UNFINISHED BUSINESS IN UNWRITTEN JUSTICE: UNWRITTEN CONSTITUTIONAL PRINCIPLES AFTER *TORONTO (CITY) V. ONTARIO (ATTORNEY GENERAL)*

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This article examines unwritten constitutional principles (UCPs) within the context of the Supreme Court of Canada's 2021 obiter opinion in Toronto (City) v. Ontario (Attorney General)*. The Supreme Court has traditionally accepted three main arguments in justifying the use of UCPs. The* Toronto (City) v. Ontario (Attorney General) *majority strictly prescribed a "textual approach," whereby a court broadly interprets the written Constitution, negating the importance of UCPs as independent legal tools. I respectfully submit that the majority failed to provide a reasoned framework for UCPs. I argue that certain constitutional issues arise that cannot be addressed through explicit constitutional provisions. Relying exclusively on enumerated provisions to invalidate legislation may stress the democratic authority of the Constitution when its provisions have a weak tie to a desired principle that addresses the constitutional threat at hand. In these cases, it is better if constitutional principles and values are openly acknowledged and subjected to careful consideration, analysis, caution, and criticism through structural argumentation. While the written text of the Constitution must always take priority, Canadian courts must sometimes turn to the full legal power of UCPs when faced with novel constitutional issues unforeseen when the Constitution was drafted.*

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I. INTRODUCTION

Unwritten constitutional principles (UCPs) are core legal principles that are not explicitly enumerated within the four corners of the Canadian Constitution[1] but represent fundamental assumptions about what the text of the document seeks to establish. The Supreme Court of Canada has framed UCPs as the "lifeblood" of the Constitution, which "dictate major elements of the architecture of the [document] itself."[2] These principles assist in the interpretation of the text and the delineation of jurisdiction and prescribed rights.[3] More significantly, UCPs have helped determine the roles of our political institutions and have formed the basis of legal rules where the text of the Constitution presents a gap: where no provision explicitly addresses a threat to the Constitution. However, when a UCP is employed to develop the Constitution beyond its substantive provisions, one might conclude that the judiciary has implemented a constitutional term in defiance of the amendment formula in the *Constitution Act, 1982*.[4] Is this a form of judicial activism?[5] A sword to parliamentary sovereignty? It raises a question of the very nature of constitutional design: what is the role of the judiciary in Canada's structure of government?[6] Absent clear direction from the Constitution, the Supreme Court has employed a methodology over the last 40 years of reading in these "implied terms" to assist with issues that were unforeseen when the text was drafted.[7]

Enter the Supreme Court in the recent *Toronto (City) v. Ontario (Attorney General)*[8] decision. *City of Toronto* is a 2021 decision which established the constitutionality of the government of Ontario's *Better Local Government Act*.[9] The *Government Act* decreased the number of Toronto municipal election wards from 47 to 25 (the Ward Reduction). A majority of the Supreme Court ruled that the government of Ontario did not breach candidates' and voters' section 2(b) *Canadian Charter of Rights and Freedoms*[10] guarantee of freedom of expression in enacting the *Government Act* just ten weeks before the 2018 City of Toronto municipal election (the Election). In *obiter*, the majority further decided that the *Government Act* could not be struck down based on the UCP of democracy.[11] It also sought to clarify the

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1 In this article, "the Constitution" refers to the various explicit constitutional texts cited in section 52(2) of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

2 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 248 [*Secession Reference*].

3 *Ibid* at 248–49.

4 *Supra* note 1, Part V, ss 38–49 (to amend the Constitution using the general formula in section 38, the amendment must be approved by the federal Parliament, the Senate, and at least seven provinces representing at least 50 percent of Canada's population).

5 Brian A Garner, ed, *Black's Law Dictionary*, 11th ed (Saint Paul, Minn: Thomson Reuters, 2019) sub verbo "judicial activism" (judicial activism is defined as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents").

6 For the purpose of this article, "Canada's structure of government" is the judicial branch, the executive branch, and the legislative branch of government in Canada.

7 Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2007) (loose-leaf updated 2022, release 1), s 15:28.

8 2021 SCC 34 [*City of Toronto*].

9 SO 2018, c 11 [*Government Act*].

10 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. [*Charter*].

11 The UCP of democracy and a precise overview of the case are discussed below.

legal limits of UCPs generally in deciding they cannot independently invalidate legislation.[12] The majority opined that UCPs have only two uses. First, they may be used to *interpret* the *written* Constitution.[13] Second, UCPs can be used to develop common law doctrine unstated in but derived from *explicit* constitutional provisions.[14] The Supreme Court's treatment of UCPs is the focus of this article.

City of Toronto demonstrates that the current composition of Canada's Supreme Court is acutely aware of their place in our government.[15] The case attempted to clarify a line of case law on UCPs that stems back to the early 1980s. However, the Supreme Court is still divided, as outlined by the split decision between the majority, led by Chief Justice Wagner and Justice Brown: UCPs cannot independently invalidate legislation;[16] and the four dissenting judges led by Justice Abella: UCPs may, in rare circumstances, carry the full substantive weight of written constitutional provisions to invalidate legislation.[17] The majority's proposition that UCPs cannot independently carry the full force of law to limit the legislature in any circumstances is inconsistent with much of the literature and prior Supreme Court jurisprudence.[18]

I respectfully suggest that the majority's comments on UCPs were troublesome if one accepts that the Constitution should grow and evolve with modern technology and contemporary societal perspectives on government.[19] This article argues that the Supreme Court should not foreclose the possibility of certain unwritten principles having an independent and concrete legal function. Further, UCPs should be deployed without reliance on inconsequential constitutional provisions in certain scenarios where the text of the Constitution presents a gap.

The uncertain future of UCPs presents an opportunity for the Supreme Court to further develop its approach to these principles. The Supreme Court has yet to establish a coherent theory of how UCPs can be exercised. Specifically, the *City of Toronto* Supreme Court attempted, but failed, to draw a logical distinction between which principles may operate to invalidate legislation and which cannot. I suggest that the majority's approach to such is incomplete and may result in the Supreme Court using UCPs without transparent reasoning if they are merely used to *interpret* constitutional provisions in the case of a constitutional gap. In such cases, the UCPs, which are derived from the structure of the Constitution as a whole, substantively address the issue, not the written Constitution. Therefore, the central question remains: when does a UCP become capable of invalidating legislation? The

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12 *City of Toronto*, *supra* note 8 at paras 50, 69. "Independently invalidate legislation" means UCPs being used to invalidate legislation in the sense of declaring it under section 52(1) of the *Constitution Act, 1982*, to be of no force or effect without the UCP being connected to a prescribed constitutional provision.

13 *Ibid* at para 55.

14 *Ibid* at para 56. See also the more precise discussion on this aspect of the majority's decision below.

15 See e.g. *ibid* at paras 58–59.

16 *Ibid* at paras 50–52.

17 *Ibid* at para 170.

18 The citations for these cases and academic articles will be given below at the point in the text they are mentioned.

19 The Constitution of Canada requires a flexible interpretation to adapt it over time to changing conditions. This is the source of what has been called the "progressive interpretation": *Quebec (AG) v Blaikie*, [1979] 2 SCR 1016 at 1029. See also Hogg & Wade, *supra* note 7, s 15:28.

Supreme Court's discussion of UCPs in *City of Toronto* prolongs an important and incomplete debate about the applicability of UCPs in the administration of justice.

Part II of this article begins with an overview of how UCPs are used in Canada and their controversy. Next, I examine the dominant theories used to support UCPs in Supreme Court jurisprudence in Part III. Part IV summarizes the majority and dissent's UCP analysis in the *City of Toronto* decision. In Part V, I critically examine what I perceive as the majority's error in establishing a rule for UCPs. I also propose a unified analytical approach to UCPs derived from past Supreme Court cases in reasoning from the structure of the Constitution as a whole. In Part VI, I conclude my arguments and offer some final thoughts.

II. UNWRITTEN CONSTITUTIONAL PRINCIPLES IN CANADA

A. SECTION 52 OF THE *CONSTITUTION ACT, 1982*

While Canada's Constitution is written in part, the Supreme Court has recognized and embraced "unwritten" rules. The recognition of UCPs stems from the Supreme Court's analysis of the operative provisions of the Constitution, which prescribes its scope. Section 52(2) of the *Constitution Act, 1982* states:

> The Constitution of Canada *includes*:
>
> (a) the *Canada Act 1982*, including this Act;
>
> (b) the Acts and orders referred to in the schedule; and
>
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).[20]

Section 52(2) is related to section 52(1), which establishes the supremacy of the Constitution of Canada. While section 52(1) suggests the written exhaustiveness of constitutional *provisions*, the operative word "includes" in section 52(2) has resulted in an open-ended interpretation of this section. For instance, the unanimous Supreme Court in *Reference re Senate Reform* stated: "Section 52 does not provide an exhaustive definition of the content of the Constitution of Canada."[21]

The reasoning behind the open-ended interpretation of section 52 flows from the Supreme Court's recognition in the *Senate Reference* and the *Secession Reference* that our "'basic constitutional structure'" or "'architecture'" enables it to change and adapt to issues unforeseen by the explicit provisions.[22] Accordingly, principles and rules emerge from an understanding of the text itself, its historical context, and previous judicial interpretations of

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20 *Constitution Act, 1982*, *supra* note 1 [emphasis added].

21 2014 SCC 32 at para 24 [*Senate Reference*]. See also *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 378 [*New Brunswick Broadcasting*]; *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at paras 90–92 [*Judges Reference*]; *Secession Reference*, *supra* note 2 at 239–40; *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21.

22 *Senate Reference*, *ibid* at para 26, citing *Secession Reference*, *supra* note 2; *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at 57 [*OPSEU*].

constitutional meaning.[23] Jean Leclair observes that the role of the courts in the Canadian structure of government has increased since the advent of the *Charter*, empowering their "law-creating enterprise."[24] Therefore, it appears that the Supreme Court has found increased authority to embrace these principles and rules as having substantive normative force since the *Charter* came into force in 1982. The result, according to Leclair, is a weakening of parliamentary supremacy and the enhancement of judicially interpreted constitutional supremacy.[25] This shift toward greater judicial decision-making has deeply divided courts and academics.

B. JUDICIAL INTERPRETATIONS

UCPs identified by the Supreme Court post-1982 "include federalism, democracy, constitutionalism and the rule of law, … respect for minorities,"[26] the separation of powers and the independence of the judiciary,[27] and the sovereignty of Parliament.[28] This list is not exhaustive.[29] The *existence* of UCPs in Canada's Constitution is accepted completely in recent Supreme Court jurisprudence. For one, it is uncontentious that UCPs may be used to help interpret the wording of the Constitution.[30] Further, Justice Major, in his skeptical analysis of whether UCPs could invalidate legislation in *British Columbia v. Imperial Tobacco Canada Ltd.*, admitted that UCPs may restrain the actions of the executive and the judiciary.[31] However, the most contentious issue relates to the role of these principles in invalidating legislation and the source of their constitutional legitimacy in doing so.[32]

On the one hand, the Supreme Court has repeatedly stated that UCPs carry the full force of the law. Most notably, the dissent in *Reference re Resolution to Amend the Constitution* proclaimed that UCPs "have been accorded full legal force in the sense of being employed to strike down legislative enactments."[33] The unanimous Supreme Court in the *Secession*

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23 *Secession Reference*, *ibid* at 239–40.

24 Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389 at 392 [Leclair, "Unfathomable"].

25 *Ibid*.

26 *Secession Reference*, *supra* note 2 at 220.

27 *Judges Reference*, *supra* note 21.

28 *Babcock v Canada (Attorney General)*, 2002 SCC 57 [*Babcock*]. For an example of how UCPs were used before the *Charter* era, see e.g. *Reference Re Alberta Statutes*, [1938] SCR 100 at 133 (the right of public discussion). The use and need for UCPs before 1982 was clear cut because of the absence of the constitutionally enshrined rights and freedoms prescribed in the *Charter*. These pre-*Charter* cases are now of little practical consequence, given that the rights they secured are now constitutionally codified.

29 See e.g. additional principles mentioned by the majority in the *Judges Reference*, *supra* note 21 at paras 97–104. Vanessa MacDonnell notes that there is also a line of case law which suggests that the honour of the crown and the duty to consult are established UCPs: Vanessa A MacDonnell, "Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making" (2019) 65:2 McGill LJ 175 at 184–85, citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 42 [*Mikisew*].

30 *City of Toronto*, *supra* note 8 at para 55. See also Hogg & Wade, *supra* note 7 at s 15:28; MacDonnell, *ibid* at 185.

31 2005 SCC 49 at para 60 [*Imperial Tobacco*]. It should be noted that the Supreme Court's reasons for rejecting the UCP argument in *Imperial Tobacco* were more intricate and multifaceted than this succinct summary suggests. These reasons are explored in greater depth in the subsequent discussion on this case in Part V.B, below.

32 Grant Huscroft, "Romance, Realism, and the Legitimacy of Implied Rights" (2011) 30:1 UQLJ 35 at 47; Leclair, "Unfathomable," *supra* note 24 at 431; MacDonnell, *supra* note 29 at 193.

33 [1981] 1 SCR 753 at 845 [*Patriation Reference*].

Reference endorsed this minority passage.[34] Therefore, in theory, like explicit constitutional provisions, UCPs play a role in defining the institutional relationships that form the Canadian system of government, for example, by declaring legislation that threatens such relationships as invalid for operating outside of the constraints of the Constitution. Such was the case in the *Judges Reference*, where the Supreme Court used the principle of judicial independence, which had a weak explicit link to the written Constitution in this context,[35] to strike down legislation that reduced judicial salaries and, therefore, purportedly interfered with the independence of the judicial branch of government.[36] The majority in that case wrote: "Judicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*."[37] While the *Judges Reference* was technically decided by section 11(d) of the *Charter*, Chief Justice Lamer specified that the application of the independence of the judiciary principle did not derive from the written Constitution itself.[38]

On the other hand, members of the Supreme Court have also backtracked on the "full legal force" language and maintained that UCPs are, at best, explanatory principles which merely support the true substantive legal operation of written constitutional provisions. For example, *Imperial Tobacco* suggested that the Supreme Court be hesitant to give independent effect to UCPs, such as the rule of law, that support broader versions of existing constitutional provisions.[39] In that case, the majority implied that judges should rely on constitutional requirements that flow from textual provisions to assess the validity of legislation.[40] Further, in the *Judges Reference* dissent, Justice La Forest feared that empowering UCPs would override the entrenched nature of the Constitution, which may only be modified with a clear expression of democratic will: a constitutional amendment.[41] According to this legal positivism account,[42] the interpretation of the Constitution begins and ends in the express provisions of the Constitution.

The Supreme Court confronts the debate on when and how to use UCPs in the face of novel issues where they must rely on open-textured or ambiguous constitutional provisions. Constitutions are designed to be applied to a wide range of specific issues that cannot be explicitly stated in the text.[43] Inevitably, the written Constitution is sometimes silent or incomplete on certain matters of constitutional significance.[44] However, the Constitution (either written or unwritten) *must* prescribe a comprehensive framework of rules and

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34 *Secession Reference*, *supra* note 2 at 249–50.

35 *Judges Reference*, *supra* note 21 at paras 85–86, 90–92 (judicial independence has some links to sections of the Constitution, however, based on the facts of this case, the tie was absent; section 11(d) of the *Charter* and sections 96–100 of the *Constitution Act, 1867* did not extend to provincial statutory courts exercising noncriminal adjudicative functions).

36 *Ibid* at paras 106, 108, 126.

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

38 *Ibid* at para 109.

39 *Imperial Tobacco*, *supra* note 31.

40 *Ibid* at para 66. See generally Alyn James Johnson, "*Imperial Tobacco* and *Trial Lawyers*: An Unstable and Unsuccessful Retreat" (2019) 57:1 Alta L Rev 29 at 32–34 [Johnson, "Retreat"].

41 *Judges Reference*, *supra* note 21 at para 314. See also *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 102, Rothstein J, dissenting [*Trial Lawyers*].

42 Garner, *supra* note 5, sub verbo "legal positivism" (legal positivism is "[t]he theory that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law").

43 MacDonnell, *supra* note 29 at 191.

44 *Ibid*.

principles to dictate our system of government.[45] Therefore, in these constitutional "gap" scenarios, jurists must either look beyond the text of the Constitution to deploy UCPs as a solution, or fashion an analysis that extends an enumerated constitutional provision or provisions to the situation at hand. Over the past several decades, courts have applied a combination of these two techniques.[46]

As an example of UCPs filling a constitutional gap, the Supreme Court was tasked with determining the legitimacy of Quebec unilaterally leaving the federation of Canada in the *Secession Reference*. The decision, which opined that Quebec could not constitutionally leave Canada without some form of negotiation with the other provinces, outlined four UCPs: "the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities."[47] The core reason for cementing these principles into the constitutional order was to address "secession" — a gap in the Constitution.[48] The drafters did not foresee such a scenario and provided no relevant provisions for the Supreme Court to interpret a legal framework. As a result, the *Secession Reference* Court looked beyond the text.

It should be noted that the overall impact of UCPs in the jurisprudence is minimal.[49] UCPs have seldom played a decisive role in constitutional litigation, and even less frequently have they been used as a standalone justification for nullifying legislation or governmental actions. However, unanimous courts have expressed that UCPs can limit the actions of legislatures[50] and the operation of the Constitution itself.[51] Prior to *City of Toronto*, a majority of the Supreme Court had not explicitly restricted this ability.[52]

Although courts have employed UCPs to decide complex cases, they have yet to form a systematic framework or body of rules regarding their use.[53] Therefore, to analyze the legitimacy of UCPs, we must examine the legal sources that courts have turned to in their analysis.[54] In other words, how have courts rationalized their acceptance or rejection of UCPs?

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45 *Secession Reference*, *supra* note 2 at 239–40.

46 See e.g. *Judges Reference*, *supra* note 21 (the Supreme Court used the UCP of judicial independence first to connect and then supplement the provisions of the written Constitution that speak to the principle of judicial independence but were irrelevant in the context of the case at hand, as discussed further below). See also MacDonnell, *supra* note 29 at 185–86.

47 *Secession Reference*, *supra* note 2 at 220, 239–40, 247–48.

48 *Ibid* at para 48.

49 MacDonnell, *supra* note 29 at 186–87.

50 See e.g. *Babcock*, *supra* note 28 (Chief Justice McLachlin wrote that while UCPs did not apply in the circumstances of the case, "unwritten constitutional principles are capable of limiting government actions" at para 54).

51 See e.g. *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 [*Manitoba Language Reference*].

52 Even in cases like *Imperial Tobacco*, *supra* note 31, and *Trial Lawyers*, *supra* note 41, despite the restrictive language with respect to the rule of law principle in those cases, the Supreme Court did not explicitly state that any UCP capable of challenging legislation must carry an explicit tie to the written Constitution.

53 MacDonnell, *supra* note 29 at 188–89, citing David Schneiderman, "Unwritten Constitutional Principles in Canada: Genuine or Strategic?" in Rosalind Dixon & Adrienne Stone, eds, *The Invisible Constitution in Comparative Perspective* (Cambridge: Cambridge University Press, 2018) 517 at 519. Schneiderman notes that the Supreme Court has often turned to UCPs as a last resort to "get out of a jam" (*ibid* at 524).

54 MacDonnell, *ibid* at 187 (academic critique of UCPs has focused on their legitimacy, legal source, uncertainty in application, and conflicting and competing principles). See also Leclair, "Unfathomable," *supra* note 24; Jean Leclair, "Unwritten Constitutional Principles: The Challenge of Reconciling Political and Legal Constitutionalisms" (2019) 65:2 McGill LJ 153 [Leclair, "Reconciling"].

III. SOURCES

The Supreme Court has referenced various sources to derive the authority of UCPs.[55] For example, they have cited "the general object and purpose of the Constitution";[56] the preambles of the Constitution;[57] specific provisions of the Constitution;[58] the Constitution's architecture;[59] the United Kingdom's and Canada's constitutional history;[60] the common law;[61] practice;[62] and logic.[63] As a helpful framework for conceptualizing these sources, Robin Elliot summarizes various forms of constitutional argumentation that categorize the Supreme Court's reasoning.[64] Applicable to a discussion of UCPs are "historical argumentation,"[65] "textual [argumentation],"[66] and "structural argumentation."[67]

A. THE HISTORICAL ARGUMENT AND THE PREAMBLE

According to Philip Bobbitt, historical argumentation is "argument that marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution."[68] The preamble to the *Constitution Act, 1867* states that Canada is to have a "Constitution similar in Principle to that of the United Kingdom."[69] The UK Constitution was primarily unwritten in 1867 and it remains so.[70] The rules of such were, for the most part, articulated by judges following the common law method of law-making.[71] Drawing on the preamble to the *Constitution Act, 1867* and her "historic perspective," Justice McLachlin (as she then was) wrote in *New Brunswick Broadcasting* that in determining what constitutional powers the structures of Canadian government have, one must ascertain the powers which historically have been ascribed to those of the UK.[72]

Similarly, in the *Judges Reference*, Chief Justice Lamer stated that the preamble "is the means by which the underlying logic of the Act can be given the force of law."[73] In reasoning that explicit sections of the Constitution merely elaborate this underlying logic, he wrote: "[I]t is in [the] preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located."[74] In this context, the Chief Justice was demonstrating that written provisions of the Constitution "are not an exhaustive written code for the protection of judicial independence

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55 MacDonnell, *supra* note 29 at 179.
56 *Manitoba Language Reference*, *supra* note 51 at 751.
57 *Ibid* at 750; *Judges Reference*, *supra* note 21; *New Brunswick Broadcasting*, *supra* note 21.
58 *Trial Lawyers*, *supra* note 41; *Judges Reference*, *supra* note 21.
59 *Secession Reference*, *supra* note 2; *Judges Reference*, *supra* note 21.
60 *New Brunswick Broadcasting*, *supra* note 21.
61 *Ibid.*
62 *Ibid.*
63 *Ibid.*
64 Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1 & 2 Can Bar Rev 67 at 72–74.
65 *Ibid* at 72.
66 *Ibid.*
67 *Ibid* at 74.
68 Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982) at 7.
69 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
70 MacDonnell, *supra* note 29 at 177.
71 *Ibid.*
72 *New Brunswick Broadcasting*, *supra* note 21 at 378.
73 *Judges Reference*, *supra* note 21 at para 95.
74 *Ibid* at para 109.

in Canada."[75] In other words, Chief Justice Lamer declined to rely primarily on specific written provisions of the text; the preamble allowed him to recognize the *unwritten* norm of judicial independence.

Interestingly, Chief Justice Lamer in the *Judges Reference* also noted that the preamble "'has no enacting force'"[76] and "strictly speaking, it is not a source of positive law."[77] Critics have further pointed out that preambles to acts do not have the independent force of law.[78] His reasoning also encounters practical issues. For instance, primarily relying on the preamble to legitimize a particular UCP would be problematic in controlling the number and power of these "rules" and the meaning they can be given.[79] Further, in the *Secession Reference*, the Supreme Court recognized the weak substantive power of the preamble argument. The Supreme Court admitted that UCPs were only supported by an "oblique reference in the preamble to the *Constitution Act, 1867*."[80] Therefore, the strength of the preamble as a source for unwritten rules remains unclear. The preamble can best be viewed as one source from among many that the Supreme Court has used to justify their application of UCPs.

B. THE TEXTUAL ARGUMENT

The textual argumentation method of using UCPs treats these principles as mere interpretive tools to understand the meaning of express constitutional terms. It is "argument that is drawn from a consideration of the present sense of the words of the provision."[81] For example, Justice La Forest, dissenting in the *Judges Reference*, was content in locating judicial independence squarely within the bounds of the written Constitution via sections 96–100 of the *Constitution Act, 1867* and section 11(d) of the *Charter*.[82] According to him, judicial review based on constitutional grounds is only legitimate insofar as it involves the interpretation of the express textual authority in the Constitution.[83] In this way, Justice La Forest prioritized the principle of parliamentary sovereignty, which he found in section 17 of the *Constitution Act, 1867*, over the "tenuous" textual relationship he perceived concerning judicial independence.[84] This view, therefore, assumes that democratically elected legislatures are the ultimate guarantors of civil liberties, not the courts. It suggests that when there is a challenge to the ambiguity of a constitutional provision, courts should look

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75 *Ibid*.

76 *Ibid* at para 94 citing *Patriation Reference*, *supra* note 33 at 805.

77 *Judges Reference*, *ibid*.

78 Elliot, *supra* note 64 at 95; Alyn James Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019) 56:4 Alta L Rev 1077 at 1112 [Johnson, "Judges"]; Mark D Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51:2 UTLJ 91 at 103.

79 See e.g. Johnson, "Judges," *ibid* ("[a] court applying the Preamble must confront the crucially vague phrase 'a Constitution similar in Principle to that of the United Kingdom.' How much space can be traversed by the words 'similar in Principle to' before the Preamble is pushed beyond the bounds of legitimate argument?" at 1112). See also *City of Toronto*, *supra* note 8 (the majority critiqued that the Constitution must not be "'an empty vessel to be filled with whatever meaning'" a judge wishes from time to time, at para 65).

80 *Secession Reference*, *supra* note 2.

81 Bobbitt, *supra* note 68 at 7.

82 *Judges Reference*, *supra* note 21 at para 303. See also Johnson, "Judges," *supra* note 78 at 1096.

83 *Judges Reference*, *ibid* at paras 314–16.

84 *Ibid* at para 318.

throughout the written Constitution to ascertain its meaning and only resort to UCPs for assistance.[85]

Given the written Constitution's undisputed primacy (in so much as the provisions are clear), the Supreme Court has repeatedly used textual argumentation to supplement its rulings. For example, in the *Judges Reference*, Chief Justice Lamer clothed the power of judicial independence behind section 11(d) of the *Charter*[86] even though it was technically inoperative in the context of that case.[87] Before that, in *MacMillan Bloedel Ltd. v. Simpson*, the Supreme Court held that the part of section 47(2) of the *Young Offenders Act* which granted the youth court *ex facie*[88] contempt of court powers was unconstitutional because it violated the rule of law, along with sections 96–101 and 129 of the *Constitution Act, 1867*, in infringing the jurisdiction of provincial superior courts.[89] However, determining whether the ultimate jurisprudential power of like decisions derives from the text itself or the unwritten principles from which the Supreme Court reasons continues to be contentious. For example, critics of the textual approach argue that it is not express provisions of the Constitution that do the "heavy lifting" in cases like the *Judges Reference*, but rather the application of the principles themselves, which do not originate in the written Constitution.[90]

C. THE STRUCTURAL ARGUMENT

Finally, the Supreme Court has often drawn on the structure or "architecture" of the Constitution as a whole to form its reasoning on how and why a particular principle should be used. Elliot attributes structural argumentation to the American constitutional scholar Charles Black[91] and describes this method as "argumentation that proceeds by way of the drawing of implications from the structures of government created by our Constitution, and the application of the principles generated by those implications … to the particular constitutional issue at hand."[92] Elliot writes that structural argumentation is "clearly accepted as a legitimate form of argumentation."[93] For instance, the Supreme Court accepts that the Canadian Constitution has a "basic constitutional structure"; the individual elements of its architecture are linked to the others and must be interpreted by reference to the structure of the Constitution as a whole.[94] Further, as early as the 1985 *Manitoba Language Reference* case, the majority of the Supreme Court reasoned that normative legal order was a fundamental genesis behind the constitutional drafters' intention to instill the rule of law into our system of governance through the Constitution.[95] The Supreme Court upheld the principle of the rule of law to justify preventing the disastrous result of nearly the entirety of the province of Manitoba's laws being held unconstitutional because they were not in

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85 See e.g. *Trial Lawyers*, *supra* note 41 at paras 24–27.
86 *Judges Reference*, *supra* note 21 at paras 82–83.
87 See the text accompanying note 35.
88 *Ex facie* contempt of court means contempt outside of the court as opposed to *in facie* contempt of court, which is committed before a judge and can be punished immediately.
89 *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, at paras 37, 41 [*MacMillan Bloedel*].
90 See e.g. Johnson, "Judges," *supra* note 78 at 1095, 1101.
91 Elliot, *supra* note 64 at 75, citing Charles Black, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969) at 15.
92 Elliot, *ibid* at 68.
93 *Ibid* at 74.
94 *Senate Reference*, *supra* note 21 at para 26, citing *Secession Reference*, *supra* note 2; *OPSEU*, *supra* note 22.
95 *Manitoba Language Reference*, *supra* note 51 at 750–51.

compliance with section 23 of the *Manitoba Act, 1870*[96] (itself a constitutional document), which prescribed that all laws in the province must be printed and published in English and French. The Supreme Court reasoned that the rule of law was the essence of creating the Constitution as the supreme law. However, specific written constitutional provisions conflicted with this UCP. If the Supreme Court interpreted the text without the purpose of the Constitution in mind, the result would be contradictory to why Canada developed a constitution in the first place: to establish a system of social order based on inalienable principles of civilized society.[97] In this way, the reasoning in *Manitoba Language Reference* was one of necessity and common sense. Once the Supreme Court discussed the legitimacy and importance of the principle of the rule of law, it tailored a solution by applying the structure and genesis of the Constitution to the problem based on the facts of the case.[98] The rule in *Manitoba Language Reference* was to suspend the declaration of invalidity of Manitoba's laws.[99] The Supreme Court acknowledged that "[w]hile [the rule of law] is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution."[100] In summary, structural argumentation considers both the history and text of the Constitution in determining how a UCP best supports the structural order of government instilled in the Constitution.

In the next part of this article outlines how the split Supreme Court in the *City of Toronto* disagreed on the above-mentioned UCP jurisprudence. In *obiter*, the majority ultimately decided that the UCP of democracy was not sufficiently linked to the text of the Constitution to invalidate legislation.

IV. *TORONTO (CITY) V. ONTARIO (ATTORNEY GENERAL)*

At the heart of its claim of provincial interference, the City of Toronto (the City) did not take direct issue with Ontario's authority to reform its municipal election structure. After all, under section 92(8) of the *Constitution Act, 1867*, a province has absolute legal power to legislate with respect to municipalities.[101] However, such power is limited by other parts of the Constitution. The City's qualm was the timing of Ontario implementing the *Government Act* and its effect of substantially increasing Toronto's per-ward population so close to the Election date. The City maintained that Ontario's actions meddled with democracy itself, an alleged fundamental breach of written and unwritten constitutional guarantees. The City noted that by changing the structure of Toronto's municipal Council and the boundaries of its wards without notice, Ontario created disruption, confusion, and inefficiencies in its democratic process.[102]

The issues were categorized two-fold. First, did the *Government Act* unjustifiably limit the section 2(b) *Charter* right of freedom of expression of candidates or voters in the

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[96] SC 1870, c 3.
[97] *Manitoba Language Reference*, *supra* note 51 at 742–43, 749.
[98] *Ibid*. See generally Johnson, "Judges," *supra* note 78 at 1081, 1088–93.
[99] *Manitoba Language Reference*, *supra* note 51 at 758.
[100] *Ibid* at 751.
[101] *City of Toronto*, *supra* note 8 at para 2.
[102] *City of Toronto*, *ibid* (Factum of the Appellant at paras 4–5) [*City Factum*].

Election?[103] Second, could the UCP of democracy be applied to invalidate the *Government Act*? A five-judge majority answered both questions in the negative.

A. MAJORITY

In dispensing with the section 2(b) claim, the Supreme Court ruled that meaningful expression was not effectively precluded in either purpose or effect.[104] Chief Justice Wagner and Justice Brown reasoned that: (1) candidates and their supporters still had 69 days to reorient themselves for the campaign, a longer period than most federal and provincial election campaigns; (2) the *Government Act* imposed no restrictions on the content or meaning of participants' messaging; and (3) many campaigners continued to participate in the Election with great success.[105] While some candidates' prior expression, like outdated pamphlets, would have lost their relevance, the new ward structure meant larger ward populations, therefore an opportunity for candidates to receive greater campaign funding given the new expenditure limits.[106] Overall, the majority refrained from imposing a critical opinion on what it called the "diminished *effectiveness*" of the Election.[107]

In choosing to address the second issue as *obiter*, the majority considered whether the impugned provisions of the *Government Act* were unconstitutional in violating the UCP of democracy and were, therefore, of no force or effect subject to section 52(1) of the *Constitution Act, 1982*. The majority described the democratic principle as having multiple dimensions.[108] First, the concept has an institutional aspect: it ensures representative and responsible government and the right of citizens to participate in such. Second, at an individual level, it includes the promotion of self-government. The City argued that the Ward Reduction violated the UCP of democracy "by denying voters effective representation and disrupting the election process."[109] While section 3 of the *Charter* indicates that the Constitution does not mandate democratic *municipal* elections, the City asserted that the democratic principle nonetheless applies to democratically elected statutory representative governments to ensure a fair election process.[110] To accomplish this, the City proposed reading in the principles of democracy found in section 3 of the *Charter* to either nullify the *Government Act* directly, or interpret both section 3 and section 2(b) as guaranteeing municipalities the right to effective representation, therefore limiting provincial competence under section 92(8) of the *Constitution Act, 1867*.[111]

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103 *Ibid* at para 13.
104 *Ibid* at paras 27, 36. See also *ibid* at paras 14–47 (for how the Supreme Court applied section 2(b) in the context of municipal elections). See also *ibid* at paras 112–62 (the Supreme Court classified the City's claim as a "positive" rights claim, after which it applied the more onerous section 2(b) test from *Baier v Alberta*, 2007 SCC 31, instead of the *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 test, which the dissent would have applied).
105 *City of Toronto*, *ibid* at para 37.
106 *Ibid* at para 38.
107 *Ibid* [emphasis in original]. See also *ibid* at paras 39–40.
108 *Ibid* at para 77.
109 *Ibid* at para 48. See also *City Factum*, *supra* note 102 at para 105.
110 *City Factum*, *ibid* at paras 94–95.
111 *Ibid* at paras 104–106, 110–21. The City's arguments were several pointed and distinct claims that deconstructed multiple provisions of the Constitution and the UCP of democracy. For the purpose of this article, I limit my summary to the basis of the argument upon which the Supreme Court used to opine on UCPs in general.

Crucial to the City's argument was their analysis of UCP jurisprudence by which they claimed that UCPs have been used to independently invalidate legislation.[112] However, the majority disagreed: because UCPs, like the principle of democracy, are not explicitly prescribed in the text of the Constitution, they are incapable of striking down legislation.[113]

The contrasting views of the *City of Toronto* majority and minority ultimately turned on their interpretation of what "full legal force," endorsed by a unanimous Supreme Court in the *Secession Reference*, means.[114] In the majority's view, "full legal force" does not necessarily mean that a legal instrument can invalidate legislation. The majority used the example of a will; a will has full legal force but cannot be used to strike down legislation. The majority opined that UCPs have two uses. First, they may be used to help interpret constitutional provisions.[115] For example, the majority explained that this function has been used in invalidating legislation based on the principle of judicial independence: they agreed with Justice La Forest's dissent in the *Judges Reference* that judicial independence derives its application from sections 96–100 of the *Constitution, 1867*, and the preamble and sections 11(d) of the *Charter*.[116] Second, UCPs can be used to develop structural doctrines unstated in but derived from constitutional provisions,[117] such as the doctrine of paramountcy[118] or that of full faith and credit.[119] In this way, structural doctrines give effect to provisions that are difficult to apply; doctrinal development makes written constitutional principles practically coherent. In summary, the majority wrote that the substantive legal force of UCPs "must arise by necessary implication from the Constitution's text."[120]

In affirming the text of the Constitution as supreme, Chief Justice Wagner and Justice Brown ultimately rejected the UCP of democracy as having any operative role in the City's appeal: democracy cannot be used in a way that goes beyond its interpretative role. Accordingly, its sole purpose in this context was to support "an understanding of free expression as including political expression made in furtherance of a political campaign."[121] By dismissing the City's interpretation of UCP jurisprudence,[122] the majority made clear that the remedy to undesirable or unfair legislation lies not in UCPs but in the written constitutional text and at the ballot box.[123]

The majority also rejected the City's section 2(b) and section 3 "effective representation" claim, which the City asserted could apply to municipal elections vis-à-vis the principle of democracy.[124] Democracy could not narrow the application of section 92(8) of the

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112 *Ibid* at paras 69–91.
113 *City of Toronto*, *supra* note 8 at paras 50, 69.
114 *Ibid* at para 54.
115 *Ibid* at para 55.
116 Part III.B, above, provides more on this proposition.
117 *City of Toronto*, *supra* note 8 at para 56.
118 Simply stated, the doctrine asserts that where both the Parliament of Canada and one or more of the provincial legislatures have enacted legislation which comes into conflict, the federal law shall prevail: see e.g. *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at paras 62–66.
119 The doctrine requires each province to recognize judicial judgments of the other provinces: see e.g. *Hunt v T&N plc*, [1993] 4 SCR 289 at 324.
120 *City of Toronto*, *supra* note 8 at para 75.
121 *Ibid* at para 78.
122 *Ibid* at paras 64–75.
123 *Ibid* at paras 59, 68, 70–71.
124 *Ibid* at paras 79–84.

Constitution Act, 1867 in such a way that *municipalities* would be subject to section 3 of the *Charter*, or a right to democratic elections generally. The majority confirmed that municipal governments are at the mercy of the political decisions of their provincial counterparts, which have "'absolute and unfettered legal power'" to legislate with respect to municipalities by operation of section 92(8).[125] Neither section 3 of the *Charter* nor section 92(8) of the *Constitution Act, 1867* are ambiguous with respect to municipalities.[126] Therefore, these provisions contain no open question of constitutional interpretation to be addressed with UCPs.

B. DISSENT

In writing on behalf of four dissenting members of the Supreme Court,[127] Justice Abella was unequivocal in her disagreement with the majority. While the entirety of the *City of Toronto* Supreme Court agreed that the Constitution consists of unwritten and written rules,[128] the dissent, citing *New Brunswick Broadcasting*, asserted that UCPs are not merely context nor backdrop to the text. Rather, UCPs are associated but independent principles of the text.[129] Embracing the preamble of the *Constitution Act, 1867*, Justice Abella outlined the historical argument that "[t]he precedential Constitution of the United Kingdom … is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, customs of Parliament, and judicial decisions, among other sources."[130] As a result, the dissent found that Canada's Constitution embraces written rules as well as unwritten rules, which have the same legal status as the text.

Contrary to the majority, the dissent deemed it an inescapable conclusion, "supported by [the] Court's jurisprudence," that UCPs can override the legislature.[131] Referring to UCPs as "structural imperatives," Justice Abella used structural argumentation to describe how they could be used.[132] For example, the Supreme Court could rely on a UCP, independent from any explicit constitutional provision, in a case "where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure.'"[133] Through this statement, Justice Abella rejected a purely textual approach to applying UCPs and opined that, in the right case, the structure of the Constitution could act as a source for deploying a UCP. While Justice Abella noted that instances of the Supreme Court invalidating legislation on this basis would undoubtedly be rare, she stated that it was unwise for the majority to foreclose that possibility. This was especially so since the issue at hand did not require the Supreme Court to make such a bold assertion: "Never … has this Court, until now, foreclosed the possibility of *all* unwritten constitutional principles [independently] invalidating legislation."[134] However, that is precisely what the majority did in *City of Toronto*. Should a "rare case" of

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125 *Ibid* at para 79, citing *Ontario English Catholic Teachers' Association v Ontario (Attorney General)*, 2001 SCC 15 at para 58.
126 *City of Toronto*, *ibid* at para 84.
127 Justices Abella, Karakatsanis, Martin, and Kasirer.
128 *City of Toronto*, *supra* note 8 at paras 49, 165.
129 *Ibid* at paras 168, 178.
130 *Ibid* at para 165.
131 *Ibid* at para 170.
132 *Ibid* at para 169, citing *OPSEU*, *supra* note 22.
133 *Ibid* at para 170 [citations omitted].
134 *Ibid* at para 184 [emphasis in original].

the type Justice Abella alluded to arise in the future, it appears the Supreme Court will be divided again.

V. UNFINISHED BUSINESS

A. UCPS CANNOT INVALIDATE LEGISLATION … OR CAN THEY?

The first criticism I respectfully submit about the *City of Toronto* majority's judgment relates to their two proposed options for how a court can utilize UCPs to nullify legislation.[135] This "textual connection"[136] test,[137] as I will call it, requires that a principle is textually connected to a constitutional provision or arises by "necessary implication" from the text.[138] The textual connection test follows the textual argumentation method discussed above by asserting that although UCPs may not possess inherent legal authority, they can elucidate how the textual provisions they reference are put into action. Essentially, the textual connection test attempts to establish the boundaries of UCPs, these principles serving as logical links between the specific text and the court's intended action.[139] This test does not, however, explain *how* a UCP will be sufficiently linked to the text to invalidate legislation and in what instances it will not. My concern is that a UCP's connection to the Constitution may become a value judgment based on a court's subjective determination of which UCPs are or are not acceptable to strike down legislation. This could potentially subject important constitutional decisions to a results-based[140] analysis.

The textual connection test is inconsistent with the Supreme Court's jurisprudence. Most notably, *City of Toronto* deviated from past decisions where the Supreme Court has stated that UCPs "have been accorded full legal force in the sense of being employed to strike down legislative enactments."[141] Seemingly, it would be difficult for the Supreme Court to gloss over its predecessor's bold finding. But that is exactly what the *City of Toronto* Supreme Court did. The majority wrote that the "context" of this statement illuminates that Justices Martland and Ritchie in the *Patriation Reference* were describing the constitutional requirements of Canadian federalism. The majority in *City of Toronto* insisted that "while

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135 *Ibid* at paras 55–56.

136 Note that Alyn James Johnson and Vincent Kazmierski have both previously used similar language to refer to the Supreme Court's analytical reliance on specific written constitutional provisions when contemplating whether to invalidate legislation based on unwritten constitutional principles: see e.g. Vincent Kazmierski, "Draconian but not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada" (2009) 41:2 Ottawa L Rev 245 (uses the term "textual anchors" at 276); Alyn James Johnson, "'Quite Apart from Charter Considerations': Constitutional Text and Unwritten Principles in City of Toronto" (24 October 2021), online (blog): *Administrative Law Matters* [perma.cc/WM3M-P399] [Johnson, "Quite Apart"]. Several American authors have also used this language in similar contexts: see e.g. Kendall Thomas, "Beyond the Privacy Principle" (1992) 92:6 Colum L Rev 1431 at 1451; Louis D Bilionis, "Process, the Constitution, and Substantive Criminal Law" (1998) 96:5 Mich L Rev 1269 at 1316; Frank H Easterbrook, "Abstraction and Authority" (1992) 59:1 U Chicago L Rev 349 at 368.

137 While not technically a test since either strategy may operate to invalidate legislation, I utilize this terminology for ease of reference.

138 *City of Toronto*, *supra* note 8 at paras 65, 71, 74–75, 79.

139 I do not aim to prescribe an approach for *identifying* UCPs in this article. In fact, most of the important UCPs have already been judicially discussed. Rather, the scope and application of UCPs remain an outstanding issue, which I argue the majority failed to define.

140 Garner, *supra* note 5, sub verbo "judicial activism" ("judicial activism" includes results-based judgments).

141 *Patriation Reference*, *supra* note 33. Affirmed in *Secession Reference*, *supra* note 2 at 249–50.

the specific aspects of federalism at issue [in the *Patriation Reference*] may not have been found in the express terms of the Constitution, *federalism is*."[142] Accordingly, principles that may invalidate legislation must not be "unattached externalities,"[143] meaning that UCPs must be connected to an enumerated constitutional provision or provisions. However, as the majority then conceded, federalism is not actually a term in the Constitution; it "is fully enshrined *in the structure* of our Constitution."[144] The principle of federalism, while absent from the text, is generally derived from the division of powers set out in sections 91 and 92 of the *Constitution Act, 1867* (the majority did not further elaborate on this connection). In essence, the majority stated that to establish a particular UCP as having positive legal force, a court must be satisfied that a UCP is at least "necessarily implied" in or "attached" to a constitutional provision. However, they did not define the parameters of how a UCP would satisfy this requirement. Therefore, a problem remains: how does a judge determine that a particular UCP is "attached" to, or "necessarily implied" in, provisions of the Constitution?

As an example of this tenuous determination, consider the comparison between the principles of federalism and democracy. Sections 1 and 3–5 of the *Charter*, and sections 17 and 50 of the *Constitution Act, 1867*[145] embody basic democratic principles similar to how sections 91 and 92 exhibit the concept of federalism.[146] However, the *City of Toronto* majority's *obiter* reasons maintained that the UCP of democracy does not have a sufficient connection to the Constitution to be "necessarily implied" in any provision. This dichotomy creates uncertainty about when the Supreme Court is prepared to endorse a UCP. It is also inconsistent with the Supreme Court's prior rulings. For example, the *Secession Reference* Supreme Court recognized that "s. 4 of the *Charter* is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33."[147] Thus, the *Secession Reference* Supreme Court recognized that the principle of democracy is not an "unattached externality;" it is expressly enshrined in provisions of the Constitution. Elliot also subscribes to the view that the principle of democracy is found within the text of the Constitution. Elliot writes that since "the advent of the *Charter*, *democracy has been expressly recognized in the text of the Constitution of Canada* as one of our important constitutional values."[148] The *Charter* incorporates "Democratic Rights" in sections 3–5 and enumerates the wording "free and democratic society" in the section 1 justification clause. As the Supreme Court recognized in the *Secession Reference*, the *Charter* made the democratic principle explicit instead of previously implicit.[149] In comparison, the Supreme Court in the *Secession Reference* cited no relevant provisions that tied federalism to the text

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142 *City of Toronto*, *supra* note 8 at para 52 [emphasis in original].
143 *Ibid* at para 53.
144 *Ibid* [emphasis in original].
145 This list is not exhaustive.
146 Kazmierski, *supra* note 136 at 276; Elliot, *supra* note 64 at 109; Johnson, "Judges," *supra* note 78 at 32. *Contra City of Toronto*, *supra* note 8 at para 76.
147 *Secession Reference*, *supra* note 2 at 255.
148 Elliot, *supra* note 64 at 109 [emphasis added]. See also Elliot, *supra* note 64 at 112.
149 *Ibid* at 109, 112.

of the Constitution.[150] By this analysis, I submit that democracy has a stronger link to the written Constitution than federalism does. Therefore, the Supreme Court's claim in *City of Toronto* that democracy does not have full legal force is incoherent by its own textual connection logic.

The *City of Toronto* majority also failed to mention that both federalism and democracy were among the same set of UCPs the Supreme Court deployed to address the issue in the *Secession Reference*.[151] That case, somewhat inconsistently when compared with that Supreme Court's description of the democratic principle's link to the Constitution noted above, stated that these principles "are not explicitly made part of the Constitution by any written provision."[152] In other words, federalism and democracy are *unwritten* and may be treated as such. Therefore, the Supreme Court in *Secession Reference* seemingly did not think it was important to tie these UCPs to a constitutional provision for them to have effect, and, if anything, they merely connected the principle of democracy to constitutional provisions as illustrative support for the truly unwritten nature of UCPs.[153] In no way did the Supreme Court in *Secession Reference* dictate a connection to constitutional provisions as a prerequisite for their prescriptive, and not merely interpretive or doctrinal,[154] use of UCPs.

Regardless of whether federalism, democracy, the rule of law, or any other UCP can be derived from prescribed constitutional provisions, the point is this: to assume, as the *City of Toronto* majority did, that one UCP (namely, federalism) can be rebranded as "attached" to a specific constitutional principle, but another is "unattached" (namely, democracy), is illogical. It creates a legal requirement (textual connection) without explaining the scope of that requirement. Using this textual strategy, a court could cherry-pick the UCPs that serve its desired result while ignoring others by asserting they do not have sufficient constitutional grounding. However, the entirety of the Supreme Court in the *Secession Reference* warned that "any one principle [does not] trump or exclude the operation of any other."[155] In a case where there truly is a gap in the Constitution, a court should pick the principles most germane for resolving the issues before them instead of accepting or rejecting UCPs outright to support its preferred conclusion.

In summary, the issue with the *City of Toronto* Supreme Court's sole endorsement of UCPs that are connected to the Constitution via the text[156] is its lack of clarity. Where does the Supreme Court draw the line between principles with "a strong textual basis" and those without? Admittedly, the notion of *unwritten* constitutional principles is inherently abstract. But the Supreme Court in *City of Toronto* appeared to attempt to reconcile the abstract and the concrete with further ambiguity: "Structures are not comprised of unattached

[150] *Ibid* ("[t]he 'principle of federalism' is said by the Court in the *Quebec Secession Reference* to be 'a central organizational theme of our Constitution'. No indication is given of the particular provisions of the Constitution that reflect or embody this principle; presumably the Court considered the existence of the principle to be beyond question and that there was therefore no need to identify those provisions" at 99).

[151] *Secession Reference*, *supra* note 2 at 239–40.

[152] *Ibid* at para 51.

[153] See e.g. *ibid* at para 148.

[154] As necessitated by the textual connection test.

[155] *Secession Reference*, *supra* note 2 at 248.

[156] *City of Toronto*, *supra* note 8 at para 53.

externalities; they are embodiments of their constituent, conjoined parts."[157] Can this be taken to mean that constitutional "structures" can invalidate legislation, but UCPs cannot? Structures seemingly being principles that can be anchored to written provisions. My concern is that the Supreme Court did not delineate the difference between textually connected constitutional principles and UCPs. Therefore, the Supreme Court created a new layer of confusion by boldly claiming that UCPs cannot independently invalidate legislation. While the majority of the Supreme Court has "officially" closed the door on UCP arguments in this way, a new door has potentially opened to reframe unwritten principles as being derivative of the text of the Constitution itself and capable of invalidating legislation.

B. UNCERTAINTY IN *IMPERIAL TOBACCO* AND SPECULATIVE REASONING

It is crucial to note that both the *City of Toronto* majority and minority interpreted key passages from the UCP jurisprudence differently.[158] The majority proclaimed that any remaining uncertainty as to whether UCPs may invalidate legislation after cases like the *Secession Reference* was "fully put to rest" in *Imperial Tobacco*.[159] I respectfully disagree. I assert that the ambiguity of jurisprudence in this area reflects the reluctance of past courts to foreclose the possibility of UCPs invalidating legislation. *Imperial Tobacco* raised skepticism with respect to UCPs, particularly the principle of the rule of law.[160] However, it did not reject UCPs as independent legal tools outright. The Supreme Court in *City of Toronto* was unwise, and potentially in violation of horizontal stare decisis,[161] in departing from its predecessors by prescribing a definitive test regarding the application of UCPs in all circumstances.

Admittedly, UCPs generally declined in the jurisprudence as having a practical legal effect after the turn of the century. It could be argued that the Supreme Court deliberately reined in their use during this time. For example, the *City of Toronto* majority fashioned the reasoning of several recent Supreme Court cases into the argument that UCPs have had a limited independent role in constitutional rulings.[162] The oft-cited quote which is relied upon to restrict the application of UCPs originates from *Imperial Tobacco*, where Justice Major, in dismissing several tobacco companies' claims that the law at issue, shifted the burden of

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157 *Ibid.*

158 Compare *ibid* at paras 71–73 and 184.

159 *Ibid* at para 50. See generally Johnson, "Judges," *supra* note 78; Johnson, "Retreat," *supra* note 40; Kazmierski, *supra* note 136 (for an in-depth discussion of the Supreme Court's UCP jurisprudence). I reference Johnson's and Kazmierski's work throughout this article as I am offering a distinct account of how the Supreme Court's most recent foray into UCPs has led the Supreme Court further astray from some of the criticisms these authors point out.

160 *Imperial Tobacco*, *supra* note 31 at paras 59–60.

161 Horizontal stare decisis, which defines how the Supreme Court may depart from their previous rulings, generally suggests that if the Supreme Court overturns their precedent, they should: (1) acknowledge that they are doing so; (2) state why they are doing so; and (3) justify their conclusion. Doing otherwise undermines certainty and predictability in the law as well as the integrity of the Supreme Court: see e.g. *Canada v Craig*, 2012 SCC 43 at paras 24–26; *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 246–427, Brown J, dissenting. The majority in *City of Toronto* did not acknowledge their departure from the Supreme Court's previous interpretations of UCPs.

162 See e.g. *City of Toronto*, *supra* note 8 at paras 55, 58–59; see especially *City of Toronto*, *supra* note 8 at paras 70–75.

proof against the companies and thus violated the rule of law and judicial independence, stated:

> [S]everal constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — *very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution* (and to the requirements, such as judicial independence, that *flow by necessary implication from those terms*).[163]

As the *City of Toronto* majority correctly acknowledged, *Imperial Tobacco* affirmed the priority of the text in constitutional adjudication.[164] However, it did not affirm a narrow interpretive role for UCPs.

This new era of UCPs ushered in by *Imperial Tobacco*, as exemplified in Justice Major's statement, presents a number of contradictions. First, the fact that UCPs *strongly favour* upholding the validity of legislation that conforms to the express terms of the Constitution does not prevent the Supreme Court from using UCPs to invalidate legislation when a gap in the Constitution arises. In *Imperial Tobacco*, Justice Major merely defended parliamentary sovereignty, suggesting that while UCPs (in this context, the rule of law) may be capable of limiting meddling of the executive and judiciary, it is *unusual* for them to do so in the case of laws that weaken the democratic function of the legislature itself.[165] Further, *Imperial Tobacco* dealt with the rule of law and judicial independence principles in a specific factual scenario; not UCPs at large. The Supreme Court in *Imperial Tobacco* noted that judicial independence and their prescribed contours of the rule of law (that is, the procedures by which legislation is to be enacted, amended, and repealed)[166] could not invalidate the content of legislation *in that particular case*.[167] However, this decision, nor that of *Babcock* (decided three years before *Imperial Tobacco*), did not close the door on UCPs invalidating legislation. In *Babcock*, which the *Imperial Tobacco* Supreme Court failed to explicitly note, Chief Justice McLachlin wrote that while UCPs did not apply in the circumstances at hand, "unwritten constitutional principles are capable of limiting government actions."[168] Outlined in both decisions is the required balancing between the principle of parliamentary sovereignty and the application of UCPs to strike down legislation incompatible with the Constitution.[169] The Supreme Court intended to limit the impact of these principles to exceptional circumstances.

A second issue is that *Imperial Tobacco* suggested the Supreme Court should not give independent effect to UCPs, such as the rule of law or judicial independence, that dictate "broader versions" of existing constitutional provisions.[170] However, this textual strategy that attempts to marry the Supreme Court's reasoning to existing rights in the Constitution runs

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163 *Imperial Tobacco*, *supra* note 31 at para 66 [emphasis added].
164 *City of Toronto*, *supra* note 8 at para 73.
165 *Imperial Tobacco*, *supra* note 31 at paras 58–60.
166 *Ibid* at para 60.
167 See e.g. *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 135 (the Supreme Court unanimously rejected the appellant's invocation of the rule of law to invalidate legislation but implied that the contours of the rule of law which Justice Major articulated in *Imperial Tobacco* may not be exhaustive).
168 *Babcock*, *supra* note 28 at para 54.
169 *Ibid* at paras 55, 57; *Imperial Tobacco*, *supra* note 31 at paras 51–54.
170 *Imperial Tobacco*, *supra* note 31 at para 65.

afoul when one considers that the Supreme Court has extended constitutional protection to UCPs, such as the judicial independence principle, that it previously stated had *no direct link* to constitutional provisions.[171]

Further, in *MacMillan Bloedel*, Chief Justice Lamer ruled that the *Young Offenders Act* infringed "the principle of the rule of law recognized both in the preamble and in all our conventions of governance."[172] In his academic commentary of this decision written one year later, Chief Justice Lamer confirmed that the rule of law, disassociated from a constitutional provision, was at work in this respect:

> [W]hile s. 96 was integral to the Court's ruling on the validity of the *grant* of jurisdiction to the youth courts over contempt *ex facie* by young offenders, it played no direct role in the ruling on the validity of the *removal* of that same jurisdiction from the superior courts. *That ruling … derives from the rule of law itself and the special role played by the superior courts of general jurisdiction in preserving it. In form, at least, this feature of the decision in* MacMillan Bloedel *serves to distinguish it from the decision in* Crevier *in which s. 96 was explicitly invoked in support of the decision to strike down the legislation at issue there*.[173]

Accordingly, Chief Justice Lamer accepted that the principle of the rule of law did not derive from specific constitutional provisions. Instead, it originated from the "special role played by the superior courts."[174] In other words, protecting the core function of courts in the governmental balance of powers justified usurping section 47(2) of the *Young Offenders Act* with the UCP of the rule of law.[175]

Another issue with Justice Major's focus on the textual connection to judicial independence in *Imperial Tobacco* was his failure to recognize that a similar textual tie to the principle of democracy could limit the legislature. For instance, if one accepts that the principle of judicial independence flows by "necessary implication" from the text of the Constitution, how could one not extend that reasoning to democracy?[176] The principle of democracy could inherently limit legislatures. As Vincent Kazmierski puts it:

> In both *Babcock* and *Imperial Tobacco*, the Supreme Court focused on the potential danger of legislative interference with the relationship *between courts and legislatures*. But this begs the question *why fundamental interferences with the democratic process should not receive the same type of treatment* as fundamental interferences with the relationship between the courts and other branches of government. *Certainly, it would be difficult to argue that the protection of the judicial process arises by necessary implication from the express terms of the Constitution while protection of the democratic process does not.* Textual anchors for the protection of the democratic process include sections 3, 4 and 5 of the *Charter* and sections 17 and 50 of the *Constitution Act, 1867*.[177]

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171 Kazmierski, *supra* note 136 at 276. See e.g. *Judges Reference*, *supra* note 21 at para 83.
172 *MacMillan Bloedel*, *supra* note 89 at para 41.
173 Antonio Lamer, "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 UNBLJ 3 at 11 [emphasis added].
174 *Ibid.* See also Johnson's discussion of this passage and the rule of law UCP generally: Johnson, "Retreat," *supra* note 40 at 34–36; Johnson, "Judges," *supra* note 78 at 1086–88.
175 *MacMillan Bloedel*, *supra* note 89 at paras 37–38.
176 Kazmierski, *supra* note 136 at 276.
177 *Ibid* at 275–76 [citations omitted] [emphasis added].

A coherent reading of *Imperial Tobacco* thus demonstrates that UCPs must be deployed when legislation substantially interferes with the structures of the Canadian government, no matter what head of government the interference originates from. Since the decision leaves open the possibility that legislative meddling with the judiciary may call for UCPs to invalidate a statute, by implication, other UCPs, like the principle of democracy, may limit the extent of parliamentary sovereignty where parliamentary sovereignty itself "would undermine the very source of its legitimacy," that being the democratic process.[178]

Indeed, as identified by the Ontario Superior Court of Justice in its 2022 decision *Alford v. Canada (Attorney General)*, legislation that fetters the state's democratic institutions and compromises its integrity is unconstitutional.[179] In *Alford*, Justice Fregeau identified section 12 of the *National Security and Intelligence Committee of Parliamentarians Act*,[180] which limits the National Security and Intelligence Committee's claims to immunity,[181] a violation of parliamentary privilege. Reasoning from the history and structure of the Constitution,[182] Justice Fregeau ruled that the fundamental principles of parliamentary privilege, the separation of powers, and democracy enshrined in the Constitution could not be abrogated through ordinary legislation.[183] Brian Bird and Kristopher Kinsinger note that his ruling demonstrates how UCPs "may be determinative in constitutional litigation."[184] For instance, the Ontario Superior Court looked beyond the text of section 18 of the *Constitution Act, 1867*, which discusses parliamentary privilege, and determined that a limit on Parliament's ability to define its own institutional principle "is a key component of our constitutional structure."[185]

In summary, at most, *Imperial Tobacco* limited the application of the rule of law[186] and favoured a textual approach to applying UCPs. Therefore, as Justice Abella, in her *City of Toronto* dissent, pointed out, what is most alarming about the *City of Toronto* majority's decision is that it perhaps closed the door entirely on UCPs invalidating legislation; at the very least, with regard to the principle of democracy. However, the majority did not need to do so as they decided the case on the section 2(b) analysis alone.

Leclair, a prominent constitutional scholar and himself a UCP skeptic, criticizes this type of speculative reasoning. Speculative reasoning is "a contemplative and detached process of reasoning" that uses logical inferences and basic principles in an abstract and hypothetical manner instead of analysis of the specific facts of a particular situation.[187] In the *Judges Reference*, Justice La Forest expressed concern over these legal conclusions when a case

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178 *Ibid* at 277.
179 2022 ONSC 2911 [*Alford*].
180 SC 2017, c 15.
181 *Alford*, *supra* note 179 at para 10.
182 See e.g. *ibid* ("constitutional democracy, having been constitutionalized through the preamble of the *Constitution Act, 1867*" at para 44). See also *ibid* at paras 35–40 (Justice Fregeau's references to *New Brunswick Broadcasting*).
183 *Ibid* at paras 29–47.
184 Brian Bird & Kristopher Kinsinger, "Constitutional Exegesis, Animating Principles and *City of Toronto*" (2023) 110:2 SCLR 38 at 53.
185 *Alford*, *supra* note 179 at para 41.
186 That is, limiting this principle to formal, not substantive, requirements when a claimant uses the rule of law to attack legislation: *Imperial Tobacco*, *supra* note 31 at paras 59, 60, 64–65.
187 Leclair, "Reconciling," *supra* note 54 at 161.

does not demand it.[188] In dissent, he asserted that "it is absolutely critical for the Court to tread carefully and avoid making far-reaching conclusions"[189] on UCPs, since the "implications of abstract legal conclusions are often unpredictable and can, in retrospect, turn out to be undesirable."[190] The danger in the *City of Toronto* majority's textual connection test is that it may prejudice future cases[191] where a legitimate threat to the Constitution exists, but no explicit constitutional provision addresses the circumstances. As I state below, grasping loosely applicable constitutional provisions that do not determinatively address the particulars of a case is unprincipled and can lead to unclear and arbitrary reasoning.

Therefore, I suggest that it was a mistake for the Supreme Court to prescribe its textual connection test in *City of Toronto*. The Supreme Court should not overarchingly reject or accept the use of UCPs when the facts of a case can be resolved in accordance with provisions in the written Constitution. Should the written Constitution truly present a gap, the following section of this article proposes a framework on how the Supreme Court could deploy UCPs in a principled, transparent, and reasoned manner. However, any constitutional analysis must always depend on the facts before it.

C. FINDING A COHERENT THEME

The growing tear in the Supreme Court's reasoning on UCPs, reflected by the *City of Toronto* majority and minority and throughout the jurisprudence over the past 40 years, is fundamentally a debate about the legal source of UCPs. One argument is that UCPs originate from the heart of the Constitution itself; on the other end, UCPs are merely used as explanatory principles of the written text. In analyzing a coherent line of reasoning from the Court's ununified use of UCPs, I argue that *structural argumentation*, or as Alyn James Johnson calls it, "reasoning from constitutional essentials,"[192] may explain the most logically coherent role for these principles.

As Johnson explains, a theme of the sample of cases outlined above is that the Supreme Court has struggled to fashion an account of how "concrete" legal *rules* are generated from the widely accepted underlying principles.[193] However, that failure does not discredit UCPs, their status in the Constitution, or the approaches the Supreme Court has employed in prior decisions.[194] UCPs may only be used to limit government action where *specific rules* lead from them that can fill a constitutional void that arises in a given case and necessitates judicial interpretation that strays from explicit wording.[195] The process of UCPs being identified by their source and developed into unique constitutional tools is the subject of this section.

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188 *Judges Reference*, *supra* note 21 at para 301.
189 *Ibid* at para 302.
190 *Ibid* at para 301.
191 See generally *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 9.
192 Johnson, "Judges," *supra* note 78 at 1088–93.
193 *Ibid* at 1114; Johnson, "Retreat," *supra* note 40 at 33.
194 Johnson, "Retreat," *ibid* at 33.
195 Johnson, "Judges," *supra* note 78 at 1084, 1114–15.

Structural argumentation is different from historical and textual argumentation because it applies principles derived from the entirety of the constitutional text, or its architecture, rather than from one of its parts.[196] Elliot explains that the justification for this approach is that complex questions of constitutional interpretation are necessarily resolved based on a court's sense of what the relevant underlying principles can be said to require.[197] While policy questions are beyond the role of courts, the nature of constitutional principles requires the judiciary to inquire into the foundational governmental objectives of the Constitution's text. Therefore, a certain amount of normative judgment is inescapable in judicial reasoning.[198] Structural argumentation confronts this reality by recognizing that it is far better for our structure of government when "those principles and values are openly acknowledged" and subjected to careful consideration, analysis, caution, and criticism "rather than hidden from view."[199]

On the topic of democracy, a principle that permeates this article and several recent judicial decisions on UCPs, the judiciary has recently accepted structural argumentation through the oft-cited "constitutional architecture" metaphor. In the *Senate Reference*, a determination of the constitutional validity of the then government's proposals to reform or abolish the Senate,[200] the Supreme Court rejected textual argumentation and reasoned that the majority of the proposed reforms were drastic changes to Canada's constitutional architecture, which required formal constitutional amendment through Part V of the *Constitution Act, 1867* — beyond minimal provincial consultation.[201] Citing the *Secession Reference* and Mark Walters' work, the Supreme Court stated that "the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement."[202] The Supreme Court's key ruling was that some architectural elements of the Constitution are entrenched, for instance, the fundamental role of the Senate.[203] This unwritten structure may have substantive status and is not merely an aid to interpretation.[204] Absent constitutional amendment, the government is obligated to maintain and protect the core pillars of the government. Fundamental to maintaining this structure, the Supreme Court implicitly employed several UCPs as justification.[205] For instance, the democratic institution of the Senate ensures that this complementary legislative body oversees the House of Commons as a "sober second thought."[206] As Christa Scholtz describes, "the architecture metaphor itself is the core premise of the Court's decision making."[207] I contend that this is pure structural argumentation at work. The structure of the Constitution necessitated a formal

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196 Elliot, *supra* note 64 at 74, citing Bobbitt, *supra* note 68 at 74.
197 Elliot, *ibid* at 82.
198 See generally *Vriend v Alberta*, [1998] 1 SCR 493 at para 136. See also *Senate Reference*, *supra* note 21 at para 82.
199 Elliot, *supra* note 64 at 82, citing Black, *supra* note 91 ("clarity about what we are doing, about the true or truly acceptable grounds of judgment, is both a good in itself, and a means to a sounder decision").
200 *Senate Reference*, *supra* note 21 at paras 49, 95.
201 *Ibid* at para 111.
202 *Ibid* at para 26.
203 See e.g. *ibid* at paras 60, 77–79, 97.
204 *Ibid* at para 27. See also *ibid* at paras 52, 106–107.
205 In particular, federalism, democracy, constitutionalism and the rule of law, and the protection of minorities: Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*" (2014) 67:1 SCLR 221 at 231–35. See also *Senate Reference*, *supra* note 21 at para 25.
206 *Senate Reference*, *ibid* at para 56.
207 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 at 668.

amendment to protect against the government's unilateral threat to displace Canada's status quo political workings. And UCPs filled the gaps in the Supreme Court's constitutional architecture theory.

The cases in this section outline how UCPs act as scaffolding for the integrity of the Constitutional castle where government action threatens or undermines its foundational structure and design. That is not to say that rooms and hallways cannot be renovated or changed with decorative detail, as Vanessa MacDonnell and Philippe Lagassé analogize, but after these updates and improvements, the Constitution's structure must remain.[208] These principles "can thus be seen as securing the [constitutional] architecture's overarching plan, while allowing for updates and renovations."[209]

Contrary to the *City of Toronto* textual connection test, constitutional argumentation need not be based on reasoning from certain principles that the Supreme Court decides to have a sufficient constitutional grounding in the text to be effective. Instead, such reasoning should prioritize maintaining a stable government structure. While many provisions of the Constitutional text have express and reasonably "determinative normative content," other provisions have an "inchoate" meaning.[210] When the text is clear and does not itself offend the constitutional structure, it prevails over structural principles. However, the meaning of the Constitution itself is stressed when the Supreme Court attempts to stretch indeterminate provisions to formulate a justification for using the legal force of UCPs. For example, as discussed above, the *Secession Reference* Supreme Court neglected to rely on any specific constitutional provisions that could support its ruling. Instead, the Supreme Court drew on widely accepted constitutional norms derived from both the original written intention of the federation's creators and modern societal values.

The *Secession Reference* Supreme Court developed a solution that did not derive from any set of constitutional provisions but, as MacDonnell points out, was nonetheless minimally impairing and only partially justiciable.[211] For instance, the Supreme Court only required that Quebec conduct some form of discussion with other provinces, notably declining to enforce any specific procedural requirements upon possible secession.[212] Therefore, structural argumentation is consistent with the trend of the Supreme Court using UCPs as a "shield rather than a sword."[213] When a court utilizes foundational constitutional principles in a decision rather than relying on an overly broad interpretation of only loosely relevant constitutional provisions, it arguably restricts its power to make solid and binding orders. Vital to the legitimacy of the structural argumentation approach is recognizing that the unwritten rules crafted by courts do not infringe on parliamentary sovereignty or the written text of the Constitution more than is necessary to resolve the issue at hand.

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[208] Vanessa MacDonnell & Philippe Lagassé, "Investigating the Legal Political Contours of Unwritten Constitutional Principles after *City of Toronto*" (2023) 110:2 SCLR 51 at 74.

[209] *Ibid.*

[210] Johnson, "Quite Apart," *supra* note 136.

[211] MacDonnell, *supra* note 29 at 185, 192. See also Elliot, *supra* note 64 at 94–95, 109, 117–18.

[212] As another example of a UCP minimally impairing parliamentary sovereignty, consider the rule in *Judges Reference*, *supra* note 21, where the Supreme Court required the legislature to create an independent judicial compensation commission to negotiate judicial salaries.

[213] MacDonnell, *supra* note 29 at 192–93. On the shield versus sword metaphor: *Mikisew*, *supra* note 29 at para 86.

Logic based on the structure of the Constitution maintains the institutional relationship between the legislature, executive, and judiciary.[214] It forces the judiciary to reflect on its jurisdictional limits. Reliance on underlying principles lends itself to pragmatic and unintrusive solutions because such solutions must conform to the structural democratic system of government that grants their authority. On the other hand, dependence on vague sources from constitutional texts may legitimize bold legal rules that would otherwise be overreaching in the case of a constitutional gap. For example, had the *Secession Reference* Supreme Court followed the *City of Toronto* approach and attempted to connect the four principles it identified to written constitutional provisions, it is possible that it would have felt more comfortable prescribing specific procedures that Quebec would have to follow to leave the federation, for example declaring geographic boundaries or distributing public assets. In other words, reasoning from universally accepted constitutional principles ironically supports greater judicial responsibility and restraint since any ruling that the Supreme Court makes, logically, must be consistent with those norms. However, when the Supreme Court decides that a specific constitutional provision or provisions give them the power to enforce a rule, it follows that any far-fetched link between a principle and a connected provision will not necessarily be backed up with transparent reasons on why that rule flows from the Constitution. As the *Secession Reference* Supreme Court acknowledged: "A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution."[215]

The thrust of this argument is that text gains its authority because it is "posited" and democratically decided upon.[216] As Johnson indicates, unwritten principles gain authority because they are "functionally essential" to the system of constitutional government.[217] If the judiciary relies on text that has an indistinct normative tie to a factual scenario, the democratic authority for that law loses its value. The result is a disguised analysis that nonetheless reverts to unwritten principles and reasoning. Johnson describes this paradox by noting that "in its weaker manifestations, [textual connection] reduces written provisions of the Constitution to hollow and convenient receptacles in which to pour meaning properly derived from unwritten sources."[218] The more legitimate process is to clearly state and discuss the unwritten principles relied upon and provide a transparent line of reasoning therefrom to establish legal force.

Ironically, credence upon overreaching "textual anchors"[219] undermines the legal positivist argument on which the textual approach is based.[220] This is because strictly equating law as an explicit, formal rule-making, and institutionalized enforcement tool, where the text of the law does not facilitate that approach, "suggests that absent explicit, formal prescription, those exercising legal and constitutional authority may do so in any manner they please."[221] In this

[214] See e.g. Johnson, "Judges," *supra* note 78 at 1100–101.
[215] *Secession Reference*, *supra* note 2 at 292.
[216] Johnson, "Quite Apart," *supra* note 136. See also MacDonnell, *supra* note 29 at 190.
[217] Johnson, "Quite Apart," *ibid*.
[218] *Ibid*.
[219] For other authors' use of the term, see e.g. Kazmierki, *supra* note 136 at 276; Thomas, *supra* note 136 at 1451; Bilionis, *supra* note 136 at 1316; Easterbrook, *supra* note 136 at 368.
[220] See e.g. *City of Toronto*, *supra* note 8 at para 65.
[221] Thomas McMorrow, "Denying & Reckoning with Implicit Law: The Case of *The City of Toronto v. Ontario (A.G.)*" (2020–21) 25:2 Rev Const Stud 205 at 209.

way, the textual connection approach results in more leeway for courts; it does not encourage judicial restraint. I suggest that when the law (especially the Constitution) is not clear-cut, judges should openly recognize this and appreciate the unique responsibility they have to uphold their role in our system of government. In summary, when the judiciary overrides legislation using textual tools, the connection between the constitutional provision relied upon and the constitutional principle at work must be strong.[222] Otherwise, the judiciary metaphorically takes a power tool to our Constitution instead of fulfilling its proper role in constitutional maintenance.

D. ISSUES AND OPPORTUNITIES

Although courts relying on UCPs may face challenges, such as the difficult balancing act between constitutional supremacy and parliamentary sovereignty,[223] the independent application of these principles should not be precluded. Before I conclude this article, it is worth briefly addressing the explicit critiques of UCPs that the *City of Toronto* majority identified: (1) UCPs trespassing into the legislative authority to amend the Constitution;[224] (2) the abstract and uncertain nature of UCPs;[225] and (3) UCPs conflicting with sections 1 and 33 of the *Charter*.[226] As I will explain below, these perceived shortcomings can be appropriately reconciled when courts apply UCPs in a considerate manner.

First, this article should be understood not as an explicit endorsement of UCPs but as an analysis of the Supreme Court's reasoning of the necessary circumstances when they are used. The written text of the Constitution should always be prioritized over UCPs, and the Supreme Court should only resort to independently applying UCPs when necessary to maintain constitutional order.[227] It is also crucial to recognize that UCPs are only a marginal phenomenon in the Supreme Court's jurisprudence. Nonetheless, a degree of suspicion is warranted when courts invocate such principles, especially to invalidate legislation.[228] But given the change in world order since its inception, the Constitution will inevitably be silent on certain issues of constitutional importance.[229] And when a gap arises that undermines the coherence of the Constitution, courts are justified to step in and address it.[230] In this way, when the Supreme Court applies a written or an unwritten principle to fill a "gap," it is not acting as a lawmaker in the sense of de facto amending the Constitution. Instead, it is applying the principles embodied in the "lifeblood of the Constitution" in a scenario where an ex post facto constitutional amendment is virtually impossible. I contend that the same reasoning justifies the *City of Toronto* majority's endorsement of structural doctrines, like paramountcy, that are legally determinative but nonetheless judicially created. UCPs extend no further into the legislature's constitutionally protected realm of law-making than judicially created constitutional doctrines. Therefore, given the virtual impossibility of amending the

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222 Johnson, "Quite Apart," *supra* note 136.
223 *Babcock*, *supra* note 28 at para 55.
224 *City of Toronto*, *supra* note 8 at para 58.
225 *Ibid* at para 59.
226 *Ibid* at para 60.
227 Namely, the responsible and predictable functioning of the executive, legislature, and judiciary in the way in which our constitutional drafters intended.
228 MacDonnell, *supra* note 29 at 193.
229 *Ibid* at 191.
230 *Ibid* at 185.

Constitution[231] each time a case arises that illuminates a gap in the Constitution, to fulfil its constitutional goals, the judiciary should continue to be guided by its evolutionary role in interpreting the rights and freedoms guaranteed in our Constitution. Occasionally that interpretive role will extend to the Constitution's structure, not merely its provisions.[232]

It is also worth recognizing that should the other branches of government take issue with the extent of the Supreme Court's responsibility, it is ultimately the federal and provincial legislatures that define the judiciary's role in Canadian government, not the judiciary. In this way, parliamentary supremacy is theoretically maintained.[233] For example, Parliament could, hypothetically, amend the Constitution to define the scope of UCPs. While the political difficulties of such may make this option practically impossible,[234] the point is that our constitutional procedure ensures that the legislatures are the ultimate lawmakers and constitutional drafters in this country.

Second, when applied through structural argumentation, UCPs are not based on the arbitrary or subjective view of a particular judge; they are applied through a rigorous legal reasoning process.[235] As former Chief Justice McLachlin described it, "[w]here, having regard to convention, written provisions and internationally affirmed values, it is clear that a nation and its people adhere to a particular fundamental principle or norm, then it is the court's duty to recognise it. This is not law-making in the legislative sense, but legitimate judicial work."[236] Further, as discussed above, the Supreme Court has applied UCPs with restraint, like in the *Secession Reference*, and created actionable legal rules from them only when fair and predictable, as seen in the *Manitoba Language Reference* and the *Senate Reference*.[237]

Finally, the *City of Toronto* majority opined that UCPs would undo the section 1 justification clause in the *Charter* and the section 33 "notwithstanding" provision, which allow, respectively, reasonable limitation of *Charter* rights and legislative override of sections 2, 7, and 15.[238] However, the correct application of UCPs renders this issue moot. As I have outlined, a court may only independently apply a UCP where there is a legitimate gap in the Constitution. Where a case before the court triggers sections 2, 7, or 15 of the *Charter*, UCPs would not be used as an independent basis for ruling on that issue. The

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231 The amending procedures of the *Constitution Act, 1982* require such broad consensus for most amendments that they cannot be a regular form of adaptation: *Constitution Act, 1982*, *supra* note 1, Part V. Canada's Constitution has been called the most difficult Constitution in the world to amend: Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 Alta L Rev 85. See generally Hogg & Wade, *supra* note 7, s 4:23.

232 MacDonnell & Lagassé make a similar argument: MacDonnell & Lagassé, *supra* note 208 at 72 ("direct application of unwritten principles by the courts will be rare. At the same time, such a power must be retained to protect the fundamental principles of our constitutional order against incursions by political actors").

233 Hogg & Wade, *supra* note 7 ("it is now literally true that legislative power in Canada is exhaustively distributed among Canadian institutions. Every law is amenable to repeal or amendment by one of three processes: (1) the federal Parliament has authority over all laws within federal legislative power; (2) the provincial Legislatures have authority over all laws within provincial legislative power; and (3) one of the various amending procedures is available to repeal or amend any law that is outside the competence of both the federal Parliament and the provincial Legislatures," s 12:4).

234 See the text accompanying notes 4, 230.

235 Beverly McLachlin, "Unwritten Constitution Principles: What is Going On?" (2006) 4:2 New Zealand J Public & Intl L 147 at 159.

236 *Ibid*.

237 MacDonnell, *supra* note 29 at 192.

238 *City of Toronto*, *supra* note 8 at para 60.

extent of their application would be to interpret the aforementioned sections because the applicability of the written Constitution would take precedence. In other words, this would not be a situation where a UCP would be the operative principle that would decide the case. Section 33 and section 1 would still apply, and, subject to the possible caveat outlined in the paragraph below, UCPs could not override their use.

Related to this issue, the majority questioned if a situation would even arise where a UCP could strike down legislation where such legislation would not itself infringe on the written Constitution.[239] Justice Abella, in dissent, herself could not identify such a scenario beyond admitting that such cases would undoubtedly be "rare."[240] To answer this question, it is first worth pointing out that the jurisprudence on this point provides examples: for instance, all of Manitoba's laws being technically unconstitutional in *Manitoba Language Reference* or the possibility of Quebec leaving the federation in the *Secession Reference*. Furthermore, while I will not attempt to engage in speculative reasoning for the aforementioned reasons, for the sake of the logical coherence of this article and to conservatively suggest a limit on parliamentary sovereignty in its law-making function, it is possible to identify some extreme examples that illustrate why the Supreme Court should not preclude the Constitution's unwritten form. Chief Justice McLachlin states that it is widely accepted in developed modern democracies that legal systems must adhere to certain basic norms, such as allowing people to vote and not torturing any of a government's citizens.[241] In the hypothetical case of a statute violating these most basic normative standards, and if the *Charter* did not protect against such because of the operation of section 33, natural justice and basic human rights would undoubtedly necessitate the application of UCPs.[242] In such objectively abhorrent instances, UCPs could render the notwithstanding clause inoperative. Another illustration of the applicability of UCPs is in response to an institutional violation of the unwritten Constitution.[243] For instance, our written Constitution does not prescribe certain politically enforced conventions, such as the Governor General picking the leader of the federal political party with the most seats in the House of Commons to be Prime Minister. Such is merely a constitutional convention[244] and not constitutionally prescribed. However, institutional stability is essential to the structure of government as mandated by UCPs, like democracy and the rule of law. These UCPs could provide a remedy. While these extreme examples may not be practically useful, they demonstrate the inherent unpredictability of gaps in the Constitution. If we (or the drafters of the Constitution) could foresee these gaps, we would address them in the Constitution accordingly.

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239 *Ibid* at para 52.
240 *Ibid* at para 170.
241 McLachlin, *supra* note 235 at 150.
242 Walters, *supra* note 78 at 140. See further examples in Bird & Kinsinger, *supra* note 184 at 39, 54–55.
243 Walters, *ibid* at 114–28 (for a discussion of "institutional" unwritten constitutional norms).
244 Albert, *supra* note 231 ("A constitutional convention is not a formal legal rule since it does not emerge from the judicial or legislative law-making process; it is better described as a rule of political morality because its content is determined by the action, agreement and the acquiescence of political actors" at 100). See also MacDonnell & Lagassé, *supra* note 208 at 64–65.

VI. CONCLUSION

Section 52 of the *Constitution Act, 1982* permits non-prescribed law like UCPs to operate in a way as to read down legislation not compliant with the unwritten Constitution. The *City of Toronto* majority dismissed the independent application of UCPs to limit government action in this way. A majority of the Supreme Court prescribed a two-pronged "textual connection" test, which requires UCPs to be grounded in explicit provisions of the Constitution. Conversely, the dissent favoured a flexible view of UCPs, noting that cases may arise where a constitutional threat eludes the written words of the Constitution.

My critique of the *City of Toronto* majority analyzes the textual connection standard that I argue arbitrarily categorizes UCPs as only having full legal force (in the sense of striking down legislation) when a court determines that a principle is sufficiently connected to constitutional text. The textual connection test is unclear and unnecessarily mechanical in its operation. Further, the majority insufficiently explained the textual ties that it held had to exist for a UCP to be applied.

Acknowledging that UCPs *can* be used as interpretive aids, as the *City of Toronto* majority prescribed, does not logically preclude deploying UCPs where a constitutional provision does not have a sufficient connection to a UCP. The argument for recognizing that UCPs may be used to independently invalidate legislation rests upon a situation unlike *City of Toronto* or *Imperial Tobacco*, where no applicable provision shields the institutions of government from a threat to constitutional order. Such was the case in the *Judges Reference*. I argue that in cases like the *Judges Reference*, the Supreme Court should not attempt to hook on to unrelated constitutional provisions to justify their application of UCPs. While in such cases, it might make sense to reference relevant provisions, as the majority did in the *Judges Reference*, the real reasoning and justification for using UCPs should be grounded in the purpose of the Constitution itself and the structure of government that it prescribes. As Justice Abella put it in her *City of Toronto* dissent: "[S]tructural doctrine helps identify what the unwritten principles *are*, it does not limit their role."[245] In the *Judges Reference*, had Chief Justice Lamer not independently construed judicial independence as an actionable legal principle, sections 96–100 of the *Constitution Act, 1867* and section 11(d) of the *Charter* would have been operationally insufficient to fill the gap that was addressed in that case: constitutional application to statutory courts in a non-criminal adjudicative setting. Regardless of what one may think of the finding in that case,[246] the UCP of judicial independence was the necessary principle by which to analyze its facts.

The Supreme Court was deeply divided on this subject in *City of Toronto*. Four members of the Supreme Court would have upheld UCPs as independent, binding law capable of limiting the legislature. As such, we are likely to see this issue argued before the Supreme Court again. Furthermore, for the reasons I have described in this article, I suspect the Supreme Court will be forced to retreat from its blunt textual connection UCP standard.

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[245] *City of Toronto*, *supra* note 8 at para 172 [emphasis in original].

[246] The *Judges Reference* decision has been criticized as being self-serving as judges were, in effect, deciding on the remuneration parameters of other judges: see e.g. Leclair, "Unfathomable," *supra* note 24; Leclair, "Reconciling," *supra* note 54.

The most logical way to identify UCPs is the structural argumentation method. Connecting UCPs to the Constitution as a whole facilitates transparent and well-reasoned judgments. I argue that while UCPs may be perceived as transcending the legislature's law-making role, a close examination of the process of judicial reasoning on UCPs is consistent with the judiciary's position on the separation of powers. Modern society faces novel issues that did not arise within the technological and societal constraints at the time of the Constitution's genesis. Therefore, the Constitution contains a framework for courts to deal with these issues. To zealously defend the integrity of the Constitution, courts must seek guidance from its written provisions whenever possible. However, rare cases arise where members of the judiciary are forced to act as guardians of the Constitution[247] and look outside its text to ascertain key UCPs implicitly contained in its structure. While I do not attempt to definitively prescribe when these rare cases will come before the Supreme Court, applying UCPs is inevitably necessary to the judiciary's role in our government.

247 *Judges Reference*, *supra* note 21 at 23, 138, 150 (uses the "guardian" descriptor).