Unwritten Constitutional Principles: The Challenge of Reconciling Political and Legal Constitutionalisms

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Introduction

> Th[e] power [of the United States' Supreme Court justices] is immense; but it is a power of opinion. They are omnipotent as long as the people consent to obey the law; they can do nothing once the people scorn the law. Now, the power of opinion is the most difficult one to exercise, because it is impossible to know its limits exactly. Often it is as dangerous to fall short, as to go beyond those limits.[1]

On March 21 and 22, 2019, a symposium entitled "Unwritten Constitutional Norms and Principles: Contemporary Perspectives" was held at the Faculty of Law of the University of Ottawa. This special issue comprises five of the papers that were then presented. The organizers of the symposium, Vanessa MacDonnell and Se-shauna Wheatle, graciously asked me to participate, initially as a commentator, and subsequently, as the author of the foreword to this special issue.

How one envisages the unwritten constitution in general and unwritten constitutional principles (UCPs) in particular is deeply rooted in one's understanding of, and convictions about, both constitutionalism and democracy. Such understanding is also closely connected to what we as scholars believe to be the factors that trigger constitutional evolution—namely, speculative reason or political struggle, or both—and the role played by institutional actors in such evolution. And, most importantly, since a researcher's conceptual theorization, however abstract it may be, is always—if only implicitly—based on a certain anthropological premise, our understanding of UCPs is linked to the kind of individual citizen we wish a particular constitutional regime to foster.

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1 Alexis de Tocqueville, *Democracy in America: Historical-Critical Edition of* De la démocratie en Amérique, ed by Eduardo Nolla, translated by James T Schleifer (Indianapolis: Liberty Fund, 2010) vol 1 at 246.

The papers featured here are all intellectually stimulating, not only because of the thought and meticulousness with which they were written, but also because they cover most of the central issues raised by the conceptual nebula the "unwritten constitutional principles" have become. As I have written many papers on this subject, in both French[2] and English,[3] some of my own work is analyzed and criticized in this special issue.

My position as author of this foreword is therefore somewhat uncomfortable. On the one hand, I cannot simply recount and summarize these papers, for although they are all excellent pieces of scholarship, I at times strongly disagree with what some authors assert, and with the manner in which my own work is sometimes depicted. On the other hand, it would be unjust to criticize colleagues deprived of the full opportunity to respond.

I have therefore chosen the following strategy, one that does not require direct references to specific papers. This foreword will take the shape of a short essay.[4] In Part I of this text, I will delineate what exactly is controversial about UCPs. In Part II, I shall inquire into the role of speculative reason and political struggle in constitutional evolution. I will discuss how our emphasis, as legal scholars, on one over the other testifies to our understanding of democracy and constitutionalism, and therefore impacts the degree of latitude we are willing to afford to judges in recognizing and enforcing UCPs. Throughout, I will argue for a just equilibrium to be struck

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2 See e.g. Jean Leclair, "Les silences de Polybe et le Renvoi sur la sécession du Québec" in Jacques Bouineau, ed, *Personne et Res Publica*, vol 2 (Paris: L'Harmattan, 2008) 135; Jean Leclair & Yves-Marie Morissette, "L'indépendance judiciaire et la Cour suprême : reconstruction historique douteuse et théorie constitutionnelle de complaisance" (1998) 36:3 Osgoode Hall LJ 485.

3 See e.g. Jean Leclair, "Legality, Legitimacy, Decisionism and Federalism: An Analysis of the Supreme Court of Canada's Reasoning in *Reference re Secession of Quebec, 1998*" in Alberto López-Basaguren & Leire Escajedo San-Epifanio, eds, *Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain* (Cham, Switzerland: Springer, 2019) 63 [Leclair, "Legality, Legitimacy, Decisionism and Federalism"]; Jean Leclair, "Constitutional Principles in the *Secession Reference*" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 1009; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389 [Leclair, "Canada's Unfathomable Unwritten Constitutional Principles"]; Jean Leclair, "The Secession Reference: A Ruling in Search of a Nation" (2000) 34:3 RJT 885; Jean Leclair, "Impoverishment of the Law by the Law: A Critique of the Attorney General's Vision of the Rule of Law and the Federal Principle" (1998) 10:1 Const Forum Const 1**;** Jean Leclair, "The Attorney General's Vision", translated by IM Milne, in David Schneiderman, ed, *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer & Company, 1999) 72.

4 My intent is not to examine the extensive literature dealing with UCPs in detail, but rather to bring to light some of the most challenging issues they raise, as they are revealed by the five papers making up this special issue.

between legal and political constitutionalisms, and more particularly, for the cultivation of a measure of skepticism toward a judge's or a scholar's capacity to find the "best answer" to a question of law. The five papers comprising this special issue showcase most of the major arguments commonly invoked in favour of or in opposition to UCPs, and they all, in one way or another, address the issues I intend to examine. Consequently, although I will purposely avoid any explicit mention of the papers, "authors" in this essay must be understood not as a general reference to scholars having written about UCPs, but rather as alluding to some or all of the five authors featured in this special issue.

To conclude on this point, I must emphasize that this is not a contest. Even if the authors with whom I disagree were identified,[5] no great harm would follow. It would in no way mean that my position is better in absolute terms than theirs. In his famous lecture "Science as a Vocation," Max Weber contends that a teacher cannot decide for the student, but can tell her, "if you want such and such an end, then you must take into the bargain the subsidiary consequences which according to all experience will occur. … Figuratively speaking, you serve this god and you offend the other god when you decide to adhere to this position."[6] My aim is simply to seek to reveal which god we respectively serve when we subscribe to a particular understanding of UCPs.

I. Distinguishing Between the Unwritten Constitution and Unwritten Constitutional Principles

UCPs have generated an extensive literature. I, along with others, have been identified as a staunch opponent of these principles. However, my objections have been largely exaggerated. I am partly at fault here. Chief Justice Lamer's lamentable instrumentalization of British and Canadian constitutional histories in the *Judicial Remuneration Reference*[7] still stands, according to me, as one of the most intellectually dishonest rationales ever devised by a Supreme Court justice.[8] My irritation at this travesty of history certainly lent a patina of ferocity to some passages of my paper "Canada's Unfathomable Unwritten Principles"[9] and to the one I co-authored

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5 It goes without saying that if someone reads the whole special issue, she will identify the authors with whom I agree or disagree.

6 Max Weber, "Science as a Vocation" in HH Gerth & C Wright Mills, eds, *From Max Weber: Essays in Sociology*, translated by the editors (New York: Routledge, 2009) 129 at 151.

7 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 150 DLR (4th) 577 [*Remuneration*].

8 Described by dissenting Justice La Forest as a "historical fallacy," strong words indeed coming from a colleague (*ibid* at para 311).

9 *Supra* note 3.

with Professor Yves-Marie Morissette (as he then was), "L'indépendance judiciaire et la Cour suprême : reconstruction historique douteuse et théorie constitutionnelle de complaisance."[10] That said, rejecting the part is not equivalent to rejecting the whole. Those of us who found the *Remuneration Reference* unpalatable have never been wholly against UCPs; this would be a ludicrous stance to take for anyone even slightly knowledgeable in constitutional history.

To begin with, UCPs must not be confused with the unwritten constitution, and more precisely, the common law constitution. The latter is generally understood as comprising common law rules designed to control administrative action, or as encompassing such common law methodological techniques as "the principle of legality"—providing for a restrictive interpretation of legislation infringing upon common law rights (such as the control and enjoyment of one's own property[11] or the need to establish the existence of mens rea in criminal matters[12]). A more ambitious definition also encompasses constitutionally enshrined common law rules, such as those regulating parliamentary privileges.[13] Finally, the unwritten constitution is sometimes defined as equivalent to the material as opposed to the formal constitution[14] (i.e., the whole panoply of norms and practices regulating and limiting state power, such as constitutional conventions).

These understandings of the unwritten constitution are, for the most part, uncontroversial, since the unwritten rules to which they refer are either "democracy-promoting"[15] or "liberty-enhancing." Democracy-promoting rules require politicians to bear the political responsibility for their actions (principle of legality and constitutional conventions) and provide them with unhindered freedom of speech and debate (parliamentary privileges). Liberty-enhancing rules ensure that citizens' affairs will be dealt with according to law rather than whim (control of administrative action), that their property will not be arbitrarily encroached upon, and that only malevolent intent will lead to a deprivation of liberty. In addition, most of

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10 *Supra* note 2.

11 See *Colet v R*, [1981] 1 SCR 2, 119 DLR (3d) 521.

12 See *Beaver v R*, [1957] SCR 531, 118 CCC 129.

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

14 For a recent and interesting overview of the distinction, see Julian Arato, "Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations" (2012) 10:3 NYU Intl J Cont L 627.

15 I borrow this expression from Sujit Choudhry & Robert Howse, "Constitutional Theory and the *Quebec Secession Reference*" (2000) 13:2 Can JL & Jur 143 at 162–63.

these rules do not stand in the way of the sovereignty of Parliament, as they impose only "manner and form" requirements.

In truth, the controversy centres on the "structural" UCPs as understood in the *Remuneration* and *Secession* references.[16] So-called because they are part and parcel of our constitution's "internal architecture," and because, without them, the "constitutional structure" of our polity would be inconceivable.[17] UCPs, as understood in both these cases, refer to abstract legal principles identified and interpreted by courts, from which judges can deduce the existence of more specific rules. The latter can be implemented by judges and can lead, in some instances, to the invalidation of legislation. Reflecting the broader debate over UCPs, some authors of this issue are quite comfortable with the courts' exercise of such a power to create specific rules, whereas others—closer to my own opinion—are less so.

Notwithstanding the controversy, many features of these principles are uncontroversial. Importantly, no one doubts that, as underlined by the Supreme Court in *Secession*, they "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."[18] Everyone also agrees that UCPs, as well as the legal obligations to which they give rise, may impose substantive limitations on government action:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference* ...), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.[19]

Some of the purposes to which they can be applied also raise no problem. For instance, as one author suggests, they can, and in fact do, operate as ground rules or codes of good governance for both the executive and the legislative powers. Finally, I do not believe anyone would quarrel with what I wrote nineteen years ago: "[T]he legitimacy of invoking unwritten principles will depend on the purpose they serve and on how the courts use them."[20] However, this point gives rise to an area of wide disagreement, for

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16 See *Remuneration*, *supra* note 7; *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession*].

17 See *Secession*, *supra* note 16 at paras 50–51.

18 *Ibid* at para 32.

19 *Ibid* at para 54 [references omitted].

20 Leclair, "Canada's Unfathomable Unwritten Constitutional Principles", *supra* note 3 at 431.

the following questions arise: What are those purposes? In what manner should courts utilize UCPs? Are courts the best forum to instantiate them?

Proponents of a generous judicial recourse to UCPs invoke a series of arguments, the value of which skeptics such as I acknowledge. For instance, they insist on the limits of a purely textualist approach to the Constitution, on the ontological vagueness of constitutional texts and legal doctrines in general, on the undoubted existence of "gaps" in our written constitution, on the fact that resorting to unwritten sources of law is unavoidable, on the quasi-impossibility of amending our Constitution, and finally, on the inflated claims regarding the democratic underpinning of the written constitution. Nevertheless, from this, they conclude that it is legitimate for courts to resort to UCPs to "impose" legal duties that can be judicially enforced. The vocabulary employed is quite eloquent: UCPs "entail," "demand," or "impose" affirmative constitutional obligations or the adoption of specific rules, they "require" the executive to create and maintain particular institutions or processes, and they give rise to "concrete legal obligations." These authors are not indifferent to the legitimacy issues raised by their proposals. They take great care to state that their suggestions minimally impair parliamentary sovereignty. The specific rules they advocate are confined, so they argue, to administrative processes or procedural schemes comprising certain minimal but well-defined requirements. Legislatures remain free to act, but within the bounds delineated and imposed by courts.

It remains that, in encouraging courts to create judicially enforceable binding rules based on UCPs, these authors give pride of place to judges in the identification and implementation of the rules that could be deduced from these very abstract principles (democracy, federalism, rule of law and constitutionalism, and respect for minorities). However, as illustrated by the *Secession Reference*, one should not forget that UCPs remain "binding upon both courts and governments,"[21] even though their implementation can only be accomplished by domestic or foreign political actors. In other words, as was clearly demonstrated in that case, a judge can at once create a legal framework ("duty to negotiate") under the aegis of a number of UCPs, and delegate its enforcement to non-judicial bodies.

Allow me to clarify. The rules, processes, and institutions endorsed by some authors, and that should, according to them, be recognized and eventually implemented by courts, could indeed strengthen the democratic fibre of our polity. I myself have not hesitated to make what might seem to some

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[21] *Secession*, *supra* note 16 at para 54.

as very idealistic proposals.[22] However, when I did so, I remained convinced that they could not be translated into *specific* binding rules sanctioned by judges, the latter lacking, in my opinion, the legitimacy to do so.[23]

I wish to highlight two contentious issues that are specific to *unwritten* constitutional principles and that, with respect, are insufficiently addressed in some of the papers.

First, the level of abstraction of UCPs is such that there is a theological dimension to them. They operate as articles of faith that are impossible to object to—who would quarrel with the sublime?—and, more importantly, they are, in themselves, devoid of any precise meaning. That is why the Supreme Court stressed, in *Secession*, that Canada's specific history constituted the horizon, the background of intelligibility, that had to be resorted to as a basis for interpreting the unwritten constitutional principle of federalism.[24] Indeed, if all references to the horizon of significance that is history were to be eliminated, then all choices would be equally valid and equally important.[25] Any desirable idea gleaned in other constitutions could then certainly be marshalled by courts, as advocated by one author, to fill gaps in our Constitution. By the same token, as others argue, the importance of the constitutional text could be downgraded on the pretense that the guidance it provides is no less vague than that yielded by UCPs, though this would beg the question of why the abstract federal principle should not lead the supreme courts of the United States, Australia, and Switzerland to eventually propose carbon-copy solutions.

In fact, history and text, however unclear the paths they provide, do operate as essential boundaries to the interpretation of UCPs. Claiming that they are no more imprecise than the text of the Constitution has its limits. None of the authors of this special issue would assert that there is no fundamental difference between the Pacific Ocean and the Loch Ness, the one just being bigger and saltier than the other. All would agree that

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22 See Jean Leclair, "Invisibility, Wilful Blindness, and Impending Doom: The Future (If Any) of Canadian Federalism" in Carolyn Hughes Tuohy et al, eds, *Policy Transformation in Canada: Is the Past Prologue?* (Toronto: University of Toronto Press, 2019) 106.

23 See *ibid* at 110; Jean Leclair, "Nanabush, Lon Fuller and Historical Treaties: The Potentialities and Limits of Adjudication" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 325 [Leclair, "Potentialities and Limits of Adjudication"].

24 See *Secession*, *supra* note 16 at para 32.

25 See Leclair, "Legality, Legitimacy, Decisionism and Federalism", *supra* note 3 at 71.

one's chances of getting lost on the former are much greater than on the latter. The same is true of UCPs and constitutional texts.[26]

As there are many UCPs, another problem that needs to be addressed is the "weight and priority" they must respectively be given.[27] This is what I have dubbed the conundrum of their "interrelatedness."[28] Contrary to what some claim, I did not say—although I could have—that such interrelatedness may lead to conceptual incoherence because of the inherently abstract nature of each principle and the unclear boundary lines between them. Rather, I praised the Supreme Court for having insisted on the interrelatedness of UCPs, for "if given their full extension," not only could these principles be irreconcilable with one another, but more importantly, they could be brandished as absolutes.[29] Absolutization of a single principle by a court is one of the greatest dangers raised by UCPs. Whereas the majority's reasoning in *Remuneration* was unconvincing on account of its total indifference to countervailing UCPs,[30] the Supreme Court's careful and prudential appraisal of the UCPs' interrelatedness in the *Secession Reference* gave that decision the stamp not only of great scholarship, but also of great statecraft. The Court at once wisely insisted on the need to avoid absolutist interpretations of UCPs[31] and monistic descriptions of our country's political communities.[32]

As mentioned earlier, in spite of the difficulties associated with the UCPs themselves, the main controversy centres on the extent to which they allow judges to create, based on a highly abstract matrix, more specific

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26 Would the Court have made as much mileage on the unwritten constitutional principle of the "honour of the Crown" (*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42) had it not been for the presence of section 35 of the *Constitution Act, 1982*?

27 See Leclair, "Canada's Unfathomable Unwritten Constitutional Principles", *supra* note 3 at 417ff.

28 See *ibid* at 392, 400.

29 See *ibid* at 417–18: "Some of these principles, if given their full extension, may be irreconcilable; for example, democracy and the rule of law. In *Secession*, the Court was well aware of the problem. This is why it emphasized that these principles do not exist in the abstract, but must be put into historical context. The Court also insisted that there is no hierarchy among them." And at 430–31: "[U]nlike written constitutional provisions, unwritten constitutional principles are liable to operate in an absolute fashion, unless judges decide to invoke a counteracting principle. Ignoring counteracting rules is hardly possible when explicit provisions are concerned. Section 91 of the *Constitution Act, 1867* could not be invoked without any mention being made of section 92."

30 See *ibid* at 420, 423, 433.

31 See *Secession*, *supra* note 16 at para 49: "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."

32 See Leclair, "Legality, Legitimacy, Decisionism and Federalism", *supra* note 3.

rules that they can then implement themselves. Behind this rather technical issue are fundamental questions relating to the role of speculative reason and political struggle in constitutional evolution. Emphasizing one over the other tellingly reveals how we conceive of democracy and constitutionalism. And this perception impacts the degree of latitude we are willing to afford to judges over UCPs.

II. Speculative Reason and Political Struggle as Impulses of Constitutional Evolution

The extent to which scholars differ in the discretion they would impart to judges over the determination and implementation of specific rules under UCPs reflects the well-known tension between legal constitutionalism and political constitutionalism.[33] In a nutshell, the first attributes a greater role to courts than the second for holding those in power to account.[34]

A fundamental characteristic of the legal constitutionalists' epistemological perspective is their greater faith—even if only implicitly—in the power of speculative reason. Defined as an ideal type, speculative reason points to a contemplative and detached process of reasoning that privileges logical inferences drawn from basic principles over analyses of the specifics of a particular situation. Speculative reason is most preoccupied with seeking the "Good" in the abstract, and is therefore less concerned with the realm of experience.

For instance, although section 11(d) of the *Charter* had always been interpreted as only allowing the level of judicial independence necessary to guarantee a fair trial to the accused,[35] the abstractness of the unwritten principle of judicial independence was interpreted as logically entailing a

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[33] There is a vast literature on this multifaceted subject. For a recent examination of this tension by a leading constitutionalist, see Martin Loughlin, "The Political Constitution Revisited" (2019) 30:1 King's LJ 5. For my own take, see Jean Leclair, "Michael Oakeshott ou la recherche d'une politique dépourvue d'abstractions" (2014) 12 Jus Politicum 1.

[34] See Graham Gee & Grégoire CN Webber, "What is a Political Constitution?" (2010) 30:2 Oxford J Leg Stud 273 at 273: "[T]he idea of a *political constitution* … is associated with holding those who exercise political power to account, for the most part, through political processes and in political institutions … [whereas] a *legal constitution* ... [is] associated with holding those exercising political power to account, to a substantial and increasing extent, through judicial review."

[35] As underlined by dissenting Justice La Forest in *Remuneration*, "it is important to remember that judicial independence is not an end in itself. Independence is required only insofar as it serves to ensure that cases are decided in an impartial manner" (*supra* note 7 at para 332). He then quotes, of all people (!), Chief Justice Lamer in *R v Lippé*, [1991] 2 SCR 114, 1990 CanLII 18 as authority.

requirement to depoliticize the relationship between courts and governments.[36] Thus, *whether an accused was involved or not in litigation*, section 11(d)[37] was held to give rise to a constitutional obligation on the part of the provinces who intended to reduce the salaries of judges to submit any proposed changes to an independent, objective, and effective body that would depoliticize the process. Curiously, a unanimous court had previously determined that such commissions were unnecessary under section 11(d).[38]

Similarly, although they cannot point to an actual crisis concerning the issue they are studying, some authors of this special issue argue that judges should recognize and "impose" specific rules or institutions. They find their inspiration in other countries' constitutions or in what their own research (or that of other knowledgeable scholars) has led them to consider appropriate. The whole purpose of their defence of UCPs is precisely aimed at providing judges with the power to implement what speculative reason dictates is necessary to address societal threats. For these authors, live threats are no longer necessary as justification for such a position; potential threats that could logically come to mind suffice. I share these scholars' frustrations over the slow pace of reforms. I also admit that prescribing potential amendments is part of the legal scholar's and normativist's genome. All the same, because speculative reason knows no bounds, such a perspective serves to enhance the role of judges as exponents of specific normative and institutional reforms, and therefore prioritizes legal constitutionalism over political constitutionalism.

At its extreme, the espousal of UCPs leads some to claim that the public institutions comprising Canada's constitutional architecture are simply manifestations of these principles. This is equivalent to standing Canadian constitutional history on its head. To take but one example, our federal institutions were not primarily the product of an abstract unwritten principle of federalism. Rather, they were the result of compromises made by highly pragmatic politicians faced with the instabilities generated by the regime

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[36] See *Remuneration*, *supra* note 7 at para 95: "[T]he preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the *underlying logic* of the Act can be given the force of law" [emphasis added].

[37] The Chief Justice had stated that the "substantive provisions of the *Constitution Act, 1867* ... [including section 11(d)] merely elaborate those organizing principles in the institutional apparatus they create or contemplate" (*ibid* at para 95).

[38] See *Valente v R*, [1985] 2 SCR 673 at 706, 24 DLR (4th) 161 [*Valente*].

of the 1840 *Union Act*, and who knew or cared very little for political theory.[39] Once established, however, our federal regime triggered a variety of normative discourses on federalism that eventually influenced the manner in which our Constitution was to be interpreted.

The English Parliament provides another good example of how constitutional evolution proceeds. It was not created in celebration of the principle of democracy or equality, but out of an act of royal will.[40] Parliament was created because it served the King's interests. In the sixteenth century, the English Parliament did not suffer the fate of its continental counterparts because it *assisted* rather than opposed Henry VIII in his quest to undo the medieval privileges constraining the exercise of his royal authority.[41] Parliament also proved essential in the financing of the ever more expensive wars in which the King was embroiled. Kings realized that allowing a measure of political representation in Parliament to those who produced wealth was an astute political investment, much more efficient than predation. By protecting the interests of the wealth-producers and letting them have a say in the political arena, kings were able, in exchange, to obtain the producers' consent to the taxation that generated the revenue stream they needed to consolidate their power.[42] This is not to say, however, that this *political* struggle did not generate *reason-based*, *normative* discourses that eventually played a significant role in constitutional evolution. Indeed, more and more non-elite groups adopted the normative vocabulary of democracy, equality, and liberty to claim their share in the exercise of political power. This was not the result of a well thought out rational plan or a mystically propelled evolution, but rather the result of what I described as a "diffuse constitutionalism,"[43] where constitutionalism results from the

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39 Jean-Charles Bonenfant has documented the lack of interest manifested by the Fathers of Confederation toward political theory: see Jean-Charles Bonenfant, "L'esprit de 1867" (1963) 17 :1 R histoire Amérique française 19 at 20–21, 25–27; Jean-Charles Bonenfant, "La genèse de la Loi de 1867 concernant l'Amérique du Nord britannique" (1948) 9:1 Culture 3 at 17; Jean-Charles Bonenfant, "Le Canada et les hommes politiques de 1867" (1967) 21:3a R histoire Amérique française 571 at 587; Jean-Charles Bonenfant, "Les projets théoriques du fédéralisme canadien" (1964) 29 Cahiers dix 71 at 81–82; Jean-Charles Bonenfant, "L'idée que les Canadiens français de 1864 pouvaient avoir du fédéralisme" (1964) 25:4 Culture 307 at 310.

40 See Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford: Oxford University Press, 2013) at 46.

41 See *ibid* at 47–48.

42 See Douglass C North, *Structure and Change in Economic History* (New York: WW Norton, 1981) at 140–41; Hendrik Spruyt, "War, Trade, and State Formation" in Robert E Goodin, ed, *The Oxford Handbook of Political Science* (Oxford: Oxford University Press, 2011) 567 at 573; Robert H Bates, *Prosperity & Violence: The Political Economy of Development*, 2nd ed (New York: WW Norton & Company, 2010) at 40–56.

43 See Jean Leclair, "The Story of Constitutions, Constitutionalism and Reconciliation: A Work of Prose? Poetry? Or Both?" (2017) 22:3 Rev Const Stud 329 at 341 [Leclair, "The Story of Constitutions, Constitutionalism and Reconciliation"].

unintended consequences of willful or spontaneous human actions—for instance, the King's creation of Parliament—that are not necessarily designed to do good.

In other words, the political constitution nourishes a normative discourse that eventually finds its way into political theories and the legal constitution, and, in turn, fuels further political movements. Thus, viewed from a historical perspective, legal and political constitutionalisms are complementary, although they are sometimes in tension with one another.[44]

The role we are willing to ascribe to judges in constitutional developments is indicative of our understanding of democracy and constitutionalism.

No doubt, it is possible to recognize a democratic quality to judicial review, and therefore to the legal constitution. Democracy is not simply majority rule. It is simultaneously a mechanism of authorization and decision-making (elections and majority rule), as well as a mechanism for the justification of decisions (based on openness and rational deliberation).[45] If this assumption regarding the dual nature of democracy is maintained, then adjudication is not devoid of a democratic foundation.

As Lon L. Fuller has posited, adjudication is expected to allow the expression of *reasoned* arguments by all parties involved and the serene consideration of those arguments by the judge or arbiter, contrary to decisions resulting from an election.[46] Furthermore, in the absence of reasoned argument, meaningful participation in the process of adjudication would be impossible. The simple affirmation of something does not qualify as reasoned argument. The latter can only be so if some principle or principles are asserted upon which its soundness and relevancy rest.[47] That is why, in the words of Fuller, "[t]he proper province of adjudication is to make an authoritative determination of questions raised by claims of right and accusations of guilt."[48] It is in this sense that courts can claim, as Pierre Rosanvallon puts it, to possess a "reflexive legitimacy."[49]

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44 I explore this idea in more detail in "The Story of Constitutions, Constitutionalism and Reconciliation", *ibid*.

45 See Marcel Gauchet, *La démocratie : d'une crise à l'autre* (Nantes: Cécile Defaut, 2007).

46 See "The Forms and Limits of Adjudication" in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller* (Durham: Duke University Press, 1981) 86.

47 See *ibid* at 96: "The litigant must therefore, if his participation is to be meaningful, assert some principle or principles by which his arguments are sound and his proofs relevant."

48 *Ibid*.

49 Pierre Rosanvallon, *La légitimité démocratique : impartialité, réflexivité, proximité* (Paris: Seuil, 2008).

What are the limits then to the "province of adjudication"? As Fuller has stated, courts are not well equipped to address "polycentric"[50] issues, meaning issues involving many affected parties, not all of whom are represented before the court—issues whose complex ramifications render it difficult to measure the consequence that a particular solution may have on the entire political dynamic more generally.[51] Interventions that take place outside the scope of a court's "province of adjudication" could compromise the legitimacy of its decision. The outcome of a decision may be considered desirable or morally justifiable according to some external moral conception, but from a Fullerian perspective, the moral legitimacy of the decision itself will be compromised if the process leading to it does not respect the mode of participation that is inherent to it.[52]

In my view, most of the rules or processes advocated for by some of the authors, whether or not they be defined as a "thin" rather than a "thick" version of a given UCP, deal with polycentric issues. They mostly seek to rebalance the equilibrium of power between the people and the state, or between the different institutions of the state. That they could be suggested by judges is one thing; that judges could impose them is another.

Besides, there is a significant difference between a rule aimed at establishing a general legal framework within which the political forces could negotiate the very fate of our country, as was the case in *Secession* ("the duty to negotiate"), and one that unilaterally imposes a duty allowing for the quashing of democratically enacted legislation, as in *Remuneration* ("the establishment of independent, objective and effective judicial remuneration bodies").

After all, if constitutionalism is defined as a dynamic and interactional process aimed at limiting the abuse of state power, then the judiciary's own power must also be scrutinized and delimited. By encouraging judges to impose solutions on the basis of UCPs, we scholars may end up, if we are not careful, indirectly fostering a "democracy without a people,"[53] a polity

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50 Fuller, *supra* note 46 at 111–21.

51 Fuller stresses that the majority principle is not appropriate either for solving polycentric problems—as would be the case if direct democracy were resorted to (see *ibid* at 117).

52 See Leclair, "Potentialities and Limits of Adjudication", *supra* note 23 at 330–31.

53 I borrow this expression from Pierre Manent, *La raison des nations : réflexions sur la démocratie en Europe* (Paris: Gallimard, 2006) at 16. See also Jean Leclair, "Le discours des droits : un frein à la défense des droits des minorités?" in Frédéric Bédard, Jean Leclair & Michel Morin, eds, *La diversité culturelle et linguistique au Canada et au Maroc en droit interne et en droit international* (Montreal: Thémis, 2018) 73 [Leclair, "Le discours des droits"].

where democratic principles are honoured by courts, but where the soul of democracy—public participation—withers away.[54]

Acknowledging that some issues are better left to be decided under the political constitution is also much more in tune with our parliamentary democracy. I admit that we are increasingly witnessing a "presidentialization" of power that further marginalizes the role played by the people's representatives.[55] Just the same, turning to courts is no answer to that problem, and it carries serious consequences. In stating clearly, as it did in *Secession*, that it "ha[d] no supervisory role over the political aspects of constitutional negotiations,"[56] the Supreme Court embraced a divided understanding of interpretive responsibility anchored in its preoccupation with legitimacy. If, on such a fundamental issue as the ability of a province to secede, political actors had been left with no responsibility to exercise constitutional duties in the hustle and bustle of democratic institutions, how then would it have been possible to infuse political and civic life with a true constitutional and democratic ethos?[57] Would this not have encouraged political actors to completely eschew their duty to comply with the Constitution?

If democracy is to mean anything, then courts must design solutions undergirded by an "active" rather than a "passive" understanding of citizenship.[58] This is so with common law constitutionalism. The principle of legality, requiring express statutory derogations to common law rights, operates as an alarm bell by alerting the opposition and the citizenry that potential abuse is on the horizon. However, embracing the tragic nature of democracy, the principle of legality implicitly accepts that the citizens' indifference to their own fate might lead them to ignore the forewarning chimes. Where there is inertia, nothing will prevent the abuse from taking place. Be that as it may, the best way to discredit the judiciary is for courts to try to substitute their will for that of the majority on the basis of vague UCPs. Courts must constantly reiterate that the fate of liberal democracy is the responsibility of citizens and their representatives. Where UCPs are concerned, the question should be: How are the principles to be mobilized,

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54 I think that even the imposition by judges of specific rules designed to enhance democratic representation would go too far. How and by what means such representation might be strengthened certainly qualifies as a polycentric issue.

55 See Pierre Rosanvallon, *Le bon gouvernement* (Paris: Seuil, 2015).

56 *Secession*, *supra* note 16 at para 100.

57 See Leclair, "Legality, Legitimacy, Decisionism and Federalism", *supra* note 3.

58 See Jean Leclair, "Réflexions critiques au sujet de la métaphore du dialogue en droit constitutionnel canadien" (2003) R du B 377. In that paper, I criticized "reading-in" as a technique that encourages citizen apathy. At 397–98, I wrote: "Dans une perspective démocratique, le titulaire du pouvoir ne peut être une autorité autocratique, aussi bienveillante soit-elle. Le principe démocratique suppose la participation des citoyens et non leur obéissance passive."

if they are thought to be aimed at furthering the collective interests of a responsible citizenry composed not of passive individuals, but of active ones? Hence, the question is not what is structurally and rationally desirable at an abstract level, but what is appropriate for the lived experiences of individuals involved in the imperfect and messy world of representative democracy.[59]

As I and others have advocated, "judicial interpretive activity [should be] aimed at reinforcing rather than enfeebling the democratic fibre of the Canadian constitutional order."[60] American legal scholar Cass R. Sunstein has argued that "decisional minimalism,"—that is, when judges "sa[y] no more than necessary to justify an outcome, and leav[e] as much as possible undecided,"[61]—can actually enhance democratic deliberations. It succeeds in doing so by "promot[ing] reason-giving and ensur[ing] that certain important decisions are made by democratically accountable actors."[62] In my article "Canada's Unfathomable Unwritten Constitutional Principles," I tried to demonstrate that all of the Supreme Court's decisions based on UCPs met that test, with the exception of one, namely the *Remuneration Reference* (and its large progeny). Nineteen years later, this still holds true.[63]

Interestingly, in that case, the majority, without giving any explanation, did not resort, as it traditionally had before, to a judicial (and judicious) test that, however symbolically, gives pride of place to the perception of the "reasonable and informed person" in the adjudication of judicial independence issues—a test that is citizen-centric rather than state-centric.

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59 Interestingly, some of the suggestions made by authors on the basis of UCPs have been adopted by a number of legislatures, which goes to show that there is no need to make use of the legal constitution when the political one is working.

60 Leclair, "Canada's Unfathomable Unwritten Constitutional Principles", *supra* note 3 at 428, 431–32.

61 *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass: Harvard University Press, 1999) at 3.

62 *Ibid* at 5. See also Leclair, "Legality, Legitimacy, Decisionism and Federalism", *supra* note 3 at 82–83.

63 In *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59, the majority decision reinforced its interpretation of section 96 of the *Constitution Act, 1867* by harnessing it to the unwritten constitutional principle of the rule of law. Having done so, it concluded that the hearing fee scheme established under British Columbia's *Supreme Court Civil Rules* was unconstitutional, as it "den[ied] people access to the courts" and so "infringe[d] the core jurisdiction of the superior courts" (at para 32). As did Justice Cromwell in his concurring opinion, I believe this recourse to UCPs was unnecessary, since the same result could heve been reached on traditional administrative law grounds. That said, at the very least, the use of the rule of law UPC was designed to provide citizens with a means to make their voices heard. Furthermore, the Court's recourse to this principle was limited to the striking down of the litigious regulatory scheme. The Court did not use it as a stepping stone for prescribing what should replace it.

Chief Justice Lamer did refer to this criterion, but added an objective dimension to it that radically modified its nature:

> However, it would be a mistake to conclude that Le Dain J. [in *Valente*] intended the objective guarantees and the reasonable perception of independence to be two distinct concepts. Rather, the objective guarantees must be viewed as those guarantees that are necessary to ensure a reasonable perception of independence. As Le Dain J. said himself, for a court or tribunal to be perceived as independent, that "perception must ... be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence".[64]

In other words, it is not so much the reasonable and informed citizen's perception that matters, but that of the reasonable and informed citizen who is aware that independent commissions are an objective necessity. In other words, the test could be rechristened the "reasonable and informed judge-in-disguise" criterion.[65] I still remain firmly convinced that Justice La Forest was absolutely right when he concluded:

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64 *Remuneration*, *supra* note 7 at para 112 [references omitted]. Ironically, in *Valente*, the very same Justice Le Dain concluded that what was theoretically appropriate—including a commission process—was not necessarily mandated constitutionally:

> Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government and should be made a charge on the Consolidated Revenue Fund rather than requiring annual appropriation, I do not think that either of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s. 11(d) of the *Charter*. At the present time in Canada the amount of judges' salaries is a matter for the initiative of the Executive, whether they are fixed by act of the legislature or by regulation. Moreover, it is far from clear that having to bring proposed increases to judges' salaries before the legislature is more desirable from the point of view of judicial independence, and indeed adequate salaries, than having the question determined by the Executive alone, pursuant to a general legislative authority. *In the case of the salaries of provincial court judges in Ontario, assurance that proper consideration will be given to the adequacy of judicial salaries is provided by the role assigned to the Ontario Provincial Courts Committee, although I do not consider the existence of such a committee to be essential to security of salary for purposes of s. 11(d).* The essential point, in my opinion, is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. Making judicial salaries a charge on the Consolidated Revenue Fund instead of having to include them in annual appropriations is, I suppose, theoretically a measure of greater security, but practically it is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole (*Valente*, *supra* note 38 at 706 [emphasis added].

65 I acknowledge that the "reasonable person" is always a judge in disguise. However, to assume that this reasonable person would be aware of the existence of the "objective conditions of judicial independence" is pushing the envelope a little too far.

> In my view, it is abundantly clear that a reasonable, informed person would not perceive that, in the absence of a commission process, all changes to the remuneration of provincial court judges threaten their independence. I reach this conclusion by considering the type of change to judicial salaries that is at issue in the present appeals. It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this.[66]

In situations where an informed citizen would perceive a reasonable danger of political manipulation, the need for institutional reform might arise, but the responsibility of devising the appropriate institutional design would be incumbent upon the legislature.[67] In the absence of any real threat, dogmatic ratiocinations were held to require the solution favoured by the Court. Some will say that "output legitimacy" (reinforcing judicial independence) should trump "input legitimacy" (the quality of the democratic process leading to a decision). I personally do not agree.

When all is said and done, one's preference for legal constitutionalism over political constitutionalism, for courts over politicians, for speculative reason over what Michael Oakeshott referred to as political "traditions of behaviour,"[68] comes down to how one conceives of truth. The greater one's belief in a form of universal truth attainable by way of reasoning upon principles, the greater one's faith in judges will be.[69] If, on the contrary, one

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66 *Remuneration*, *supra* note 7 at para 337.

67 Justice La Forest did conclude, for instance, that some of the actions taken by the Manitoba government might have led a reasonable person to conclude that the government intended to financially penalize judges if they attempted to challenge the legislation reducing the salary of Provincial Court judges and public sector employees (see *ibid* at paras 364–65). This meant that the Government of Manitoba would have to intervene to remedy the problem.

68 "Political Education" in *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Fund, 1991) 43 at 56: "Politics is the activity of attending to the general arrangements of a collection of people who, in respect of their common recognition of a manner of attending to its arrangements, compose a single community. To suppose a collection of people without recognized traditions of behaviour, or one which enjoyed arrangements which intimated no direction for change and needed no attention, is to suppose a people incapable of politics. This activity, then, springs neither from instant desires, nor from general principles, but from the existing traditions of behaviour themselves. And the form it takes, because it can take no other, is the amendment of existing arrangements by exploring and pursuing what is intimated in them."

69 In a brilliant article, Yves-Marie Morissette (now Justice Morissette QCA) dissects with the utmost clarity what kind of "truths" the irreducible indeterminacy of law allows jurists and judges to attain: see Yves-Marie Morissette, "Deux ou trois choses que je sais

tends to be more skeptical, and thus more relativist, one will tend to recognize a greater role for political debate and political struggle, however imperfect the solutions they lead to may be. According to the latter view, democratic truths are closer in nature to rational compromises than to rational perfections.[70] We all stand somewhere along this spectrum. Although a staunch rationalist, I see Truth as a moving target, a horizon always receding. As a jurist, I witness daily the very fragile nature of the legal truths to which adjudication may lead. And as a legal historian, I cannot but recognize the inescapability of the law of unintended consequences. For those reasons, I recoil at attempts to cast judges as primary oracles of the law and foreseers of the Good.[71] Then again, I might just be deficient in confidence and audacity.

"Nothing to excess," the celebrated inscription in the temple of Apollo at Delphi, encapsulates the prudential approach we should adopt in determining who, between the judge and the politician, should be invested with the responsibility of defining and implementing the rules distilled from UCPs.

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d'elle (la rationalité juridique)" (2000) 45:3 McGill LJ 591. He demonstrates, very convincingly in my opinion, how H.L.A. Hart's positivism better reflects the reality of what judges actually do when they create or interpret law (especially constitutional law), as compared to Ronald Dworkin's Hercules thesis of "better fit" which, in truth, defies empirical verification. How could one empirically demonstrate, for instance, that the aboriginal law doctrine developed by the Supreme Court since the mid-1990s fits (or does not fit) the legal practice better, and puts (or does not put) it in a better light?

70 These last two sentences are inspired by Hans Kelsen's analysis of democracy in his essay *The Essence and Value of Democracy*, ed by Nadia Urbinati & Carlo Invernizzi Accetti, translated by Brain Graf (Lanham: Rowman & Littlefield, 2013) 101 at 103:

> The metaphysical-absolutistic worldview is linked to an autocratic, and the critical-relativistic to a democratic disposition. [A person] who views absolute truth and absolute values as inaccessible to the human understanding cognition must deem not only his own, but also the opinion of others at least as feasible. The idea of democracy thus presupposes relativism as its worldview. ... The rule of the majority, which is so characteristic of democracy, distinguishes itself from all other forms of rule in that it not only by its very nature presupposes, but actually recognizes and protects—by way of basic rights and freedoms and the principle of proportionality—an opposition, i.e., the minority. The stronger the minority, however, the more the politics in a democracy become politics of compromise. Similarly, there is nothing more characteristic of the relativistic worldview than the tendency to seek a balance between two opposing standpoints, neither of which can by itself be adopted fully, without reservation, and in complete negation of the other.

71 See Leclair, "Le discours des droits", *supra* note 53; Leclair, "Legality, Legitimacy, Decisionism and Federalism", *supra* note 3.

Conclusion

As I said in the introduction, our understanding of UCPs is closely associated with our innermost beliefs as to what constitutes a liberal democratic regime. Whatever our differences might be, the authors of this special issue would all agree—and some, in fact, explicitly do—that, if such a regime is to survive, it calls for what Hoi Kong and the late Roderick A. Macdonald termed as "virtuous judges."[72] Institutional and cultural conditions must exist that will "both facilitate the exercise of judicial virtues including temperance, courage, intelligence, and wisdom, and discourage judges from falling prey to judicial vices such as corruption, cowardice, incompetence, and foolishness."[73] It would appear that informal political and judicial culture plays an essential part in the fostering of these judicial virtues. Judges must tread a path of legitimacy that is sometimes very narrow and calls for the exercise of *phronesis*, or practical wisdom.[74] The stakes are high. In the sentence following the passage quoted in the epigraph to this foreword, Alexis de Tocqueville summarizes the challenge beautifully:

> [F]ederal judges must be not only good citizens, learned and upright men, qualities necessary for all magistrates, but they must also be statesmen; they must know how to discern the spirit of the times, to brave the obstacles that can be overcome, and to change direction when the current threatens to carry away, with them, the sovereignty of the Union and the obedience due to its laws.[75]

In all honesty, if the majority in *Remuneration* had demonstrated as much statecraft as some of the same judges showed in *Secession*, and had it refrained from quashing legislation on the basis of a reasoning evidencing judicial self-interest, I do not believe that UCPs would have generated such controversy.

Finally, there is an undeniable Dworkinian flavour to the Supreme Court's reasoning in *Remuneration* and *Secession*, as well as that of many scholars. A word of warning to us all: Dworkin lived and thought in a time of liberal-minded judges. Looking at what is now happening in the United States, let us not forget that his Hercules might become someone else's Hades. Would UCPs appear as exciting then?

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[72] See Roderick A Macdonald & Hoi Kong, "Judicial Independence as a Constitutional Virtue" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 831.

[73] *Ibid* at 841.

[74] See *ibid* at 852.

[75] *Supra* note 1 at 246.