Unwritten Constitutionalism Symposium

This one-day symposium brings together emerging and established scholars to explore various aspects of Canada's unwritten Constitution – including constitutional principles, norms, and conventions – in light of recent case law and controversies.

September 19, 2025 | 9:00 AM to 5:00 PM
CN Alumni Hall, University of Alberta Law Centre

To register, please email mailey@ualberta.ca

Centre for Constitutional Studies
Centre d'études constitutionnelles

Carleton University

CENTRE DE DROIT PUBLIC
PUBLIC LAW CENTRE

Unwritten Constitutional Norms and Principles
A Comparative Study

UNWRITTEN CONSTITUTIONALISM SYMPOSIUM PROGRAM

8:45–9:00 AM — Welcome & Breakfast

9:00–10:30 AM — Panel 1: Novel Perspectives
Speakers: *Jessica Eisen, Howie Kislowiscz, Marion Sandilands*

10:30–10:40 AM — Break

10:40 AM–12:00 PM — Panel 2: Honour, Dialogue, Community
Speakers: *Richard Mailey & Ian Peach, Rebeca Macias Gimenez, Jock Gardiner*

12:00–1:00 PM — Lunch

1:00–2:50 PM — Panel 3: Judicial Interpretation
Speakers: *Emmett Macfarlane, Ryan Alford & Kris Kinsinger, Mary Liston, Mark Harding*

2:50–3:10 PM — Break

3:10–5:00 PM — Panel 4: The Political Branches
Speakers: *Vanessa MacDonnell & Seána Glennon, Philippe Lagassé, Howard Anglin, Joanne Murray*

5:00 PM — Closing Remarks

UNWRITTEN CONSTITUTIONALISM SYMPOSIUM

Presented by:
The Centre for Constitutional Studies, University of Alberta; the University of Ottawa Public Law Centre; the Barton Chair at Carleton University; and the Unwritten Constitutional Norms and Principles Project
Edmonton, Alberta, September 19, 2025

Unwritten constitutionalism and the range of research questions it raises is generating a new wave of discourse around the world. This symposium and special issue will bring together emerging and established scholars to explore various aspects of Canada's unwritten Constitution, including constitutional principles, norms, and conventions, and the workings of the machinery of government.

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8:45–9:00 AM
WELCOME

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9:00–10:30 AM
PANEL 1: NOVEL PERSPECTIVES

This panel brings together scholars using extra-legal disciplinary lenses — from ancient Greek philosophy to Jungian psychoanalysis to "Law and Emotions" scholarship — in an effort to reveal and interrogate features of unwritten constitutionalism that are typically neglected if not completely unseen.

Jessica Eisen, *Canada's Other Unwritten Constitution*

The Supreme Court of Canada's approach to "unwritten constitutional principles" has arguably fluctuated with respect to which principles are included in the canon, and how these principles properly interact with constitutional texts and ordinary legislation. Throughout these shifts, however, the Court has maintained a stable view of these durable yet unwritten constitutional elements as each being normatively good and just — even as it is conceded that these principles may in some cases conflict, and even as some (particularly the rule and law) are increasingly criticized within postcolonial and other analyses. This paper will explore what might be gained by courts, advocates, and scholars from confronting the possibility that some elements of our constitutional order may be fundamental, durable, and at-times-binding, while being normatively ambiguous or even ignominious. What if, for example, our Constitution might be accurately described as committed to economic inequality or to racial or gender hierarchy, with the same vigour and predictability that characterizes its commitments to democracy or rule of law? This paper will build upon analyses provisionally explored in other forthcoming work on the place of the more-than-human world in constitutional theory. The present contribution will take a broader view of the proposed approach to "unwritten constitutional principles," exploring such dynamics as 1) temporal dimensions and dynamism of unwritten principles; 2) interactions between principles; and 3) the role of social movement advocacy in defining the judicial expression of unwritten constitutional principles.

Howie Kislowiscz, *Emotions and Canada's Unwritten Constitution*

"Law and Emotion" scholarship insists that emotion is omnipresent in human reasoning, destabilizing law's traditional idealization of emotionless reasoning. Properly understood, say law and emotion scholars, the question isn't whether emotion belongs in legal decision-making, but what role it ought to play. The Canadian jurisprudence on the unwritten Constitution provides a rich site of investigation for this question as it deliberately goes beyond text and amplifies courts' interpretative role.

This paper approaches emotions in Canada's unwritten Constitution in two ways. First, it analyzes the emotional interests the Constitution protects and the emotions it seeks to cultivate. For example, the convention that the Governor General acts only on the advice of cabinet guarantees a form of democratic self-government. The same convention also protects and enhances the dignity- and self-esteem-enhancing emotions that come along with participation in self-rule. Second, the paper assesses whether the emotions present in judicial writing about the unwritten Constitution are the most conducive to wisdom and statecraft. For instance, the metaphorical language adopted by courts about the Constitution in these cases evokes awe and reverence. While these emotions induce humility, they may also obscure judicial agency in interpretation.

Ultimately, the paper argues that emotions play a powerful role in constituting the unwritten Constitution, giving meaning to its structures and protections for both citizens and decision-makers. To ignore them is to miss a good part of the point of constitutional analysis.

Marion Sandilands, *Writing as Forgetting: What Plato's Phaedrus Can Tell Us About Unwritten Constitutionalism in Canada*

"Phaedrus, my friend! Where have you been? And where are you going?"

The relationship between Canada's written and unwritten Constitution is highly contested. While our Constitution is based on an unwritten Constitution "similar in Principe to that of the United Kingdom," there is a tendency, perhaps influenced by American constitutionalism, to treat the written constitution as more primary or authoritative. What is lost with this approach?

In Plato's *Phaedrus*, a dialogue about rhetoric, Socrates critiques the written word. For Socrates, writing does not convey truth or knowledge; rather, it is a mere image. Thus, rather than being a "potion for memory and for wisdom," writing may have the opposite effect: it may "introduce forgetfulness into the soul of those who learn it." Worse still, once a thing is written down, the writing stands frozen, unable to explain its own meaning: it is like a wandering child whose parent is not there to defend it. While writing is external and static, knowledge lies in the souls of people, is shared through "living, breathing discourse," and made immortal through dialogue.

This paper will offer a reading of the *Phaedrus* to frame the relationship between written and unwritten constitutionalism in Canada. This reading reveals how by its nature, a written constitution lacks some key elements present in unwritten traditions. I also reveal that the unwritten constitution is prior and fundamental to the written one, but requires lively discourse and practice. In this way, the *Phaedrus* can help frame the role and limits of a written constitution, and the legitimacy and authority of the unwritten one.

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BREAK
10:30–10:40AM

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10:40 AM–12:00PM
PANEL 2: HONOUR, DIALOGUE, COMMUNITY

This panel focuses on the dimensions of the unwritten Constitution that promote honourable or dialogic relations between political actors and/or distinct political communities, including the duty to negotiate and the duty to consult. It accordingly considers, in a broad sense, what our unwritten Constitution tells us about how to be in community with one another, both as individuals and collectives.

Richard Mailey & Ian Peach, *The Duty to Negotiate as a Constitutional Principle: Reflections on Alberta's Equalization Referendum*

In October 2021, the Government of Alberta held a relatively under-the-radar constitutional referendum, asking Albertans to vote on whether to remove section 36(2) of the 1982 *Constitution Act*. While most legal commentators agreed that no legal consequences would follow a vote to remove section 36(2), Alberta Premier Jason Kenney suggested otherwise. More specifically, Kenney claimed that the *Secession Reference* imposed a constitutional duty on Canada's federal and provincial governments to enter formal negotiations in response to a clear provincial desire for constitutional change. Contrary to those who emphasized the narrow thematic context of the *Secession Reference*, Kenney's interpretation was evidently anchored in paragraphs 69 and 88 of the Court's judgment, both of which (seem to) make the duty to negotiate applicable when a province seeks *any* type of constitutional change (not just secession). This paper responds to this claim by suggesting, first, that Kenney's framing of the duty to negotiate deserves more serious scholarly attention than it has thus far received. Rather than simply rejecting Kenney's framing by dismissing the Court's clear language at paras 69 and 88, the paper argues that the controversy over the AB referendum provides an opportunity for clarifying the nature of the duty to negotiate. Such clarity, we suggest, reveals the status of the duty to negotiate as an abstract constitutional principle, rather than a rule-like requirement. The upshot of this is that the duty to negotiate must be read in concert with other relevant constitutional principles, which may, in a given case, militate against the claim that constitutional negotiations are constitutionally required. We also contemplate the possibility, however, that cumulative failures to respond dialogically to provincial dissatisfaction with the constitutional status quo may shade into unconstitutionality.

Rebeca Macias Gimenez, *Sovereignty and Honour: Examining UNDRIP's Role in Crown Accountability and Overlapping Sovereignties*

The *Haida Nation* decision (2004) marked a significant step forward in clarifying the Crown's responsibilities toward Indigenous peoples, particularly the duty to consult and accommodate when there is a risk of infringing Aboriginal rights or title. One well-known passage from the decision explains this duty: "The Crown, acting honourably, cannot run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued" (para 27). This means the Crown cannot exploit resources on Indigenous lands while claims are being

established — such actions are not considered honourable. Further, the Court refers to reconciliation as arising from "honourable dealings," which in turn stems from the Crown's assertion of sovereignty over Indigenous peoples (para 32). In Canadian law, sovereignty and honour are vested exclusively in the Crown, raising concerns about whether the settler government can objectively determine if its honour has been met during each consultation and accommodation process (Beaton, 2018). Even as *Haida* advanced Aboriginal rights, it exposed a lingering paradox: the honour of the Crown originates in Crown sovereignty, yet its aim is reconciliation. Nichols and Hamilton (2020) argue that this paradox results from a "thick" conception of sovereignty, which restricts overlap between Indigenous and Canadian state sovereignties. This presents challenges regarding recognition and accountability across settler and Indigenous legal traditions.

This paper examines how courts are interpreting and applying the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), whether they are contributing to a more nuanced understanding of sovereignty and a clearer notion of the honour of the Crown, paving the way for stronger legal pluralism. For example, in *Dickson v Vuntut Gwitchin* (2024), the Supreme Court highlighted that UNDRIP sheds light on the existence of multiple Indigenous legal systems within Canada. In *Reference Re First Nation, Inuit, and Métis Children, Youth and Families* (2024), the Court found the legislation to be part of a framework for implementing UNDRIP. Meanwhile, in *Gitxaala* (BCSC) and *Montour* (QCSC), courts reached different conclusions about whether UNDRIP legislation can confer justiciable rights. However, it was in *Kebaowek* (2025) that the Federal Court addressed the practical consequences of this paradox by requiring the federal government to treat UNDRIP as a contextual factor that creates an enhanced duty to consult. This means the Crown must go beyond simply satisfying its own standards of consultation to also meet the requirements for free, prior, and informed consent established by the Declaration. In this way, UNDRIP provides clearer boundaries for the honour of the Crown and supports a "thinner" approach to sovereignty.

Jock Gardiner, *Rediscovering Honour: The Behavioural Key to Countering the Decline of Liberal Democratic Constitutionalism*

This paper explores the question of the kind of behaviour liberal democratic constitutionalism requires to be able to live up to the principles it espouses. It suggests that we ought to turn to the concept of honour as a potential way of re-formulating our approach to addressing the causes of the decline of liberal democratic constitutionalism across the globe. Part explorative, part normative, the paper probes the much under researched connection between honour and liberalism, and honour and constitutionalism, paying particular attention to the role honour plays in addressing the issue of what binds constitutional actors to adhere to the unwritten and convention-based components to our constitutional orders. The paper suggests that honour is the "behavioural oil" that we have long forgotten to check when assessing the health of our constitutional orders. It is only by recognizing and tending to the importance of honour in the doing of liberal democratic constitutionalism that we can begin to tackle the illiberal threat at its roots.

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12:00–1:00 PM
LUNCH BREAK

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1:00-2:50 PM
PANEL 3: JUDICIAL INTERPRETATION

The panel provides perspectives on ongoing debates over the role that unwritten constitutional principles ought to play in legal and judicial interpretation — debates that have flared up in recent years due to Supreme Court of Canada decisions (City of Toronto, Power v Canada) that reveal stark intra-Court divisions over the nature and force of unwritten constitutional principles.

Emmett Macfarlane, *Judicial Misadventures in Unwritten Constitutionalism: Lessons from Canada*

Judicial engagement with unwritten constitution conventions and principles can be controversial, especially in the context of a system in the British constitutional tradition that has written (entrenched, supreme) constitutional law. Much of the scholarly literature frames the issue as about legal versus political constitutionalism, or about the expansive judicial discretion afforded because of the abstract and ambiguous nature of most principles. Yet unnecessary judicial engagement with the unwritten Constitution can lead to error or incoherent reasoning when courts fail to properly understand the conventions and practices at stake or where they place inappropriate emphasis on certain principles at the expense of others. Poor reasoning or unnecessary engagement with the unwritten aspects of the Constitution risks conceptual confusion or the introduction of contradictions. This paper explores a spate of recent court decisions implicating various aspects of Canada's unwritten Constitution that suffer from flawed or questionable reasoning. These cases serve to underscore the problems associated with judicial engagement with unwritten constitutionalism, particularly where such engagement is unnecessary to resolving the case or where deference to other constitutional actors might be called for.

Ryan Alford & Kris Kinsinger, *Broadening the Political Legitimacy of Animating Constitutional Principles: Grounding Constitutionalist Commitments with Text and Context*

The judicial articulation of unwritten constitutional principles, particularly when they are assessed as a potentially independent and adequate basis for declaring legislation *ultra vires*, has received considerably more support from progressives than conservatives. This paper will demonstrate that this need not be so: constitutionalism can easily be reconciled with the position that its most important legal instruments must be interpreted against a backdrop of pre-Confederation animating principles.

Upholding constitutional supremacy requires devoting close attention to the text of our constitutional instruments — but it also requires more. At the time of Confederation, it was already evident that the *British North America Act, 1867* was (and still is) not self-interpreting; it requires a holistic understanding of the tenets of the Constitution of the United Kingdom.

Accordingly, the principle of constitutionalism is neither progressive nor conservative. That being said, constitutionalism demands special attention from conservatives insofar as it entails a rigorous commitment to uphold the foundational principles of our legal order in an objective manner. We demonstrate that the judicial articulation of unwritten constitutional principles need not always be tainted by the suspicion that the Constitution is being used by judges as a

screen for their own values, or an invasion of the legislative sphere. Rather, when judges employ historically-informed methods to reveal the foundations of our constitutional order, they are ensuring that the meaning of the Constitution remains fixed and stable, such that it can be faithfully upheld.

Mary Liston, *Interpreting Canada's Unwritten Constitutions*

Building on a paper written (and to be published in) the edited collection entitled *Multi-Textual Constitutions of the World* (Richard Albert, ed, forthcoming), and drawing on insights from other similar jurisdictions, this paper will consider appropriate and inappropriate approaches to interpreting the unwritten constitution in relation to the written constitution. The argument will explore the strengths and risks of dynamic approaches to constitutional interpretation with a specific inquiry into unwritten features. The paper will also revisit the benefits and weakness of textualism in relation to the unwritten constitution. These two themes will be worked through a small set of selected cases with an eye to thinking through how the reference function has advanced our understanding of unwritten constitutionalism by providing a helpful — if at times controversial — bridge between the written and unwritten aspects of Canada's Constitution(s). Finally, the paper will consider the potential future role of, and interpretive approach to, Indigenous unwritten principles as they may become more explicit in the Canadian constitutional order.

Mark Harding, *How Democratic are Unwritten Constitutional Principles? And Does it Matter?*

In a 2003 article, Rainer Knopff posed the questions: "How democratic is the *Charter*? And does it matter?" Knopff answered these questions "not very" and "not really" because the more significant arguments about the *Charter* lay elsewhere. This paper poses a similar set of questions: How democratic is the Supreme Court's use of unwritten principles? And does it matter? I answer "not very" for the former but "it does matter" for the latter. In doing so, this paper develops a normative critique of the democratic legitimacy of the judicial use of unwritten constitutional principles. Canada, as a constitutional democracy, requires both courts and legislatures to participate in articulating the meaning of the Constitution and the contours of rights-based conflicts. However, the judiciary's use of unwritten constitutional principles creates tensions between the elected and non-elected branches of government. This paper addresses this tension in three ways. First, this paper explores the democratic implications of using unwritten constitutional principles by considering instances where institutional reforms initiated by a government were part and parcel of what the Court was adjudicating (*Senate Reform Reference* [2014]; *City of Toronto* [2021]). Second, it considers the difficulty of engaging in a legislative response following the use of unwritten constitutional principles. Finally, this paper argues that the Court's use of unwritten principles has been less controversial when invoked descriptively and will continue to strain democratic legitimacy when used to create new constitutional obligations.

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BREAK
2:50–3:10 PM

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3:10–5:00 PM
PANEL 4: THE POLITICAL BRANCHES

This panel examines the role that unwritten constitutionalism plays and ought to play beyond the courts, exploring the way that political action in Canada is contoured and disciplined by unwritten constitutionalism, whether through legally unenforceable conventions or unwritten constitutional principles.

Vanessa MacDonnell & Seána Glennon, *Unwritten Constitutionalism Beyond the Courts: The Implications of "Writtenness" for Canadian Institutions*

The recent Canadian legal scholarship on unwritten constitutionalism has tended to focus on the courts' invocation and enforcement (or not) of unwritten constitutional principles. However, the case law demonstrates that unwritten principles rarely have a significant impact in determining issues of constitutional salience. In this article, by contrast, we make the case for broader consideration of the significance of the unwritten Constitution, casting our gaze on institutions beyond the courts.

While some Canadian institutions and actors are contemplated by the constitutional text, many others are not. Yet these institutions and actors carry out important constitutional functions, a significant example being the Office of the Prime Minister. We begin this paper by considering the extent to which Canada's current institutional arrangements are codified in the constitutional text. We then offer a conceptualization of the relationship between institutions and unwrittenness, paying particular attention to concerns about the authority and legitimacy of "unwritten institutions" performing constitutional functions. In the final section of the paper, we reflect on what this conceptualization means for the modern constitutional state, its range of formal and informal institutions, and the emergence of novel new democratic institutions aimed at involving citizens more effectively in the democratic process. Taking the view that the Canadian constitutional order is characterized as much by the unwritten as the written, we argue that, far from lacking legitimacy, informal and unwritten institutions can make a vital contribution to democratic health and to the functioning of constitutional democracy.

Philippe Lagasse, *Ultimate Unwritten Responsibility: The Prime Minister and National Security*

Canada's Prime Minister is ultimately responsible for national security, yet their responsibility in this area, and the powers they exercise in this domain, are largely unwritten. The constitutional and legal foundations of the Prime Minister's national security responsibilities and functions have not been given much attention, as a result. Indeed, those who study the Prime Minister and national security from a bureaucratic or policy perspective often take the head of government's powers as a given, without probing into their source or origins. This paper aims to fill this gap. It seeks to highlight how the constitutional convention, prerogative power, and the practices that surround their office underpin the Prime Minister's ultimate responsibility for national security. The paper examines the conventions, powers, and responsibilities that surround the head of government in Canada. In addition, the paper outlines how these conventions, powers, and responsibilities shape the Prime Minister's national security functions. Finally, it examines how the Prime Minister's national security responsibilities and functions work in particular instances.

Howard Anglin, *Gulliver Bound: How the Political Dialogue Constrains the Executive in the Westminster System*

Accountability is not a word generally associated with the executive in the Westminster parliamentary system. Nor is this a new critique. For more than a century, commentators have decried executive domination of the legislature, comparing the powers of the government to "an Eastern despot" or "an elective dictatorship." This characterization leans too heavily on the theory of parliamentary government and ignores its practice. This essay looks at how an executive embedded in Parliament is constrained through a political dialogue with the legislature in ways that may not be apparent to outsiders. Together, these constraints constitute a form of "responsive government," which complements and supports the essential functioning of responsible government. If responsible government is the principle that the prime minister and other ministers must maintain the confidence of the House of Commons, then responsive government is the practice of how the government maintains that confidence.

More than a century ago, Sidney Low wrote about the rise of mass democracy that, "for the control of Parliament, which was supposed to be regular, steady, and constant, is exchanged the control of the electorate, which is powerful, but intermittent." The reality is more complicated; the exchange less complete. In spite of the rise of popular mass democracy, and perhaps buoyed by it, the "regular, steady, and constant" political dialogue persists. The formal mechanisms of responsible government, including elections, may be intermittent, but the work of responsive government keeps the spirit of responsible government and the connection it maintains between the government and the governed alive in the meantime.

Joanne Murray, *Unwritten Constitutional Principles as Power-Conferring Principles*

Most discussions about the legitimacy of constitutional principles assume unwritten constitutional principles (UCPs) must be justified on the basis that they "constrain the decision-making of executive and legislative branches" (*Toronto City*, 2021). However, the assumption that legitimacy lies in the extent to which principles constrain power overlooks the important power-conferring or enabling nature of constitutions. This paper will thus consider whether and to what extent UCPs might be power-conferring and thus whether they produce rather than constrain legal and political authority. Drawing on HLA Hart's theory of power-conferring rules (rules that create and make possible the valid exercise of legal powers) I argue that while the written constitution authorizes and creates legislative actors, we can interpret UCPs as power-conferring principles that constitute the valid exercise of legislative authority. In other words, UCPs make the valid exercise of public authority possible by stipulating the conditions under which legitimate authority can be produced and thereby govern the nature and terms upon which legislative power can be exercised.

A consequence of that analysis would be that legislative actors would be required to give due weight to UCPs in order to validly exercise their powers and that parliamentary supremacy is not absolute. By implication, legislative decisions could be invalidated if they do not give due weight to UCPs or provide a reasoned justification for overriding them (challenging the recent decision in *Toronto City*). Another consequence of this analysis is it rests on the contentious view that the "rule of law change" must be more than simple manner and form requirements but includes normative and political principles. I substantiate this argument by contending that the internal point of view of the rule of change (and legal powers more generally) necessarily involves making a moral claim about law's normativity. I argue these moral claims must be justified to legal subjects and involve invoking moral, normative, and political principles (as

UCPs are). I end the paper by considering what this power-conferring interpretation means about the nature of law and unwrittenness more generally. First, it suggests that law must be inherently moral and principled (not simply source-based). Second, I show that it is not possible for a legal power to exist without power-conferring norms, and so the power of creating law is itself generated by unwritten, internal power-conferring norms. This suggests all liberal democratic constitutions are based on unwrittenness.

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CLOSING REMARKS
5:00 PM

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