoral process is offensive to the Constitution."[115] As with the arguments over the scope of section 2(b), arguments over the significance of unwritten constitutional principles are caught in the tension between the competing characterizations of how the Court may decide any constitutional case. Not declaring the law unconstitutional is an example of judicial restraint, if you agree with it. It's an abdication of judicial responsibility, if you don't. Similarly, people will denounce the Court for engaging in judicial activism if they object to its finding of invalidity or, if they welcome the ruling, they will proclaim the Court to be fulfilling its supreme constitutional duty.

When it comes to determining both whether provincial legislative authority over municipal institutions is subject to a right to effective representation and whether any *Charter* infringement is nonetheless justified, courts pass through terrain well staked out by claims for judicial deference. And yet, the sense of obligation to ensure consistency with the Constitution does not vanish; if anything it can be heightened when courts are entreated to defer to parliamentary sovereignty. In sum, where the lines are drawn between the branches of government correlates to expectations about how each branch ought to discharge its role(s). Those expectations can change depending on the circumstances. Since the Court enjoys a particular status in determining the boundaries, it is harder to make a charge for trespassing stick on them. But in deciding all four issues — but especially the fourth, dealing with the proportionality of the *Charter* breach as a whole — there is indeed room for the Court to express deference. Interpretations of the text of the Constitution and the Court's jurisprudence mingle with considerations about the appropriate limits to a judicially enforceable *Charter*.

The City argues that the Court should identify "certain constitutional limits which the legislature must respect when designing a municipal election framework."[116] First, so long as the law provides for a democratic municipal election, it must ensure that the election is stable. Revising ward boundar-

114 *Ibid* (Factum of the Intervener, Canadian Constitutional Foundation, at para 7).
115 *Ibid* (Factum of the Intervener, Federation of Canadian Municipalities, at para 23).
116 *Ibid* (Reply Factum of the Appellant, City of Toronto, to Interveners at para 37).

ies or changing the number of seats on council after the election period has already begun interferes with the "electoral expression" of candidates, infringing their freedom of expression, protected under section 2(b) of the *Charter*. Secondly, the City argues that to be constitutionally compliant, the legislation must protect the effective representation of Toronto residents in their democratic elections. The City contends that cutting the number of councilors, while dramatically increasing the size of the electoral wards, undermines effective representation, itself a constitutionally protected element of democratic government in Canada.

The City argues that, in keeping with the unwritten constitutional principle of democracy, elections must be "free and fair without state interference." Citing the minority opinion at the Ontario Court of Appeal, the City claims that section 2(b) of the *Charter* and the unwritten principle of democracy together require "governments to respect the s[ection] 2(b) right of all persons to freely express themselves *within the terms of a municipal election once that election has commenced*." Furthermore, the City argues that the province's infringement of the *Charter* was not demonstrably justified. On the contrary, the City claims that evidence of the province's stated objectives — to secure parity between wards and make council more efficient — does not stand up to scrutiny, and the province's goals were certainly not so pressing and substantial that they justified disrupting a major democratic election mid-stream.

Meanwhile, the Ontario Attorney General argues that the *Better Local Government Act*, which reflected the policy preferences of the newly elected provincial government, was constitutional.[117] The province argues that not only does the provincial legislature enjoy full lawmaking authority over municipal institutions, its legislative changes to the ward boundaries and city council structure did not infringe the candidates' freedom of expression. Candidates continued to be free to express themselves. Responding to the City's claim that the abrupt changes to the election violated the candidates' freedom of expression, the province counters that section 2(b) does not entitle candidates to the maintenance of a particular electoral platform or ensure that their expression retains its worth. As for effective representation, the province argues that, under the Constitution, this applies to federal and provincial, not municipal, elections. Nevertheless, the principle of effective representation does not prescribe a minimum ratio of electoral representatives to electors. Moreover, the province suggests that although the timing of the legislation may not have been ideal, it was nevertheless better than the alternatives. To pursue its policy objectives by

117 See *ibid* (Factum of the Respondent, the Attorney General of Ontario).

passing legislation with over two months to go before the scheduled election day was preferable, at least, to abstaining from making its desired changes to the City of Toronto's governance structure or pursuing the reforms after the election, which it contends would have been even more disruptive, wasteful, and undemocratic.

Miller JA (on behalf of a majority of the Ontario Court of Appeal) reasons it was well within the legislature's authority to proceed in such a manner. Miller JA distinguishes between the written (legal) constitution and the unwritten (political) constitution. He indicates that whereas the former is judicially enforceable, the latter (which includes unwritten constitutional principles) is not. This juxtaposition aligns with the distinction Harding and Knopff draw between an expansive and a restrictive view of constitutionalism. According to the expansive view, "explicit provisions are mere examples of broader zones of judicial protection based on underlying principles."[118] Conversely, the "more restrictive view … distinguishes between the legitimate use of underlying values to construe explicit provisions and their illegitimate use to create entirely new rules of constitutional law."[119] Thus, Miller JA writes: "To use such indeterminate, open-ended, and contested concepts as grounds to invalidate legislation would be, as the Supreme Court has observed, to devolve into 'judicial governance'."[120] In applying this restrictive view of constitutionalism, however, Miller JA appears to overstate the extent to which the Supreme Court subscribes to the same perspective.[121] Yes, there are cases where the Court has refused to invalidate legislation on the basis of unwritten constitutional principles but it has also stated expressly that they "in certain circumstances give rise to substantive legal obligations (have "full legal force"…) which constitute substantive limitations upon government action."[122] The nature of these underlying or unwritten constitutional principles renders their use and effect difficult to predict.

Miller JA's reasoning lends support to the view that the constitutional limits on government action are defined by the text of the Constitution. To quote:

> There is no open question of constitutional interpretation here. Municipal institutions lack constitutional status. Section 3 democratic rights were not extended to

118 Harding & Knopff, *supra* note 91 at 143.

119 *Ibid*.

120 *City of Toronto CA II*, *supra* note 1 at para 87.

121 See *Fraser*, *supra* note 91 at para 78 ("What Health Services rejected was a judicial "no go" zone for an entire right on the ground that it may involve the courts in policy matters: creating such a Charter-free zone would "push deference too far"".).

122 *Secession Reference, supra* note 11 at para 54.

> candidates or electors with respect to municipal councils. These are not gaps in the Constitution — oversights or slips by the framers of the *Constitution Act, 1867* and the *Constitution Act, 1982* that can be addressed judicially. If the Constitution is to be amended, the *Constitution Act, 1982* provides the mechanism for amending it.[123]

Miller JA insists that courts should not treat the exclusion of municipal councils from the Constitution as an accident. The *Constitution Act, 1867* distributes heads of power between the federal and provincial levels of government. Even if Canada was still primarily an agrarian society in 1867, by 1982, when the *Charter* enshrined democratic rights in the Constitution, the country had witnessed urbanization on a massive scale. The fact that there is no reference to municipal councils in section 3 of the *Charter* must be respected, not "corrected."

Nevertheless, circumstances have changed in the nearly forty years since the enactment of the *Charter*. Urbanization has increased and intensified worldwide. And yet, as Ran Hirschl notes, despite this demographic phenomenon, "[c]ities have remained virtually absent from constitutional law and constitutional thought."[124] Recognizing this gap, a group of four former Toronto mayors (John Sewell, Art Eggleton, Barbara Hall, and David Miller) succeeded in obtaining intervener status at the Supreme Court. Summarizing their position, Sewell writes:

> Cities should be protected from outside meddling in their democracies: it is inconsistent with the importance of cities to Canadians and their status as independent and important orders of government. Local decision making should be respected. A city such as Toronto should be seen as an independent order of government with effective autonomy over decisions of a local nature. A statement by the [C]ourt to this effect would be an enormous boost. It would not resolve the exact relationships between cities and provinces, but it would open the door for discussions and would challenge provincial bravado when it comes to interfering with local affairs.[125]

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123 *City of Toronto CA II*, *supra* note 1 at para 95. See also Emmett Macfarlane, "Doug Ford's law to slash Toronto council is unfair — but the court shouldn't have spiked it", *Maclean's* (10 September 2018), online: <https://www.macleans.ca/opinion/doug-fords-law-to-slash-toronto-council-is-unfair-but-it-should-not-be-struck-down/> (anticipating the main lines of reasoning in the OCA's ruling). See also Simon Archer & Erin Sobat, "The Better Local Government Act versus Municipal Democracy" (2021) 34 J L & Soc Pol'y 1.

124 Ran Hirschl, "Constitutions and the Metropolis" (2020) 16 Annual Review of Law and Social Science 59 at 60.

125 John Sewell, "Former Toronto mayors team up in Supreme Court case against province of Ontario: John Sewell on why he is intervening in this court case", *TRNTO* (21 January 2021), online: <https://trnto.com/former-toronto-mayors-supreme-court-ontario/>. See also John Sewell, "Toward City Charters in Canada" (2021) 34 J L & Soc Pol'y 134.

It is easy to understand why these individuals would want the Supreme Court to weigh in with a statement that "local decision making should be respected." But it is difficult to translate this principle of subsidiarity and respect for local democracy into a meaningful constitutional remedy.[126] Nonetheless, Hirschl argues that given how important cities are in this day and age, the lack of constitutional recognition for this third order of government is a glaring oversight. Indeed, Hirschl has pointed to Canada's tradition of "living tree" constitutionalism,[127] and suggests that the present case is a ripe opportunity for the Supreme Court to accord municipalities the constitutional status they deserve.[128] Likewise, Mariana Valverde notes that "the 'living tree' doctrine could be used to argue that in this respect Canadian black letter law may be seriously out of step with political and social reality, not to mention with the very long history of elected local governments in Ontario and in the other provinces."[129] Although Valverde acknowledges that the history of city councils has not been an unstinting ascent to greater democracy and autonomy, citizens nevertheless "feel" local democratic practices "are protected" whether the text of Canada's Constitution expressly stipulates this or not.[130]

Valverde does not spell out precisely how the Supreme Court should do justice to "the broader Canadian tradition of considerable, if never formally guaranteed, local democracy" in its decision in the *City of Toronto* case.[131] In her view, the most productive step forward would actually be an amendment of the *Constitution Act*, "to recognize not only the municipal right to vote but also the general right of communities to govern themselves for many, if limited,

126 Provincial legislation already contains statements along these lines. For example, according to section 1 of the *City of Toronto Act*, 2006, SO 2006, c 11, Sch A, "it is in the best interests of the Province and the City to work together in a relationship based on mutual respect, consultation and co-operation." And yet, "[a]t the appeal hearing, Ontario conceded that there was no consultation with the City before the Act was introduced and enacted." *City of Toronto CA II, supra* note 1 at para 108. If defying the authoritative weight of such values when governing is the problem, no judicial order declaring an irreversible decision unconstitutional can be sufficiently comprehensive, prospective, or self-executing to solve it. This fact does not render the judicial remedial enterprise pointless but it does provide context.

127 See *Edwards v Canada (AG)*, 1929 CanLII 438 (UK JCPC), [1930] AC 124. See also Wil Waluchow, "Constitutions as Living Trees: An Idiot Defends" (2005) 18:2 Can JL & Jur 207; Noura Karazivan, "Constitutional Structure and Original Intent" (2017) 2 U Ill L Rev 629. *Cf* Benjamin Oliphant & Leonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42:1 Queen's LJ 107.

128 Ran Hirschl, "City, State: Constitutionalism and the Megacity" (Zoom lecture, David Asper Centre for Constitutional Rights' Constitutional Roundtables, University of Toronto, 12 November 2020) [Unpublished].

129 Mariana Valverde, "Games of Jurisdiction: How Local Governance Realities Challenge the 'Creatures of the Province' Doctrine" (2021) 34 J L & Soc Pol'y 21 at 31.

130 *Ibid* at 36, 37.

131 *Ibid* at 37.

purposes."[132] She suggests, however, that the provincial consent necessary to achieve such formal constitutional change presents an insurmountable obstacle.[133] In other words, the Supreme Court must do whatever it can do with its decision because relying on other, democratically representative institutions of government to do what actually needs to be done is hopeless.

While this case involves Toronto, Canada's largest city, its potential ramifications for cities, towns, and provinces across Canada — and indeed, its ramifications for the country as a whole — are immense and unpredictable.[134] Affording constitutional recognition to Canadian cities while according them greater autonomy from provincial control would have wide-ranging, knock-on effects on all sorts of people representing a range of potentially conflicting interests, who have not been party to this litigation. So while Canada's legal constitution may be outmoded — there's a compelling case that it is — constitutional politics are indispensable in accomplishing the complex, participatory work of updating it.

Although the Ontario Court of Appeal's text-centred account of Canada's Constitution may unduly discount the potential for judicial resort to unwritten constitutional principles, it leaves room to political parties and the people they endeavour to represent to insist on more robust standards for the government and to seek change through constitutional politics. If it is not the case that only courts can provide the impetus for constitutional politics, this is certainly the kind of subject matter that commends wide consultation and coalitions of interest. Proposing to "rebalance the equilibrium of power between the people and the state, or between the different institutions of the state," presents a polycentric problem.[135] As Jean Leclair observes, judges should be careful about wading out of their depths into such uncertain waters; otherwise they put their own institutional legitimacy at risk.[136] Yes, judges make unpopular decisions all the time. It is well-recognized that courts must perform a counter-majoritarian function, lest the rights and freedoms of the individual get crushed under the will of the masses. But the values of individual and group autonomy (or self-determination) that ground the counter-majoritarian function of the judiciary

132 *Ibid* at 38.

133 *Ibid*.

134 Canada's municipalities have a range of demographic and economic profiles, not to mention political circumstances, that necessarily relate to the question of constitutional status. See Hoi Kong, "Toward a Federal Legal Theory of the City" (2012) 57:3 McGill LJ 473 at 475 ("Whether one conceives of a city broadly as a community of interest, or more specifically, as a municipality, laws shape cities.").

135 Jean Leclair, "Unwritten Constitutional Principles: The Challenge of Reconciling Political and Legal Constitutionalisms" (2019) 65:2 McGill LJ 153 at 165.

136 *Ibid.*

may be undermined in the course of according too much decision-making power to courts themselves. Enforcing reasonable, ordinary standards of responsible governance may sometimes be an extraordinary demand to make of the courts.

In contrast, Michael Pal argues that the Court has an essential job to do and that in this case, due to limitations in the textual component of Canada's Constitution, it has no option but to draw on unwritten constitutional principles. In his view, by embracing a "thin" as opposed to "thick" conception of democracy, the Court can do justice to what Canada's constitutional order demands, while deflating any objections to what it's doing based on legitimacy grounds.[137] Pal argues that "interrupting an election mid-campaign to change the rules of the game, including the electoral districts upon which candidates have crafted their campaigns and voters will have their preferences channeled," runs counter to the unwritten constitutional principle of democracy.[138] Next, he makes the point (of some vintage now, he notes) that the Canadian Constitution reveals a lacuna when it comes to the way municipalities and their democratic structures are recognized.[139] Further, Pal contends: "Canadian positive law is inadequate to resolve many constitutional disputes, given the gaps in text, including around what content to attribute to the democracy-related provisions in the Constitution."[140] But his argument actually goes further than this. It is not simply about "gaps" in the text, but about the under-determined nature of the rights and freedoms articulated in the *Charter* — an under-determined nature that grounds his argument that the Supreme Court should use this case as an opportunity to take its section 2(b) jurisprudence in a new direction. In addition to this notion of a directionality to *Charter* jurisprudence, is the idea of the courts as guardians of the animating principles and values, which the text of the Constitution informs and mediates but also stands to be interpreted by and perfected through.

Pal argues that the Court should interpret section 2(b) in light of the unwritten principle of democracy to protect democratic institutions and processes that are fundamental to the political life of Canadians. Pal argues that the Court should not be straitjacketed into the narrow reasoning of the majority

137 Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269; Nathalie Des Rosiers, "Deference to Legislatures: The Case of the 2018 Ontario Better Local Government Act" (2021) 34 J L & Soc Pol'y 39.

138 Pal, *ibid* at 302.

139 See Ron Levi & Mariana Valverde, "Freedom of the City: Canadian Cities and the Quest for Governmental Status" (2006) 44:3 Osgoode Hall LJ 409.

140 Pal, *supra* note 135 at 282.

of the Ontario Court of Appeal because recognition of the role of municipalities and the value of their democratic structures and processes is long overdue. These structures and processes, Pal says, are fundamentally connected to our freedom of expression — for what other right speaks to democratic participation in a more fundamental way? — and the Court shouldn't stand idly by when a government bulldozes over conventions of social democracy that are, in fact, fundamental to our substantive constitutional order.

And yet, when making his case for adopting a "thin" version of the unwritten constitutional principle of democracy, Pal stresses the need for courts to recognize limits on their authority. For the sake of maintaining an overlapping social consensus about the legitimacy of each branch of government, including the judiciary, it is important for the Supreme Court to be persuasive in its reasoning. Acknowledging the reasons for adopting a thin version of the unwritten constitutional principle of democracy means articulating the most defensible interpretation of the section 2(b) right to freedom of expression. Pal argues that "[t]he implication of the Court of Appeal's conclusion is that voters in Toronto could select a mayor, but then the premier could appoint the second-place finisher as the winner or simply declare that he would not respect the outcome."[141] This shows, in dramatic fashion, why some limits must constrain the exercise of provincial legislative authority in this area. While similar in kind, what happened with the *Better Local Government Act* was surely different in degree. And this difference in degree is not only relevant but may be determinative in calibrating how far the courts should go when invalidating legislation that defies unwritten constitutional principles. Even more problematic for this aspect of the argument, however, is the City of Toronto's concession that altering the municipality's governance structure after the election had concluded would have been consistent with the province's constitutional authority. Making the changes after voting day may protect the integrity of the campaign period, but it would defy public and private expectations about the meaning and consequences of the election itself.

Ultimately, the challenge is not just to define the democracy principle in such a way that it will not displace the text or absorb other unwritten principles. Rather, the challenge is to interpret and apply that principle in a way that does justice to the various purposes and constraints to which judicial authority in the context of constitutional adjudication is subject. Any government that disregards this basic principle of Canada's constitutional order is doing something more insidious and destructive than a judicial remedy can cure. After all,

141 *Ibid* at 299.

according the unwritten principle of democracy explicit constitutional authority — which the Supreme Court of Canada has done already — does not ensure the principle will find meaningful expression in the exercise of legislative authority when it should.

Recognizing what was specifically wrong with the *Better Local Government Act*, while accounting for just how pervasive the problems have been with the Ford Government's legislative projects, demonstrates the limitations to judicial recourse. Nathalie Des Rosiers contends that if there is a question as to whether a proposed piece of legislation offers adequate rights protection, and "the human rights issue is not fully addressed, nor debated, and not all points of view are expressed, then little deference should be given."[142] Des Rosiers claims that the *Better Local Government Act*'s impact "on the sacredness of the electoral period"[143] violated democratic rights — which she, in some places, characterizes as constitutional rights, and others, as human rights. Of course, it is hardly just bills that raise obvious or direct rights issues that warrant full discussion, debate, and deliberation on all the relevant evidence and points of view. The fact is — and this case is no exception — every governmental wrong may be re-formulated as the violation of a human or constitutional right. It is hard to imagine any legislative measure with serious shortcomings or deleterious effects that could not be framed as infringing on someone's rights.

However, describing an unjustified legislative intervention as a matter of rights-infringement does not necessarily name (and therefore may fail to remedy) the governmental wrong as fully and precisely as possible. What's more, it reinforces the superiority of civil and political rights to judicially unprotected, but no less essential, social and economic rights. In effect, courts have the opportunity to stop Ford's government from changing electoral ward boundaries a couple of months before an election on the basis of the legislation's sheer effect on electoral expression. Meanwhile, courts do not have the obligation or authority to even look at legislative acts and omissions that continue to disadvantage low-income Ontarians, because that claim cannot be successfully translated into the authoritative language of formal constitutionalism. In this light, the living tree planted in Canada resembles a rather large, immoveable mass, providing little protection to the materially disadvantaged. At the same time, an aspirational sense of constitutionalism is invoked only to be confined to a court-controlled account of constitutional change.

142 Des Rosiers, *supra* note 137 at 66.
143 *Ibid* at 61.

The timing of the alteration of municipal election rules in Toronto — not to mention the confusion, waste, and frustration it caused — signaled less of an attack on the freedom of expression of individual candidates than on the integrity of the electoral process.[144] This is why it seemed — in the view of the dissenting judges, the applicants, and many citizens — like something that in a liberal democracy committed to the rule of law should just not be allowed. But in part because the principle of democracy happens to be an unwritten constitutional principle — an implicit rather than explicit part of Canadian constitutional law — the dissenting justices, like Justice Belobaba at first instance, were leery of relying solely on such a ground.[145] But the specifics play a role in their reluctance, too: the provincial legislature that passed the law had just been elected in a democratic election. The new provincial government viewed this as an opportune moment to make the kind of cuts to government and spending consistent with the thrust of its election campaign. The fact there were still over two months to go until voting day, and that federal campaigns are permitted to be as short as 36 days, and only as long as 50 days, means that the constitutional invalidity of the law on the basis of its inconsistency with the principle of democracy is far from obvious or incontestable. Thus, section 2(b) of the *Charter* offers the strongest footing for the courts to strike down a law that the Constitution's distribution of powers ostensibly gives the provincial legislature the authority to make.[146] It does not just give formal constitutional grounding to reasoned justifications for restraining an exercise of legislative power that overrides expectations of what those challenging the legislation consider legitimate political decision-making ought to entail. It is also an effort to show that the low threshold for breach that the Supreme Court has set in its general section 2(b) jurisprudence applies here. Justice Morris Fish's dissent in *Baier* applies this standard, reflected in the *Irwin Toy* test.[147] Fish J concluded

144 *City of Toronto SCC*, *supra* note 7 (Factum of the Appellant, City of Toronto, at para 47) (where the plaintiffs acknowledge that the case "may not fit into a recognizable model of free expression claims" but insist it qualifies under the approach to freedom of expression that the Supreme Court set out in *Irwin Toy, supra* note 110).

145 *City of Toronto SC, supra* note 1 at para 12-13.

146 See Jamie Cameron & Bailey Fox, "Toronto's 2018 Municipal Election, Rights of Democratic Participation, and Section 2(b) of the Charter" (2021) 30:1 Const Forum Const 1 (arguing that the legislation's interference with electoral expression constitutes, under the test in Irwin Toy, a breach of s. 2(b) properly giving rise to a declaration, not of invalidity, but that the government acted unconstitutionally). In the oral submissions before the Supreme Court of Canada, counsel for the City indicated that if the Court were to find a s. 2(b) breach based on the timing of Bill 5's enactment (i.e. not as a result of its impact on effective representation), the City now seeks the remedy Cameron and Fox describe, and that Cameron argued for on behalf of the intervener, The Centre for Free Expression at Ryerson University. See *City of Toronto SCC, supra* note 7 (Factum of the Intervener, The Centre for Free Expression at Ryerson University, at para 22).

147 *Baier*, *supra* note 105 at para 90.

that barring school employees from running for trustee in any school board infringes their section 2(b) rights. The majority of the Court in *Baier* disagreed, however, reasoning that since the school employees remained free to express themselves on education issues, there was no substantial interference with their fundamental freedom of expression, and the *Charter* did not ground a right to access a particular statutory platform.[148]

Although the City of Toronto's "unwritten constitutional principle of democracy" argument did not succeed before the Ontario Court of Appeal, that is because the Court was not satisfied the plaintiffs' arguments were planted firmly enough in constitutional text to justify pruning the power of the legislative branch. A majority of the Supreme Court may not be quite so loath to rely expressly on unwritten constitutional principles. Regardless, the Court will most likely need to be convinced of the section 2(b) breach argument (as well as of, of course, the province's failure to satisfy the *Oakes* test)[149] to find the statute unconstitutional. As may have occurred to members of the Court in *Baier*, reviewing legislation passed by Alberta Premier Ralph Klein's government, such cases not only present a risk of courts being perceived as political ideology police for imputing a weak rationale to a certain kind of government's legislative project. There is also the perhaps even graver risk that comes with developing the section 2(b) jurisprudence so as to render any legislative or executive act's collateral effects on freedom of expression the basis of a *Charter* breach requiring justification under section 1. What appears to be the establishment of a constitutional backstop in the face of a particular government's perceived exercise of bad faith could prove a springboard for strategic litigation, thereby presaging a series of hurdles, in years to come, for governments and legislatures acting conscientiously.

V. A Revitalized Constitutionalism

The Court of Appeal's reasons for deciding not to put a halt to the government's reckless gallop should not obscure the fact that the government charged ahead with an imprudent piece of legislation in the first place. One may agree with the City of Toronto that democracy is an unwritten principle of Canadian constitutional law and that respect for that principle implies respect for the electoral process, while viewing success at appeal a pyrrhic victory. Relying on the Supreme Court to vindicate the principle of democracy may reflect a more pervasive challenge for Canadian constitutionalism. Resort to litigation for lack of effective political organization represents the scale and nature of the

148 *Ibid* at para 33.

149 *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103.

challenges people in Ontario must confront. Judicial review of constitutionality embodies too narrow an institutional focus.

That is because "the internalization of the normative ideals associated with the rule of law by those who exercise power"[150] is central to a robust constitutional democracy. Even though Canadian courts have a privileged role in pronouncing on what is or is not constitutional, their own legitimacy depends on how they are perceived to exercise that power. Although apex courts define and address legal problems, doing so informs but does not exhaust law as an intellectual, political, and social activity. Knowledge of the way courts may treat and adjudicate the claims that come before them is not only useful for marshalling resources in the political pursuit of legal, social, and economic change; it can also help to inform and refine the ways in which people grasp and reflect on their commitments as members of a moral and political community. In other words, the Supreme Court of Canada's analysis of constitutional conventions and unwritten principles matters, but not because it definitively determines the only worthwhile way to understand implicit constitutional law or even legal constraint on political action. Rather, it matters because judicial authority and the state legal system are a force in peoples' lives. Conversely, though, in a variety of most often quite modest, single-grain-of-sand type ways, individual people in turn play a role in the constitution and authorization of that power. That Supreme Court judgments participate in the interactive, discursive practices of justification for these exercises of power is another reason it matters, too.

Accounts of constitutional law may emphasize at least three perspectives: constitutional law as the benchmark for legal validity; constitutional law as the foundation of law's legitimacy; and constitutional law as convention, custom, tradition.[151] With respect to the first of these three perspectives, constitutional law is frequently presented as a benchmark for evaluating a given law's validity, and failures to meet this benchmark are accordingly what courts determine and grant remedies for. On this account, one would say: governing unconstitutionally is not permitted. Closely related, however, is the second idea of constitutional law as foundational to law's legitimacy: governing unconstitutionally is not just incorrect; it's wrong. Finally, there is an idea of the constitutional, less as

150 Lacey, *supra* note 8 at 16.

151 Unsurprisingly, resistance to the idea of implicit or unwritten constitutional law is pitched along each front, also. Jeffrey Goldsworthy argues that neither the historical record, the substantive rule of law nor the mechanics of the positive state legal order warrants fulsome recognition of the unwritten constitution. He carves out a very limited and contingent place for implicit constitutional law, presupposing a text-centric, framers-focused portrayal of constitutional law. Jeffrey Goldsworthy, "Unwritten Constitutional Principles" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008) 277 at 312.

measuring stick or moral standard than as social practice: the constitutional as characteristic of a particular political community, as constitutive of who we are.

When questions of *Charter* compliance (dominated by legal expert knowledge-claims) displace public debate of political issues,[152] it risks reifying the constitution of political community, and the broad parameters of civil society. Although the political and legal dimensions of the constitution may be conceptually distinguished, they are nonetheless closely intertwined, enmeshed most obviously in the implicit normativity that helps to ground the intelligibility of formal legal norms as well as the legitimacy of substantive policy choices.

If the point and value of a constitution is to provide a peaceful mode of political conflict, then its figurative deployment as shield, bludgeon, decoy, and ruse, as well as map, attack plan, and treaty, should come as no surprise. Too limited a facility with law's versatility as a language of power-legitimation, social symbolism, and individual aspiration will result in a failure to admit the possibility of such eventualities. Consider the extent to which the American Constitution is the object of such intense preoccupation, worship, and contestation in the US. Nowhere else are the names and health conditions of apex court judges so widely known and discussed. And yet, nowhere are interpretations of a constitutional text or expectations of those vested with the power to authoritatively interpret it more fiercely pitted against each other than in this same environment. In one register, this constitution maps a scheme of public governance. In another register, it is cover for a particular political tactic; in still another, a bulwark for protecting private economic entitlements. That the constitutional may serve as the idiom for articulating the basis of institutional legitimacy, social acceptability, and personal values speaks to its versatility. Its manipulability may in fact be the very key to its longevity.

Canadians have reason to be thankful that the constitutional banner is not nearly so crucial for motivating political engagement or shoring up normative commitment in our society. At the same time, the idea of a constitution speaks to a shared political undertaking and a collective set of civic responsibilities, as

152 Wes Pue, "Protecting Constitutionalism in Treacherous Times: Why 'Rights' Don't Matter" in AV Narsimha Rao, ed, *Constitutionalism: an International Perspective* (Hyderabad: Amicus Books, 2008), at 18, online (pdf): *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028591>. See also Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009); Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2013).

well as individual entitlements. Arbitrary, self-serving, or otherwise illegitimate uses of political power rub up against the sense of fairness so crucial to making cooperation both possible and worthwhile. Given the limits to what codification can do to render implicit norms more easily enforceable, and to relying on external oversight and review to ensure accountability, Canada's constitutional order and the value of constitutionalism need to be understood beyond the judicial, and indeed, even "the government" paradigm. Formal constitutional rules can facilitate the kinds of conscious public engagement that makes politics a forum for pursuing social justice. Whether they actually do this turns on the substantive policies governments pursue, and therefore the political will behind them. Failing to pursue more fair and equitable distributions of wealth and opportunity in society, for example, transforms the constitutional order into a fortress for powerful interests.

VI. Conclusion

It is impossible to govern well without attending to political conventions, traditional practices, underlying constitutional principles, and ethical standards. But neither an attitude of unreflective devotion to, or routine defiance of, such norms will do. When Nicola Lacey writes of "[p]opulist attitudes … [being] impatient of constraints," it is not just any old constraint in question. Not all norms are equally serious and important. The context in which their transgression arises and the reasons behind both the norms and their breach all play a crucial part in distinguishing an act of visionary political courage from an instance of authoritarian self-dealing. While a constitutional order's implicit normativity does not necessarily contain more noble aspirations or deserving standards, it tracks actual normative commitments more closely than the formal, written constitution does. Shameless conduct may reflect a lack of knowledge or scruple (or both). The more mileage one gets from adopting this method — adopted tactically or by dint of habit — the less incentive there is to abandon it. Politicians elected not only despite but in part because of their repudiation of certain behavioral norms do not spontaneously start checking themselves once they assume office. Nor do they, for that matter, who feign a more conscientious image but actually only heed the pangs of conscience on pain of public exposure. The appeal of a populism that embraces government *for*, but not *by* or *of* the people, trades on empty promises and thick distortions. But such populisms bask in the glow of the burning contradictions people experience in self-proclaimed liberal democratic constitutional orders where economic inequality widens, political participation thins, and false information piles higher and deeper by the click.

When constitutional inquiry is exclusively preoccupied with what courts will (or won't) let governments get away with, attention is diverted from what democratic representatives should actually be doing. A robust, participatory public culture of justification for political decision-making must facilitate modes of argument, and languages of legitimation, beyond formal legal constitutionalism alone, if the hope is for people to persuade each other on the basis of substantive reason. In reviewing a case dealing with the question of government disregard for constitutional constraints not spelled out explicitly in the *Constitution Acts*, my aim has been to show that simply awaiting judicial vindication of implicit constitutional law is no substitute for the public political engagement necessary to keep governments responsive to substantive constitutional principles, norms, and values. This is not a reproach of the courts, but it is a challenge to those who insist that constitutional action in this country necessarily lies in litigation. The only way to govern effectively and legitimately is to demonstrate commitment to those governing principles and values one expects people to abide by and trust. If one understands constitutional order as something citizens shape through political engagement, electoral politics, and social judgement, judicial enforcement no longer appears as the only link between political decision-making and constitutional constraint.