McGill Law Journal
Revue de droit de McGill

The Unwritten Principle of Democracy

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Volume 65, Number 2, December 2019

Unwritten Constitutional Norms and Principles: Contemporary Perspectives

URI: https://id.erudit.org/iderudit/1075517ar
DOI: https://doi.org/10.7202/1075517ar

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Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)
1920-6356 (digital)

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Cite this article

Pal, M. (2019). The Unwritten Principle of Democracy. *McGill Law Journal / Revue de droit de McGill*, *65*(2), 269–303. https://doi.org/10.7202/1075517ar

Article abstract

This article considers the content of the unwritten principle of democracy and its potential relevance in Canadian constitutional interpretation. The unwritten principles of federalism, the rule of law and constitutionalism, democracy, and the protection of minorities set out by the Supreme Court of Canada in the *Secession Reference* have received extensive academic attention. Much yet remains unknown, however, about the democracy principle. This article argues that we should interpret the unwritten principle as embodying a "thin" or procedural account of democracy tied to meaningful participation, rather than a "thick" version imposing specific outcomes or broader obligations. I argue that whatever the weight of a "thick" account of democracy, a "thin" understanding is preferable for filling in the content of a constitutional principle that has legal force. The central critiques of the use of unwritten principles in constitutional interpretation are 1) that they lack legitimacy and 2) that they are incoherent in relation to one another. Operationalizing a thin version of democracy in constitutional interpretation responds better to the claims that the unwritten principles lack legitimacy or are incoherent. A thin account still permits the unwritten principle to carry out its functional role in constitutional interpretation, such as enabling courts to fill in gaps in the text or to engage in structural reasoning. The article considers the implications of this approach for referendums and municipal elections.

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THE UNWRITTEN PRINCIPLE OF DEMOCRACY

*Michael Pal**

This article considers the content of the unwritten principle of democracy and its potential relevance in Canadian constitutional interpretation. The unwritten principles of federalism, the rule of law and constitutionalism, democracy, and the protection of minorities set out by the Supreme Court of Canada in the *Secession Reference* have received extensive academic attention. Much yet remains unknown, however, about the democracy principle. This article argues that we should interpret the unwritten principle as embodying a "thin" or procedural account of democracy tied to meaningful participation, rather than a "thick" version imposing specific outcomes or broader obligations. I argue that whatever the weight of a "thick" account of democracy, a "thin" understanding is preferable for filling in the content of a constitutional principle that has legal force. The central critiques of the use of unwritten principles in constitutional interpretation are 1) that they lack legitimacy and 2) that they are incoherent in relation to one another. Operationalizing a thin version of democracy in constitutional interpretation responds better to the claims that the unwritten principles lack legitimacy or are incoherent. A thin account still permits the unwritten principle to carry out its functional role in constitutional interpretation, such as enabling courts to fill in gaps in the text or to engage in structural reasoning. The article considers the implications of this approach for referendums and municipal elections.

Cet article examine le contenu du principe non écrit de la démocratie et sa pertinence potentielle dans le cadre de l'interprétation constitutionnelle canadienne. Les principes non écrits du fédéralisme, de la primauté du droit et du constitutionnalisme, de la démocratie, et de la protection des minorités, énoncés par la Cour suprême du Canada dans le *Renvoi relatif à la sécession du Québec*, ont fait l'objet d'une attention particulière de la part de la communauté académique. On ignore cependant encore beaucoup sur le principe non écrit de la démocratie. Cet article soutient que nous devrions interpréter ce principe comme incarnant une définition « étroite » ou procédurale de la démocratie, associée à une participation significative, plutôt qu'une définition « large » imposant des résultats spécifiques ou des obligations plus vastes. Nous soutenons que, quel que soit le poids d'une définition « large » de la démocratie, une compréhension « étroite » de celle-ci est préférable pour indiquer la teneur d'un principe constitutionnel ayant une force juridique. Les principales critiques de l'utilisation de principes non écrits dans l'interprétation constitutionnelle sont 1) qu'ils manquent de légitimité et 2) qu'ils sont incohérents les uns par rapport aux autres. L'opérationnalisation d'une définition « étroite » de la démocratie dans l'interprétation constitutionnelle répond mieux aux affirmations selon lesquelles les principes non écrits manquent de légitimité ou sont incohérents. Une définition « étroite » permet au principe non écrit de remplir son rôle fonctionnel dans l'interprétation constitutionnelle, notamment en permettant aux tribunaux de combler les lacunes des textes ou d'entreprendre un raisonnement structurel. Cet article prend en considération les conséquences de cette approche pour les référendums et les élections municipales. Cet article examine les considérations de cette approche à l'égard des référendums et des élections municipales.

* I would like to thank Jean Leclair, Mark Walters, Vanessa MacDonnell, Sarah Burton, Carissima Mathen, Se-shauna Wheatle, Grégoire Webber, Jacob Weinrib, Peter Oliver, Lorraine Weinrib, Bruce Ryder, Mariana Valverde, Craig Scott, Gabriel Edelman, Alexandra Flynn, and Thomas McMorrow for their generous feedback on the various versions of this article. The article was presented at the University of Ottawa as part of the symposium on unwritten principles and also at Queen's University and the University of Toronto. I am grateful to the participants at all three workshops.

Citation: (2019) 65:2 McGill LJ 269 — Référence : (2019) 65:2 RD McGill 269

Introduction

This article considers the content of the unwritten principle of democracy and its potential relevance in Canadian constitutional interpretation. The unwritten constitutional principles of federalism, constitutionalism and the rule of law, democracy, and the protection of minorities enunciated into being by the Supreme Court of Canada (the Court) in the *Secession Reference*[1] have received extensive academic attention. Much yet remains unknown, however, about the democracy principle. Post-*Secession Reference*, important and substantial scholarly work has taken on justifying or critiquing the use of unwritten principles in constitutional interpretation. The courts have assessed the meaning of the principles of federalism, the rule of law, and judicial independence in some detail. The content of the democracy principle has received less elaboration, apart from the Court's comments in the *Secession Reference*, and indirect definition implied from judicial interpretation of the related principle of parliamentary sovereignty.[2]

Democracy is an "essentially contested concept," meaning one that "inevitably involve[s] endless disputes about [its] proper uses on the part of [its] users."[3] There are radically competing notions of what "democracy" entails. Günter Frankenburg writes that "[t]he conceptual histories of democracy span more than 2,500 years and refer to a variety of normative orders, institutional arrangements of political decision-making, social and economic structures, and basic values of a community."[4] The contested nature of the concept and its political salience muddy what vision of "democracy"

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1 See *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*]. The principles obviously have a long intellectual and political history, and there are traces in earlier case law. The *Secession Reference* remains, however, a seminal moment for their articulation as constitutional principles. I use the term "principles" in this article primarily in the manner that it is used in the *Secession Reference*, rather than in the other diverse ways the term has been applied in legal theory.

2 See Vincent Kazmierski, "Draconian but Not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada" (2009) 41:2 Ottawa L Rev 245; Adam M Dodek, "Omnibus Bills: Constitutional Constraints and Legislative Liberations" (2017) 48:1 Ottawa L Rev 1 at 39.

3 WB Gallie, "Essentially Contested Concepts" (1956) 56 Proceedings Aristotelian Society 167 at 169. For an application of the term to democracy specifically, see David Collier, Fernando Daniel Hidalgo & Andra Olivia Maciuceanu, "Essentially Contested Concepts: Debates and Applications" (2006) 11:3 J Political Ideologies 211. For a recent claim that the contested nature of democracy does not preclude a meaningful role for the concept in constitutional interpretation, see Jo Eric Khushal Murkens, "Democracy as the Legitimating Condition in the UK Constitution" (2018) 38 LS 42 at 54.

4 "Democracy" in Michel Rosenfeld & Andrés Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 250 at 250. Frankenburg also writes that "democracy has oscillated between individualist, collectivist, and organicist notions" (*ibid* at 252). See also Murkens, *supra* note 3 (referring to democracy as a "multifarious concept" at 42).

should prevail in constitutional interpretation.[5] Perhaps resulting from this conceptual uncertainty, the scholarship has rarely tackled head-on the meaning of democracy as a legal principle in Canada.[6] Delineating the content of the unwritten principle for the purposes of constitutional interpretation from the concept of democracy in the abstract is, therefore, an important task.

Focusing on the content of the principle of democracy is also particularly relevant at this moment in Canadian constitutionalism. First, there is a lack of clarity regarding its content in the case law. Claimants have raised the principle recently in constitutional litigation in a number of different contexts, from electoral reform and referendums[7] to municipal elections and electoral boundaries,[8] among others. The unwritten principle of democracy remains of direct contemporary relevance.

Second, the Canadian Constitution is showing its age. The *Constitution Act, 1867* and even the more recent *Constitution Act, 1982* simply do not address important aspects of contemporary democracy, no matter the interpretive approach adopted to deciphering the text. There are gaps in the constitutional text in relation to the conduct of elections and representation, for example.[9] While textual silence in a constitution can of course be

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5 Jean Leclair writes, for example, "some of these [unwritten] principles are so abstract, that, by themselves, they provide no clear answer. Democracy and federalism, for instance, can be understood in many ways" ("Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389 at 409–10 [Leclair, "Unfathomable"]).

6 Two notable exceptions are Kazmierski, *supra* note 2 at 278–85 and Dodek, *supra* note 2.

7 See e.g. *Independent Contractors and Businesses Association v British Columbia (AG)*, 2019 BCSC 291 at para 15 [*Independent Contractors*].

8 See *Toronto (City of) v Ontario (AG)*, 2018 ONSC 5151 at para 12 [*Toronto (City of)* ONSC], rev'd in *Toronto (City) v Ontario (AG)*, 2018 ONCA 761 [*Toronto (City)* ONCA 2018]. See also Colin Feasby, "*City of Toronto v Ontario* and Fixing the Problem with Section 3 of the *Charter*" (28 September 2018), online (blog): *ABlawg* <ablawg.ca> [perma.cc/W8NA-3UC7] [Feasby, "Fixing the Problem"].

9 See the healthy debate on the amendment procedures in Part V of the *Constitution Act, 1982* in relation to the constitutional status of the federal electoral system. For the view that Parliament faces few constraints over electoral reform, see generally Emmett MacFarlane, "Constitutional Constraints on Electoral Reform: Why Parliament Is (Mostly) Free to Implement a New Voting System" (2016) 76 SCLR (2d) 399; Yasmin Dawood, "The Process of Electoral Reform in Canada: Democratic and Constitutional Constraints" (2016) 76 SCLR (2d) 353. For a more restrained view of Parliament's unilateral power, *cf* Michael Pal, "Constitutional Amendment After the *Senate Reference* and the Prospects of Electoral Reform" (2016) 76 SCLR (2d) 377; Hoi L Kong, "A Modest Case for Constitutional Limits on Electoral Reform in Canada" in Andrew Potter, Daniel Weinstock & Peter Loewen, eds, *Should We Change How We Vote?: Evaluating Canada's Electoral System* (Montreal: McGill-Queen's University Press, 2017) 177.

deliberate,[10] the basic fact of representative democracy remains underspecified in the Canadian Constitution. The lack of specificity with regard to "democracy" in the text means the unwritten principle has a lot of work to do. Expectations for constitutional protection of democracy have shifted quite rapidly since 1982, as have global trends in constitutional design of democracy. Many influential constitutions, for example, protect a much larger set of political rights and electoral institutions than the text of the Canadian Constitution.[11]

Third, hovering in the background of most debates in Canadian constitutional law is the reality that constitutional amendments requiring any degree of federal-provincial consensus are nearly impossible, politically.[12] Put bluntly, we are stuck with the text that we have for the near future. Without a realistic chance of amendment, there will continue to be pressure on courts to resolve constitutional disputes where the text provides little clear guidance or no longer reflects the social, economic, or demographic facts of Canada.[13] Given that the text in relation to democracy has gaps and

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10 See Laurence Tribe's discussion of silence as a choice in *Constitutional Choices* (Cambridge, Mass: Harvard University Press, 1985) at 42–44.

11 See generally Michael Pal, "Electoral Management Bodies as a Fourth Branch of Government" (2016) 21:1 Rev Const Stud 85 [Pal, "Fourth Branch"]; Svitlana Chernykh et al, "Constitutions and Election Management" in Pippa Norris, Richard W Frank & Ferran Martínez i Coma, eds, *Advancing Electoral Integrity* (Oxford: Oxford University Press, 2014) 94.

12 See Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 Alta L Rev 85 (amendments requiring unanimous consent (s 41 of the *Constitution Act, 1982*) or the 7/50 formula set out in the general procedure (ss 38 and 42) are non-starters, politically; bilateral (s 43) or unilateral amendments by Parliament alone (s 44) remain possible in practice, though over limited subject matter). On the connection between the procedures of amendment and the use of unwritten principles, see Jean Leclair, "Constitutional Principles in the *Secession Reference*" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 1009 at 1013–23 [Leclair, "Constitutional Principles"].

13 David Schneiderman argues instead that the principles should best be understood as the product of a specific time and set of strategic imperatives of the Supreme Court in "Unwritten Constitutional Principles: Genuine or Strategic?" in Rosalind Dixon & Adrienne Stone, eds, *The Invisible Constitution in Comparative Perspective* (Cambridge, UK: Cambridge University Press, 2018) 517. There is much evidence that the Court behaved strategically in the *Secession Reference*. On this point, see Leclair, "Constitutional Principles", *supra* note 12 ("[h]ow did the Court go about deciding [the *Reference*]? Simply resorting to the written provisions of the *Constitution Act, 1982* risked alienating Quebecers even further, as it was precisely the legitimacy of the constitutional order instantiated by this reform that was challenged" at 1020). See also Jean Leclair, "Legality, Legitimacy, Decisionism and Federalism: An Analysis of the Supreme Court of Canada's Reasoning in *Reference re Secession of Quebec, 1998*" in Alberto López-Basaguren & Leire Escajedo San-Epifanio, eds, *Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain* (Cham: Springer, 2019) 63 at 77.

is out of date in relation to global practice, there is likely to be ongoing impetus to resort to the unwritten principle.[14]

This article argues that we should interpret the unwritten principle as embodying a "thin" or procedural account of democracy tied to meaningful participation, rather than a "thick" version imposing specific outcomes or broader obligations. The article proceeds as follows. Part I details the ways in which "democracy" has manifested itself in the Canadian Constitution and the gaps in the text. Part II presents the most forceful critiques raised about the use of unwritten principles in constitutional interpretation, namely, that (1) judicial review based on unwritten principles lacks legitimacy, and (2) there is an "interrelatedness" problem, in that the principles are incoherent in relation to one another.[15] Part III engages with these critiques to argue that a "thin" or procedural version of democracy best responds to the legitimacy and incoherence critiques. In relation to the legitimacy critique, a thin version of democracy is compatible with the existing constitutional text and has less scope for the arbitrary imposition of any particular judge's policy preferences. In relation to the incoherence critique, I argue that a thin version of democracy is a better fit with the other principles. A thin version of democracy would require meaningful participation through fair procedures in what I call *democratic events*. This interpretation of the principle furthers the values of political accountability and political equality. Part IV then applies this thin understanding of the unwritten principle in two contexts either not addressed, or only partially so, by the constitutional text: 1) referendums; and 2) municipal elections. I outline how the unwritten principle should result in fair procedures in both of these democratic events. I conclude the article by briefly considering the future of the unwritten principle of democracy.

I. Democracy in the Canadian Constitution: A Brief Overview

The *Constitution Act, 1867* is parsimonious in its treatment of democracy. It does not expressly determine democracy's contours in any great detail, largely because of the assumption that Canada would follow the British model of an unwritten constitution. Accordingly, parliamentary sovereignty was the pre-eminent feature of democracy.[16] The text creates a

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14 See generally Vivek Krishnamurthy, "Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles" (2009) 34:1 Yale J Intl L 207 (the author here calls the unwritten principles of the Canadian Constitution "a *flexibility device* permitting constitutional change without using the onerous amendment procedures" at 209). See also Thomas McMorrow, "Denying and Reckoning with Implicit Law" (Paper delivered at the Conference on Constitution-Making and Constitutional Change, University of Texas at Austin, 18 January 2020) [unpublished].

15 Leclair, "Unfathomable", *supra* note 5.

16 See Kazmierski, *supra* note 2.

bicameral Parliament with the qualifications for Senators[17] set out along with other features of the Upper House.[18] Constitutional conventions largely determine the relationship between the different branches of government.[19] Parliament controls its own internal operations through parliamentary privilege[20] and the operation of the conventions. The provisions on federalism delineate separate, democratically elected orders of government accountable to different publics.[21] Where the text does go into detail is on representation, particularly geographic representation. The text establishes the names, number, and boundaries of the early electoral districts, as well as the number of seats assigned to each province in the House[22] and Senate.[23]

The *Constitution Act, 1982* addressed the functioning of legislatures by setting limits on their traditional freedoms.[24] Parliament and each legislature are required to sit at a minimum once per year[25] and cannot continue more than five years between elections,[26] except in circumstances of "war, invasion or insurrection."[27] The procedures on constitutional amendment in Part V of the *Constitution Act, 1982* also reinforce the focus from 1867 on representation of the provinces in a diverse federation. The smaller provinces have a guarantee in Part V that the existing rule that they can have no fewer MPs than they have Senators can only be changed with unanimous consent.[28] The "proportionate representation" of the provinces

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17 See *Constitution Act*, *1867* (UK), 30 & 31 Vict, c 3, s 23, reprinted in RSC 1985, Appendix II, No 5.

18 See *ibid*, ss 21–36.

19 See Peter C. Oliver, "'A Constitution Similar in Principle to That of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019) 65:2 McGill LJ 207.

20 See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, 2nd ed (Don Mills, ON: Oxford University Press, 2014) at 125.

21 See *Constitution Act, 1867*, *supra* note 17, ss 91–92.

22 See *ibid*, s 40.

23 See *ibid*, s 23.

24 Also relevant are the provisions in sections 16–23 on language rights, which include a right to use English or French in Parliament and in New Brunswick's Legislative Assembly (s 17), the obligation to produce "statutes, records, and journals" of Parliament and the New Brunswick Assembly in both official languages (s 18), and rules on communicating with the public (s 20).

25 See *Constitution Act, 1982*, s 5, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

26 *Ibid*, s 4(1).

27 *Ibid*, s 4(2). It is possible that Parliament could by legislation seek to extend a parliamentary term beyond five years for reasons others than those listed in section 4(2). It is unclear whether courts would apply section 1 of the *Charter* to assess the limitation as it does for rights and freedoms or whether that would be seen as in conflict with the language of section 4(2) requiring the presence of a "war, invasion, or insurrection."

28 See *ibid*, s 41(b).

in the House set out in section 51 of the *Constitution Act, 1867* can only be altered according to the 7/50 formula.[29] Part V as interpreted by the Court also locks in the method of selecting Senators, as the Court has read down the unilateral amendment procedure in section 44.[30]

The *Canadian Charter of Rights and Freedoms* brought with it a host of entrenched rights and freedoms of direct relevance to elections.[31] Section 3 provides the right to vote in federal and provincial elections as well as to stand as a candidate. Parliament and the provincial legislatures frequently treated the right to vote as a privilege within their purview to restrict or rescind, prior to 1982.[32] Outright bans on voting by a defined group of citizens appear impermissible.[33] The only remaining group of citizens barred from voting are individuals under the age of eighteen.[34] Courts have also interpreted the provision as protecting much more than simply the right to cast a ballot. Section 3 protects "effective representation" in the allocation of the number of electoral districts and the design of their boundaries.[35] The "meaningful participation" of electors through the political parties that they choose to support is also included.[36] The text appears on its face to limit the application of section 3 to federal and provincial elections. It has been interpreted to date to exclude territorial, municipal, school board, and band council elections.

Freedom of political expression also has obvious and direct implications for democracy. The courts have repeatedly held that political expression,

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29 *Ibid*, s 42(1)(a).

30 See *Reference re Senate Reform*, 2014 SCC 32 at paras 68–69.

31 See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 25.

32 See *ibid*, s 3; Elections Canada, *A History of the Vote in Canada*, 2nd ed (Ottawa: Chief Electoral Officer of Canada, 2007) at 94.

33 See *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 (the Court struck down restrictions on prisoner voting rights) [*Sauvé #2*]; *Frank v Canada (AG)*, 2019 SCC 1 (the Court also struck down provisions denying the voting rights of long-term non-resident citizens) [*Frank*].

34 See *Canada Elections Act*, SC 2000, c 9 ("[e]very person who is a Canadian citizen and who on polling day is 18 years of age or older is qualified as an elector", s 3). The Alberta courts upheld the age limit in *Fitzgerald v Alberta*, 2002 ABQB 1086, aff'd 2004 ABCA 184. The issue has never reached the Supreme Court directly. Brown and Côté JJ, dissenting in *Frank*, *supra* note 33 at paras 144–45, assert that the majority's reasoning with regard to residence is inconsistent with an age limit. Though the intent of these paragraphs in the dissenting opinion appears to have been to point out holes in the majority's reasoning, if they are correct the implication is that the age limit may be vulnerable to a constitutional challenge.

35 See *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158 at 183–89, 81 DLR (4th) 17 [*Reference re Provincial Electoral Boundaries*].

36 See *Figueroa v Canada (AG)*, 2003 SCC 37 at paras 39–47 [*Figueroa*].

including the freedom to criticize the government, is at the very core of democracy. However, the Court has upheld spending caps on political advertising as reasonable limits on expression.[37] Where section 3 does not apply, as with a school board election,[38] referendum,[39] or municipal vote,[40] claimants have at times argued that the content otherwise present in the right to vote should also be found within section 2(b), though largely without success.

The right to equality in section 15 also indirectly relates to elections. Discrimination against voters on prohibited grounds is barred. Section 15 has played an increasing role in litigation surrounding band council elections[41] under the *Indian Act*,[42] where section 3 does not apply.

The text of the Constitution with regard to democracy reflects the times at which the particular provisions were drafted and its British colonial heritage. There is much more that could be said about the operation of Canadian democracy and the particular approach reflected in the text of the Constitution. For my purposes, however, it is sufficient to draw the following conclusions.

First, the Canadian Constitution is incomplete with regard to democracy. The text still contains gaps.[43] Not all matters ignored or only covered partially by the text have been resolved through constitutional conventions or the broad language in sections 3, 2(b), and 15. The most obvious gap is that the text does not directly specify the electoral system. Despite the size of some cities and the current importance of municipal government, much of the structure of municipal elections remains vulnerable to the whims of

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37 See *Harper v Canada (AG)*, 2004 SCC 33 [*Harper*]. See also Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 96–104.

38 See *Baier v Alberta*, 2007 SCC 31 at para 39.

39 See *Independent Contractors*, *supra* note 7.

40 See *Toronto (City of)* ONSC, *supra* note 8 at para 43.

41 See *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30; Alicja Puchta, "*Quebec v A* and *Taypotat*: Unpacking the Supreme Court's Latest Decisions on Section 15 of the *Charter*" (2018) 55:3 Osgoode Hall LJ 665 at 688–89.

42 RSC 1985, c I-5.

43 I acknowledge that the identification of a "gap" and what consequences would flow for constitutional interpretation is contested. What I mean here by using the term "gap" is an issue or topic that would likely be addressed by constitutional drafters acting today, which was not considered or not considered important enough to commit to writing at the actual time of drafting of the constitutional document. On gaps and constitutional interpretation, see Han-Ru Zhou, "Legal Principles, Constitutional Principles, and Judicial Review" (2020) 67:4 Am J Comp L 889 at 909–12. There is surprising agreement even between originalists and living constitutionalists on the role of judges in such situations, at least for some kinds of gaps: see Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42:1 Queen's LJ 107 at 144; Aileen Kavanagh, "The Idea of a Living Constitution" (2003) 16:1 Can JL & Jur 55 at 80.

provincial political majorities.[44] The inheritance of the Westminster representative model de-emphasized mechanisms of direct democracy, such as referendums. A host of issues covered in many newer constitutions, including the existence and powers of a non-partisan commission to administer elections, voter registration, electoral district design, and so on, are simply not included.[45] Newer constitutions are much more likely to contain detailed prescriptions in the text. From a comparative perspective, the focus in contemporary constitutionalism on ensuring fair election administration is absent.[46]

Second, the text of the *Charter* in relation to democracy and elections requires much from courts. Courts have had to go beneath the text to the foundational values of the Constitution and engage in structural reasoning in order to reach outcomes that protect against the imposition of unfair electoral rules by legislative bodies. Admittedly, the jurisprudence under section 3 striking down bans on voting by adult citizens, most recently in *Frank*, do largely turn on the text.[47] Section 3 enfranchises "[e]very citizen." In *Frank*, the Court took this phrasing to mean the framers were signalling that restrictions on voting based on residence violated the right to vote and must be justified under section 1. It is hard to say credibly, however, that the courts have stuck closely to the text in the jurisprudence on section 3 and section 2(b). The Court has made it clear that the right to vote, for example, means much more than simply the right to put a piece of paper in a ballot box, and instead protects the background factors that ensure an election is fair.[48] It is necessary for courts to continually protect the background structures of democracy so that the public can hold elected representatives accountable at election time.[49] A consequence of this conclusion, however, is that courts are obliged to engage in structural reasoning that requires consideration of a host of factors—including what kind of democracy should be protected in Canada—that are not dictated squarely by the text.

Third, no one particular theory of democracy has prevailed. This conclusion is perhaps not surprising given the multiple constitutional documents, disparate provisions, and the evolution of the case law over a relatively long period. The Constitution contains egalitarian measures, such as the right to vote provided in relatively untrammelled terms to all citizens,

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44 The *Constitution Act, 1867*, *supra* note 17 includes municipalities in the list of provincial powers ("Municipal Institutions in the Province", s 92(8)).

45 See e.g. *The Constitution of the Republic of South Africa, 1996*, No 108 of 1996, ch 9.

46 See generally Pal, "Fourth Branch", *supra* note 11 and Chernykh et al, *supra* note 11.

47 See *Frank*, *supra* note 33 at paras 25, 29. At para 25, Wagner CJ cites *Sauvé #2*, *supra* note 33 at para 11.

48 See *Figueroa*, *supra* note 36 at paras 19–37, 50–58.

49 I have argued elsewhere that it is part of the counter-majoritarian function of courts to do so: see Michael Pal, "Breakdowns in the Democratic Process and the Law of Canadian Democracy" (2011) 57:2 McGill LJ 299 [Pal, "Breakdowns"].

and those that are elitist, such as the unelected Senate. It creates multiple democratic systems within the federation, which need not operate in identical fashion. The *Charter* does set clear markers for democratic rights and freedoms, but there remains room for experimentation and different institutional approaches, within the framework of representative democracy and parliamentary supremacy. There is no one uniform vision for democracy. The Court's definition of the unwritten principle of democracy in the *Secession Reference* reflects these plural heritages. The Court's summary of the principle contains elements that focus on its Westminster lineage and representative democracy, others that accept the particular idiosyncrasies of the Canadian experience such as the unelected Senate, and gestures toward liberal, direct, and deliberative democratic theories.[50] The Court sought to avoid boxing itself in to any particular account of democracy.

All of this suggests that there is ample space for the unwritten principle of democracy to operate in the Canadian constitutional order. The presence of gaps, broad language in the text, and the absence of any single prevailing theory, in an aging Constitution that cannot easily be amended, all indicate an important functional role for the principle in constitutional interpretation.

II. Critiques of the Unwritten Principles

If there is space for the principle of democracy to do work in constitutional interpretation, the question that then arises is what should be its content? I will argue in Part III that a "thin" account focused on meaningful participation and procedural fairness is the most appropriate—rather than a "thicker" theory—given that the unwritten principle will be applied by judges engaged in constitutional interpretation. Before arriving at that argument, it is necessary to consider the critiques in the scholarship on the use of unwritten principles in constitutional interpretation, which I do in Part II below. In my view, a thin, procedural account of the principle of democracy is better able to respond to the arguments against the use of unwritten principles more generally.

We now have more than two decades of scholarship post-*Secession Reference* that has engaged with the Supreme Court's interpretation of the role of unwritten principles in the Canadian constitutional order.[51] The two major lines of critique of the use of unwritten constitutional principles remain those set out by Jean Leclair in 2002, which he termed the legitimacy and

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[50] See *Secession Reference*, *supra* note 1 at paras 61–69.

[51] The major cases post-*Secession Reference* on unwritten principles include *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59*; British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 [*Imperial Tobacco*]*; Babcock v Canada (AG)*, 2002 SCC 57. There are many more cases if one includes those on judicial independence and co-operative federalism.

interrelatedness arguments.[52] In brief, in the first argument, it is illegitimate for courts to apply unwritten principles in constitutional interpretation or, more narrowly, to apply them to invalidate statutes duly passed by the legislature. In the second set of arguments, the uncertain relationship and shifting boundary lines between principles, given their unwritten nature, inevitably results in incoherence and arbitrariness in their application. I engage with each of the two critiques in turn.

A. Legitimacy Critique

The legitimacy critique has multiple strands. They focus on the unwritten nature of the principles, separation of powers concerns, and the worry that they permit natural law to impede the democratically legitimate positive legal order. I set each out in turn.

One part of the legitimacy critique disapproves of the *unwritten* nature of the principles.[53] At its root is the claim that unwritten principles are judge-made constitutional law, fundamentally at odds with the notion of a written constitution. Unwritten principles are said to diverge from constitutional conventions, which have always been part of the Canadian constitutional order, because the latter are only politically enforceable. Like constitutional conventions, in this argument, the boundaries of principles are inevitably fuzzy, given their unwritten form. The legal enforcement of unwritten principles through judicial review, however, makes them problematic in a way that conventions are not.

Another strand of the legitimacy critique emphasizes separation of powers concerns. As this argument goes, unwritten principles transfer power to the courts that is properly within the ambit, first, of the framers, and then, of legislators. They provide the judicial hook with which to pull aside text that the courts find inconvenient. The acceptance of unwritten principles in the constitutional order, especially if used to invalidate statutes, allows judges to impose their own policy preferences, rather than those of the electorate or their representatives.[54] Former Chief Justice Beverley McLachlin articulates the heart of the claim as being that unwritten

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52 See "Unfathomable", *supra* note 5.

53 Mark Walters summarizes this argument, before ultimately disagreeing with it, in "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008) 245 at 247–48 [Walters, "Written Constitutions"].

54 See Leclair, "Unfathomable", *supra* note 5 at 430.

principles are a "barely concealed power grab by activist judges."[55] The unwritten principles provide nearly infinite room from which to stray from the constitutional text in order to suit judicial whim, on this account.

A third strand of the legitimacy critique is what Mark Walters has called the "naturalist" argument.[56] In this argument, unwritten principles allow judges to smuggle natural law into a positive legal order that is otherwise antithetical to natural law. Unwritten principles are often seen as a "modern reincarnation of the ancient doctrines of natural law."[57]

All three of these critiques rest on the same fundamental point—that constitutional interpretation relying on unwritten principles is illegitimate and should be avoided or, at least, constrained. They also share the common view that there is a hierarchy of misuses of unwritten principles. The most egregious misuse for those concerned about legitimacy is when courts apply unwritten principles to invalidate the clear will of the legislature as expressed in a statute. Their use to interpret existing text or to fill in true "gaps" in the text is problematic, on this view, but generally less so than invalidating statutory text.

The responses to legitimacy-based critiques of unwritten principles have been legion, from a variety of approaches.[58] Martin Loughlin argues that constitutional silence is inevitable, and even desirable, which implies that unwritten principles are as well.[59] T. R. S. Allan claims that "[t]he written law is always underpinned and informed by the unwritten, reflecting the discourse of reason."[60] From a comparative perspective, Vivek Krishnamurthy writes that unwritten principles operate "[i]n every modern democratic constitutional order,"[61] and that the Canadian principles are relatively uncontroversial, as "most any constitutional court in a modern federal democratic state would probably have come up with the same

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55 "Unwritten Constitutional Principles: What is Going On?" (2006) 4:2 New Zealand J Private & Intl L 147 at 149.

56 "Written Constitutions", *supra* note 53 at 247. See also Mark Walters, "The Common Law Constitution in Canada: Return of *Lex non Scripta* as Fundamental Law" (2001) 51:2 UTLJ 91 at 136.

57 McLachlin, *supra* note 55 at 149. Former Chief Justice McLachlin summarizes unwritten principles as "fundamental norms of justice so basic that they form part of the legal structure of governance and must be upheld by the courts, whether or not they find expression in constitutional texts" (*ibid* at 148).

58 See e.g. Walters, "Written Constitutions", *supra* note 53.

59 See "The Silences of Constitutions" (2018) 16:3 Intl J Constitutional L 922.

60 "Constitutional Justice and the Concept of Law" in Huscroft, *supra* note 53, 219 at 235.

61 *Supra* note 14 at 234.

list."[62] David Dyzenhaus states that in order to "uphold the rule of law ... [judges must] interpret the positive law of a legal order in light of their understanding of unwritten constitutional values."[63]

Those scholars who argue that unwritten principles are inevitable even in the presence of written text have the better argument over those who claim that their use is illegitimate. Even if there are no true "silences" in the positive law, judicial reasoning about the content of the text on the page must rely to some extent on background values. The lack of positive law with a "determinate content"[64] is a circumstance that confronts Canadian judges in particular. Canadian positive law is inadequate to resolve many constitutional disputes, given the gaps in text, including around what content to attribute to the democracy-related provisions in the Constitution.

B. Interrelatedness

A second major line of critique is what Jean Leclair calls "interrelatedness."[65] On this view, the result of having multiple, unwritten principles is incoherence. The inherently abstract nature of each principle and the unclear boundary lines between them are a recipe for conceptual confusion.

Leclair argues that "some of these [unwritten] principles are so abstract, that, by themselves, they provide no clear answer. Democracy and federalism, for instance, can be understood in many ways."[66] On this view, if the principles are to have legal force,[67] and cannot be exclusively understood in terms

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62 *Ibid* at 235 (to Krishnamurthy, these principles play key "functional purposes," which explains their now commonplace status in "increasingly generic" post–World War II constitutionalism).

63 "The Unwritten Constitution and the Rule of Law" in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Markham: LexisNexis Canada, 2004) 383 at 384.

64 *Ibid* at 389: "The compromises positivist judges make are forced on them by the fact that the Benthamite dream of a completely codified legal order in which all law is positive law with a determinate content was never realized."

65 "Unfathomable", *supra* note 5 at 392, 400.

66 *Ibid* at 410.

67 I do not mean to imply that there is necessarily a strict separation between law and morality. H. L. A. Hart famously claimed that there is such a separation in his espousal of legal positivism in "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593 at 601, though his views on the subject are more nuanced than often recognized: see e.g. Leslie Green, "Positivism and the Inseparability of Law and Morals" (2008) 83:4 NYUL Rev 1035 at 1035–36 and Green's "Introduction" to the revised edition of Hart's *Concept of Law*, 3rd ed (Oxford: Clarendon Press, 2012) at *xxxiv*. One variant of legal positivism, inclusive legal positivism, acknowledges that constitutions may build in moral values in the specific text that they employ, such as "equality" or other broad terms. On inclusive legal positivism, see generally WJ Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994) and Jules Coleman, "Negative and Positive Positivism" (1982) 21:1 J Leg Stud 139.

of ideal-type political theory,[68] then they must have a discernible content and be justiciable in the sense of being subject to consistent judicial application. Being principles, however, they must be general in character. Their inevitable abstractness means they are likely to slip through the hands of anyone attempting to fix a particular, concrete meaning. Potential disputes about the boundaries of the four unwritten principles from the *Secession Reference*—democracy, federalism, the rule of law and constitutionalism, and the protection of minorities—are inevitable. Where does democracy begin and federalism end, for example? On this account, the inevitability of conceptual dissonance undermines the very presence of unwritten principles. The risk of conflict between principles means that they may even be "irreconcilable."[69] The fact that there are more principles than the four set out in the *Secession References* magnifies the possibilities for conflict.[70] Their abstractness and possible irreconcilability militate against their usefulness as legal principles.[71]

This irreconcilability raises another problem, which is that courts may favour one principle over the others in the case of conflict. John Tasioulas has suggested that as a response to conflict between unwritten principles, everything deemed desirable is sometimes crammed into one principle at the expense of the others. One of the unwritten principles may eventually dominate and, indeed, come to incorporate all of the perceived beneficial content of other related principles.[72] Tasioulas has thick versions of the rule of law in mind here, but the risk that some principles will atrophy while others predominate has more general resonance. Jo Murkens appears to advocate for democracy to take on the role as the pre-eminent principle in the United Kingdom, for example, putting it ahead of its competitors, especially parliamentary sovereignty.[73]

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68 We might mean "democracy" as an ideal, for example, as involving deliberation of a type that does not exist in any current jurisdiction commonly understood as being a democracy.

69 Leclair, "Unfathomable", *supra* note 5 (where Leclair argues that democracy and the rule of law in particular may be "irreconcilable" at 417–18).

70 See Walters, "Written Constitutions", *supra* note 53 at 264 for a summary, which includes judicial independence, human rights, Indigenous self-government, and parliamentary privileges.

71 John Tasioulas argues that the rule of law principle must be internally coherent, in that it has a defined internal content, but also that it must respect the requirement of "pluralism." By "pluralism" he means the presence of multiple principles, such that each principle has content that stands on its own (see "The Rule of Law" in John Tasioulas, ed, *The Cambridge Companion to the Philosophy of Law* (Cambridge, UK: Cambridge University Press, 2020) 117).

72 See *ibid.*

73 See *supra* note 3 (here, Murkens frames democracy as "the conceptual starting point or the 'indispensable condition' on which the viability of all other constitutional concepts, including parliamentary sovereignty, depend" at 42).

The Court in the *Secession Reference* anticipated such critiques about the relationship of the principles to one another. It held that "[t]hese defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."[74] The Court emphasized the mutually reinforcing content of the principles to head off attacks about fuzzy boundaries and interrelatedness. It rejected the idea of a "trump" in light of concerns of the type raised later on by Tasioulas. The Court did live up to its stated method in the way that it defined the principles, for example by holding that majority rule is a key part of democracy, but that democracy was not equivalent to majority rule, so as to protect territorial or other minorities.[75]

The problem with this schema for the unwritten principles is that it multiplied concerns about legitimacy and incoherence. Apart from respect for federalism, the general notion of citizen participation and a universal franchise, and protection of minorities from tyranny of the majority, the Court drew few firm limits on the principle of democracy. The precise relationship between democracy and parliamentary sovereignty, for example, remains unclear. In the interrelatedness critique, the Court provided a recipe for conflict between the principles, rather than for avoiding one.

C. Implications for the Content of Unwritten Principles

The critiques and defences of unwritten principles that emerged post-*Secession Reference* focused largely on whether the courts should use them in constitutional interpretation and, if so, how they should interact with the positive legal order. These are weighty matters deserving of the sustained scholarly attention that they received. There is also in my view a need to focus on the particular *content* of the unwritten principles, at least with regard to democracy.

There are two main ways in which the unwritten principle of democracy can feature in constitutional interpretation. It can inform the interpretation of the written constitution, for example the provisions of the *Charter* related to voting and political expression. It is difficult to envision persuasive reasoning by courts about the meaning of the right to vote, freedom of political expression, or equality in political life without some deeper sense of democracy animating the interpretation of the text. More controversially, the principle could also have its own independent normative force. This second use of the principle is particularly relevant if there are constitutional gaps that need filling because of the evolution of subject matter

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74 *Secession Reference*, *supra* note 1 at para 49, cited in Leclair, "Unfathomable," *supra* note 5 at 418.

75 See *Secession Reference*, *supra* note 1 at para 63.

covered in the text beyond anything contemplated by the framers or the emergence of truly new issues.

If we accept the general point that unwritten principles are inevitably part of constitutional interpretation, because no positive legal order can exist without reasoning behind the text and all such orders are inevitably incomplete, determining the content of such principles becomes an important project.[76] While I agree with the general point that unwritten principles are necessary and unavoidable features of constitutional interpretation, in my view we must still respond to the legitimacy and interrelatedness critique in how we define the content of those principles. The two main critiques have purchase if principles mean whatever judges want them to mean in the moment, or if their scope is unbounded. In other words, the content of the unwritten principles must be defined, but also constrained. Constraining the content of the democracy principle, so that it may fulfill its purpose in constitutional interpretation without lending credence to the legitimacy and interrelatedness critiques, remains an unfinished task.[77] Courts and scholars have debated the possible meanings of federalism[78] and the rule of law[79] as legal principles in the Canadian context quite extensively. By contrast, the *Secession Reference* provided only a vague outline as to the meaning of democracy in constitutional interpretation and advances since then have been incremental.

The challenge is to define the democracy principle so that it has the scope to inform constitutional interpretation in a meaningful way, but narrowly enough so as to not push aside the text or swallow up the other unwritten principles. I turn in the next section to the task of setting out an account of the content of the principle of democracy capable of meeting the legitimacy challenge and the interrelatedness critique.

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76 I am making this argument specifically about constitutional interpretation in Canada. A particular constitution may of course set out democracy in more or less detail and the positive order or political tradition may rely on thinner or thicker visions of democratic practice. Unwritten principles would seem to inevitably play some role in interpretation given the fact that the positive order is always incomplete.

77 The most thorough explanation of the principle comes from Kazmierski, *supra* note 2, where he argues that parliamentary supremacy and judicial independence have been prioritized and placed in a hierarchy above democracy by the courts. See the discussion of this article in Dodek, *supra* note 2 at 38–39, where he suggests Kazmierski is correct to criticize the jurisprudence of the Supreme Court that downshifts the importance of the democracy principle.

78 See Schneiderman, *supra* note 13 at 527, 539; Noura Karazivan, "Cooperative Federalism in Canada and Quebec's Changing Attitudes" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 136.

79 See *Imperial Tobacco*, *supra* note 51 at 57–77; Peter Hogg & Cara F Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55:3 UTLJ 715.

III. The Content of the Democracy Principle

In this section, I argue for a "thin," procedural understanding of democracy as a means for limiting the scope of the unwritten principle while still allowing it to do meaningful work in constitutional interpretation. I will first briefly set out the differences between "thin" and "thick" accounts of democracy and argue for why a procedural account is preferable in constitutional interpretation. I will then set out a version of a "thin" account focused on meaningful participation and fair procedures.

A. Thin Versus Thick Democracy

There is a longstanding debate in democratic theory about whether "thick" or "thin" versions of democracy are preferable. In brief, thin versions of democracy emphasize the procedural element of democracy and the institutions that reflect fundamental values, particularly the political equality of adult citizens. This branch of democratic theory puts a premium on the presence of competitive elections as a necessary, though admittedly not sufficient, condition for democracy. Robert Dahl in this tradition writes about the criteria[80] or minimum conditions for democracy to be possible.[81] Phillippe Schmitter and Terry Karl have also famously adopted a thin or procedural account of democracy, stating that "[m]odern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives."[82] These procedural accounts owe much to Schumpeter, who emphasized the necessity of competition for elected office.[83] Constitutional scholars have resuscitated

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[80] See *On Democracy* (New Haven: Yale University Press, 1998) at 37–38. Dahl sets out five criteria, largely tied to procedures and rights rather than substantive outcomes.

[81] See *Dilemmas of Pluralist Democracy: Autonomy vs. Control* (New Haven: Yale University Press, 1982) at 10–11. Dahl lists seven of them:

> 1. Control over government decisions about policy is constitutionally vested in elected officials. 2. Elected officials are chosen in frequent and fairly conducted elections in which coercion is comparatively uncommon. 3. Practically all adults have the right to vote in the election of officials. 4. Practically all adults have the right to run for elective offices in the government ... 5. Citizens have a right to express themselves without the danger of severe punishment on political matters broadly defined ... 6. Citizens have a right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by law. 7. ... [C]itizens also have a right to form relatively independent associations or organizations, including independent political parties and interest groups.

[82] "What Democracy Is... and is Not" [Summer 1991] J Democracy 3 at 4.

[83] See Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (London, UK: Routledge, 2010) at 241–51.

procedural accounts of democracy in order to justify judicial review that protects the background or "structural" conditions of politics.[84]

Advocates of "thicker" versions of democracy criticize procedural accounts for focusing on inputs rather than outputs. Thin democracy is unduly focused on elections[85] and incorrigibly elite-driven, according to thick accounts. Ronald Dworkin in an exchange with Jürgen Habermas famously dismissed procedural accounts as mere "statistical democracy."[86] Thick accounts vary in their prescriptions or understanding of what true democracy is, but unite in seeking something more than formal mechanisms for participation, equality enshrined in formal liberal rights and institutions, and competitive elections.

Some thick versions of democracy pick up the procedural emphasis on equality to argue that democracy must entail relatively equal outcomes.[87] W. J. Waluchow argues for a Dworkinian "constitutional conception of democracy" to prevail in understanding the relationship between judicial review and democracy in Canada.[88] Participatory democrats argue that true democracy mandates dramatically increased individual participation,[89] including mechanisms of direct democracy.[90] Feminist theorists have detailed the inadequacies of democracy without deeper commitments to institutional transformation and equality of outcomes.[91]

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84 See Samuel Issacharoff & Richard H Pildes, "Politics As Markets: Partisan Lockups of the Democratic Process" (1998) 50:3 Stan L Rev 643; Stephen Gardbaum, "Comparative Political Process Theory" 18 Intl J Constitutional L [forthcoming in 2020].

85 See Schmitter & Karl, *supra* note 82 at 6 (this critique is sometimes framed as being against "electoralism").

86 "Constitutionalism and Democracy" (1995) 3:1 European J Philosophy 2 at 3–5, 7.

87 For a helpful articulation of the differences between procedural and outcome-based democracy, see Cécile Fabre, "Constitutional Social Rights and Democracy" in *Social Rights Under the Constitution: Government and the Decent Life* (Oxford: Oxford University Press, 2000) ch 4. Fabre sets out procedural democracy at 111–15 and rejects Dworkin's criticism of statistical democracy at 116–18.

88 *A Common Law Theory of Judicial Review* (Cambridge, UK: Cambridge University Press, 2007) at 107 and generally from 106–17 [Waluchow, *Common Law Theory*]. Christine Sypnowich offers a sophisticated critique of Waluchow's constitutional conception of democracy in "Ruling or Overruled? The People, Rights, and Democracy" (2007) 27:4 Oxford J Leg Stud 757 at 764–68.

89 See Carole Pateman, *Participation and Democratic Theory* (London, UK: Cambridge University Press, 1970) at 21.

90 See NW Barber, *The Principles of Constitutionalism* (Oxford, UK: Oxford University Press, 2018) at 148–53 (wherein the author discusses direct democracy in relation to constitutionalism).

91 See Drude Dahlerup, *Has Democracy Failed Women?* (Cambridge, UK: Polity Press, 2018) ch 1(k) on "Defining Democracy"; Anne Phillips, "Must Feminists Give Up on Liberal Democracy?" (1992) 40:1 Political Studies 68 at 68; Tracy Higgins, "Democracy and Feminism" (1997) 110:8 Harv L Rev 1657 at 1683.

Among the most prominent counterpoints to thin accounts in recent years has been deliberative democratic theory.[92] While there are many versions, deliberative democrats emphasize reasoned debate and consensus decision-making based on mutually acceptable public reasons, instead of majority-rule procedures such as elections.[93] Rather than aggregating the raw preferences of individuals through voting where the winner takes all power, deliberative democrats seek to implement reasoned, public-minded debate as a precondition for meaningful political decisions based on assessments of the collective good. The Supreme Court's decision in the *Secession Reference* reflects this scholarship in its emphasis on democracy as entailing "consent"[94] developed through a "continuous process of discussion,"[95] and by recognizing that "the need to build majorities necessitates compromise, negotiation, and deliberation."[96]

Thin accounts of democracy highlight the minimum conditions for democracy to exist. This focus provides a set of procedures and institutions whose sufficiency advocates of thick democracy dispute. Proponents of thick accounts, however, typically do not propose to do away entirely with the procedures and institutions set out in procedural versions.[97] They instead believe that *true democracy* requires supplementing those conditions. There is some common ground then, between thin and thick accounts. Deliberative democrats, for example, generally do not propose to do away entirely with voting in competitive elections as a decision-mechanism, despite their antipathy to preference aggregation.[98]

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92 From what is now a massive literature, see especially Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004); John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000); Andre Bächtiger et al, eds, *The Oxford Handbook of Deliberative Democracy* (Oxford: Oxford University Press, 2018). For a recent application of deliberative theory to Canada, see Jeffrey Kennedy, "Justice as Justifiability: Mandatory Minimum Sentences, Section 12, and Deliberative Democracy", UBC L Rev [forthcoming in 2021].

93 See e.g. Gerry Mackie, "Deliberation and Voting Entwined" in Bächtiger et al, *supra* note 92 at 218.

94 *Secession Reference*, *supra* note 1 at para 67.

95 *Ibid* at para 68.

96 *Ibid.*

97 More radical participatory accounts perhaps come the closest to doing away with liberal or representative institutions entirely. Technology has opened new options for participation that could in theory allow more immediate citizen responses and overcome some of the logistical concerns with direct democracy.

98 See Mackie, *supra* note 93 (here, the author acknowledges that "[o]riginally, classic deliberative democracy offered itself as the overcoming of merely aggregative democracy," with only some exceptions; he claims though that "[t]oday's evolved model of deliberative democracy is more nuanced in its description and evaluation of voting" at 223).

Thin versions of democracy focused on fair procedures are more appropriate for forming the content of a legal principle to be applied in constitutional interpretation. Whatever the appeal of outcome-focused definitions writ large, the imposition of thick democracy by the courts through the vehicle of an unwritten principle would validate the legitimacy and interrelatedness concerns. The thicker the principle, the more likely there is to be serious disagreement about its content. A procedural account rests on ground that is likely to be more common across the range of political beliefs and theories of adjudication. All democrats do (or perhaps should) endorse the necessity of fair procedures for aggregating preferences as a minimum condition for democracy to exist.[99] There may be disputes on the margins of what constitutes a "fair" election or referendum, but there is likely to be consensus on at least the core of the matter. A narrower account is less likely to face legitimacy problems, as it provides less leeway for courts to impose their own policy preferences or to engage in freestanding reasoning untethered from the actual specifics of the positive legal order.[100] The political branches may possess the accepted authority to implement a thicker version of democracy, but courts do not. A thin, procedural account of democracy is more likely to lead to discernible and justiciable content for the unwritten principle. It is also more likely to be compatible with the existence of other meaningful principles. In short, a thick account has a harder time rebutting the charges levelled against unwritten principles by their scholarly critics.[101]

B. Thin Democracy: Accountability and Equality

We should envision the principle of democracy understood in the way sketched out in this argument as a means of furthering meaningful participation through fair procedures. In *Figueroa*, the Supreme Court of Canada advanced an interpretation of the right to vote in section 3 of the *Charter* as requiring "meaningful participation."[102] One can transport the concept of meaningful participation out of the context of section 3 in order to fill in the content of a procedural account of the unwritten principle of democracy.

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99 Rosalind Dixon and David Landau argue that evaluation of the success of a constitutional democracy turns at least partly on its capacity to preserve a "constitutional minimum core" evaluated in light of a "thin version of democracy": "Competitive Democracy and the Constitutional Minimum Core" in Tom Ginsburg & Aziz Huq, eds, *Assessing Constitutional Performance* (New York: Cambridge University Press, 2016) 268 at 268–69.

100 Dworkin's Herculean judges may be liable to commit such acts (see Waluchow, *Common Law Theory*, *supra* note 88 at 107–08).

101 See the critique levelled by Sypnowich against Waluchow's "constitutional conception of democracy" in Sypnowich, *supra* note 88 at 764–68.

102 *Supra* note 36 at para 27.

Meaningful participation is a useful standard for providing equal opportunities to involve oneself in electoral politics. It does not require particular outcomes, but instead emphasizes the right of citizens to engage fully in the process by requiring fair procedures. In *Figueroa*, meaningful participation meant the right to partake in federal politics through the vehicle of a small political party, even though that party was not likely to form government.[103] There was no right to have one's preferences win out in the election, but instead to have an equal opportunity to attempt to sway one's fellow citizens on policy, to compete for votes, and to have a level playing field upon which one's preferred political party could operate.

Obviously, no procedural account can entirely sidestep substance or normative considerations.[104] The values furthered by a standard of meaningful participation are, in my view, political equality and accountability. Political equality is furthered by fair procedures tied to meaningful participation because engagement on equal, formal terms sends a message that each participant is worthy of concern and respect. All voters or citizens are political equals in this sense, even if there are differences in their interest in politics or their influence. The Supreme Court recently recognized that denials of the franchise communicate that those targeted are somehow less worthy than those permitted to vote.[105] This insight is an important one. There is expressive content to political rights. They are a signal of full membership in society, rather than partial or semi-citizenship.[106]

An account focused on fair procedures also furthers political accountability. Where the constitutional text does not dictate how relevant aspects of political participation are to be structured, the unwritten principle can be a check on the imposition of *unfair* procedures. Much of the literature on the Canadian law of democracy focuses on the risk of partisan self-dealing, whereby incumbents or political parties write laws that make their preferred electoral outcome more likely.[107] The text of the *Charter* should

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[103] See *ibid* at paras 39–46.

[104] See Dworkin, *supra* note 86 at 4–5.

[105] See *Frank*, *supra* note 33 at para 82. Per the majority decision written by Wagner CJ:

> In the absence of evidence pointing to a concrete problem, the justification boils down to an argument based on worthiness: the non-resident citizens in question are deemed to be less deserving of the right to vote than the resident majority on the basis that they have voluntarily left Canada and severed their connection to the country. However, this Court has quite properly foreclosed the use of such worthiness rationales to justify restrictions on the right to vote in past cases. Worthiness cannot be used to justify the disenfranchisement of non-resident Canadian citizens (*ibid*).

[106] See Elizabeth F Cohen, *Semi-Citizenship in Democratic Politics* (New York: Cambridge University Press, 2009).

[107] See e.g. Colin Feasby, "Freedom of Expression and the Law of the Democratic Process" (2005) 29 SCLR 237; Pal, "Breakdowns", *supra* note 49 at 302.

prevent manifestly unfair procedures in federal and provincial elections, such as gerrymandering, or banning participation by rival political parties,[108] or limiting access to the ballot box for citizens.[109] Fair procedures facilitate the ability of citizens to hold their representatives, as well as political parties, to account.

If one accepts the use of a procedural account of the unwritten principle, we must still ascertain to which political practices it may apply. In my argument, the unwritten principle should be in play wherever there is a *democratic event*. The term *democratic event* should include elections for representatives in public bodies, but also consultative procedures of direct democracy. Such an approach would mean that the unwritten principle of democracy would apply to municipal, territorial, and other elections for public office,[110] which section 3 does not cover. It would also apply to consultative mechanisms such as referendums, which the text incompletely covers. If an election is held, it should be based on fair procedures. There may be variation between what is required for a federal and a school board election, but the animating spirit of democracy in the Canadian constitutional order should be present for any democratic event.

Even on this vision of a robust role for the unwritten principle, the text would remain paramount. As a general matter, the unwritten principles should not crowd out the text, though they might remain an important source to draw upon in interpreting it.[111] In drawing constitutional limits on legislative action, the text is the preferable option. The principle of democracy also should not cannibalize other related principles, in line with the interrelatedness critique. Parliamentary sovereignty in particular is a limit on the principle of democracy. Courts could not legitimately use the principle against legislative inaction or true, deliberate silence,[112] out of respect for parliamentary sovereignty and the separation of powers.

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[108] I leave aside here the central question addressed in the literature on militant democracy, namely whether it is acceptable to ban political parties or apply electoral rules such as thresholds for membership in the legislature, so as to limit the participation of parties who are committed to eliminating democracy itself.

[109] I am not claiming that the current jurisprudence on sections 3, 2(b), and 15 actually achieves this goal, but that they should.

[110] Elections that could be included in the list are those for school boards or any public body where the election is consequential enough and the electorate has legitimate expectations of fairness.

[111] I acknowledge of course that the principle remains in the background, informing interpretation of the text, as I hope was made clear in earlier sections.

[112] I understand legislative silence or inaction to be different from the drafting for example of under-inclusive statutes, as was the case in *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385.

In order to flesh out the implications of my argument, I consider two case studies in depth here: referendums and municipal elections. While responsive to concerns about legitimacy, requiring fair procedures and meaningful participation on a thin account would still lead to concrete changes that better align with democratic values. The uncertain application of the unwritten principle of democracy to referendums has been a long-standing question, especially post-*Secession Reference*. The recent controversy in Ontario—over the Legislative Assembly's change to municipal ward boundaries for the City of Toronto mid-election[113]—directly raised the use of the unwritten principle for municipal elections.

IV. The Scope of the Democracy Principle

A. Referendums

Referendums are a classic instance of direct democracy, traditionally seen as being at odds with representative democracy.[114] Based as it is on the British model, Canadian parliamentary democracy has generally been loath to implement regular referendums. There are no legally enforceable requirements to hold referendums in Canadian constitutional law. The amending procedures in Part V of the *Constitution Act, 1982* famously do not require a referendum for constitutional change.[115] The right to vote in section 3 of the *Charter* does *not* apply to referendums.[116] Respecting parliamentary sovereignty means that the decision to call a referendum rests with the legislatures, not with courts wielding the unwritten principle.

Referendums have emerged, however, as an important tool of political consultation. There have been only three federal referendums since 1867, with the 1992 vote on the constitutional amendments proposed in the Charlottetown Accord as the most prominent recent example.[117] The provinces have used referendums more frequently, with multiple votes on the secession of Quebec as the obvious example. There has been an emerging pattern in recent years of a political imperative to hold a referendum where electoral reform is on the table. British Columbia has had three referendums

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[113] See *Toronto (City)* ONCA 2018, *supra* note 8 at para 12.

[114] See Barber, *supra* note 90 at 153.

[115] See e.g. Richard Albert, "The Conventions of Constitutional Amendment in Canada" (2016) 53:2 Osgoode Hall LJ 399 [Albert, "Conventions of Amendment"].

[116] See *Haig v Canada*, [1993] 2 SCR 995 at 1040, 105 DLR (4th) 577 [*Haig*].

[117] The previous two were on dramatic political issues of the time: prohibition of alcohol in 1898 and military conscription in 1942.

on electoral reform over the last two decades,[118] Prince Edward Island has had two,[119] and Ontario one.[120] Whether a referendum is a constitutional convention where major constitutional change or electoral reform are proposed is now a matter of some debate.[121] Globally, democracies hold referendums largely to consult the people when they are contemplating constitutional or quasi-constitutional change.[122]

Surveying their role around the globe, Laurence Morel concludes that there has been increasing "juridicization" of the referendum.[123] Canada is a partial exception to this trend. The courts have interpreted section 2(b) as imposing limits on their conduct once the legislative body has made the decision to hold one.[124] Section 15 applies as well, in theory. The application of the particular provisions of the *Charter* to referendums, however, has failed to result in judicial oversight of fair procedures or truly meaningful participation. With regard to fair referendums, the central issue is the right to cast a ballot, given that the right to vote in section 3 of the *Charter* does not apply. The unwritten principle has work to do in ensuring equality and accountability through the vehicles of sections 2(b) and 15.

1. The Right to Vote and Voter Qualifications

The unwritten principle of democracy should also protect the right to vote in a referendum. Prior to the *Secession Reference*'s invocation of the democracy principle, the Supreme Court ruled bluntly in *Haig v. Canada*

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118 The votes were in 2005, 2009, and then again in 2018 (see Elections BC, "Report of the Chief Electoral Officer: 2018 Referendum on Electoral Reform" (2019) at 1, online (pdf): *Elections BC* <elections.bc.ca> [perma.cc/6Y3N-QWRA]).

119 See Sara Fraser, "Islanders Vote to Keep First Past the Post", *CBC* (23 April 2019), online: <www.cbc.ca> [perma.cc/5WKR-22WE]; Peter McKenna, "Opting Out of Electoral Reform: Why PEI Chose the Status Quo" (2006), online: *Policy Options* <policyoptions.irpp.org> [perma.cc/3QV8-W9J6].

120 See Michael Pal, "The Promise and Limits of Citizens' Assemblies: Deliberation, Institutions and the Law of Democracy" (2012) 38:1 Queen's LJ 259 at 265.

121 See Albert, "Conventions of Amendment", *supra* note 115 at 415, 438.

122 See Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012) at 1. Tierney analyzes the theoretical underpinnings of constitutional referendums. See also Laurence Morel, "Referendum" in Rosenfeld & Sajó, *supra* note 4, 501 at 502. Morel discusses the increasing global use of referendums. The Brexit referendum in the United Kingdom is the most prominent recent example.

123 See Morel, *supra* note 122 at 514–15.

124 See *Libman v Quebec (AG)*, [1997] 3 SCR 569, 151 DLR (4th) 385 (the Supreme Court set rules on campaign finance generally under section 2(b) but in the context of a referendum in Quebec); Colin Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy Under the Charter: The Emerging Egalitarian Model" (1999) 44:1 McGill LJ 5 at 26–30.

that "there is ... no constitutionally entrenched right to vote in a referendum."[125] Contrary to *Haig*, Colin Feasby argues for the extension of section 3 beyond federal and provincial elections.[126]

Canada has a long and desultory history of restrictions on the right to vote. The *Charter* has swept away most limits on exercising the franchise, with *Frank* as the most recent example. The fondness of politicians for manipulating the contours of the electorate is a consistent trend in Canadian politics.[127] Outright bans on voting appear too blatant and the courts now deal with them relatively easily, as *Sauvé* and *Frank* indicate. The risk of manipulations to the franchise, however, whether in general elections or referendums remains an ongoing one. Restrictions on voting, including in referendums, is a feature of democratic decline in various countries.[128] The most popular tactic is now voter suppression, such as the introduction of strict voter identification rules, differential procedures for voting that favour one group, limitations on early voting introduced in ways that decrease the turnout of specific groups, and so on.

We should not countenance outright bans on specific groups of citizens voting in referendums. A constitutional requirement for an accessible franchise in referendums, as exists for federal and provincial elections, should not be controversial. Voting has expressive content,[129] whether in an election or referendum, and so we should interpret section 2(b) to protect it. It is arbitrary that the courts have not found section 2(b) to protect voting outside of federal and provincial elections. Bans on specific groups voting in a referendum could violate section 15 as well. Whatever their potential application, the doctrine under each of these provisions of the *Charter* has evolved in ways that make them generally ill suited to ascertain the often-subtle ways in which voter suppression occurs.

Meaningful participation in referendums must require at a minimum a right to cast a ballot. It should also require fair procedures of election administration. If a government chooses to conduct a referendum, then the unwritten principle of democracy should guarantee that it occurs on fair terms and provides opportunities to engage meaningfully in the process. The "gaps" in the *Charter*'s treatment of referendums have become untenable, given how often they are now used, the importance of the questions

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125 *Supra* note 116 at 1040.

126 See "Fixing the Problem", *supra* note 8.

127 See Pal, "Breakdowns", *supra* note 49 at 307.

128 See Gábor Halmai, "A Coup Against Constitutional Democracy: The Case of Hungary" in Mark Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018) 243 at 253.

129 On voting as speech, see Armand Derfner & J Gerald Hebert, "Voting is Speech" (2016) 34:2 Yale L & Pol'y Rev 471 at 471–72.

they now address, and the risks of interference in the process by self-interested partisans. Referendums are not general elections and serve different functions, but are the next closest thing in terms of importance in the political system. In that context, the constitutional order should require meaningful participation and procedural fairness.

B. Municipal Elections

The unwritten principle of democracy should be seen as playing an important role in constitutional protection of fair municipal elections, as long as it is appropriately constrained in relation to the parliamentary sovereignty of provincial legislatures. The current positive law with regard to municipal elections is deeply unsatisfying if the Constitution is supposed to protect procedural fairness and meaningful participation. The recent controversy surrounding the Ontario government's decision to decrease the number of wards in Toronto in the middle of an ongoing city election campaign highlighted the imperfect protection offered by the Constitution.[130] While *Toronto (City of) v. Ontario (AG)*[131] brought much public attention to the issue, in reality the unsatisfying constitutional parameters around municipalities and municipal elections has been a long-standing issue. The unwritten principle can and should fill in the gaps in the existing constitutional text to ensure fair municipal elections. It should also be the principled foundation upon which the doctrines under the applicable provisions of the *Charter* can evolve.

The constitutional status of municipalities is clear.[132] The *Constitution Act, 1867* did not imbue municipal governments with any special constitutional status. They are creatures of the provinces by virtue of section 92(8).[133] The courts have had to confront the question of whether municipalities have evolved to the point where their constitutional importance as democratically elected governments providing important services should

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[130] The legislation at issue was Bill 5, *The Better Local Government Act, 2018*, RSO 2018, c 11.

[131] See ONSC, *supra* note 8, decision stayed by *Toronto (City)* ONCA 2018, *supra* note 8, application judge overturned by *Toronto (City) v Ontario (AG)*, 2019 ONCA 732 [*Toronto (City)* ONCA 2019], leave to appeal to SCC granted, 38921 (26 March 2020). As of the time of writing, no date had yet been set for the appeal to be heard by the Supreme Court.

[132] See Eugene Meehan, Robert Chiarelli & Marie-France Major, "The Constitutional Legal Status of Municipalities 1849-2004: Success Is a Journey, but Also a Destination" (2007) 22:1 NJCL 1 at 14–19.

[133] The courts have articulated this rule clearly in the context of municipal amalgamations: see *East York (Borough) v Ontario (AG)* (1997), 153 DLR (4th) 299 at para 11, 36 OR (3d) 733 (CA).

be recognized by the Constitution.[134] For example, the case law on the application of the *Charter* under section 32 to municipalities has left open the possibility that they are the functional equivalents of the federal and provincial governments.[135] While formally administrative entities, municipalities possess a democratic nature that separates them from other such bodies.[136] The special status of municipalities also arises in the redistribution of federal electoral districts and the allotment provided to cities.[137]

The courts have been clear that section 3 does *not* protect the right to vote or to stand as a candidate in municipal elections,[138] or indeed in elections other than federal or provincial ones.[139] Those doctrines are the result of interpretive decisions by courts that are certainly plausible interpretations of the text of the *Charter*, but they were choices made by judges among many alternatives. Municipal elections must still comply with freedom of political expression in section 2(b) as well as equality rights in section 15.

While I do not challenge here the overall constitutional status of municipalities, in my view their existence as creatures of the provinces does not preclude the Constitution from ensuring fair procedures and meaningful participation in municipal elections, given their important role as democratic orders of government. It is clear that municipal elections matter in

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134 See generally Hoi Kong, "Toward a Federal Legal Theory of the City" (2012) 56:3 McGill LJ 473 (constitutional limits placed on cities at 476); Hoi Kong, "Something to Talk About: Regulation and Justification in Canadian Municipal Law" (2010) 48:3/4 Osgoode Hall LJ 499 (manifested as an examination of provincial and municipal governments' relative competences at 529–36). See Ron Levi & Mariana Valverde, "Freedom of the City: Canadian Cities and the Quest for Governmental Status" (2006) 44:3 Osgoode Hall LJ 409.

135 See *Godbout v Longueuil (City)*, [1997] 3 SCR 844, 152 DLR (4th) 577, per LaForest J at para 51: "[M]unicipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent."

136 *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 19, where in the context of a municipality the Court held that "the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" must be respected.

137 See *Campbell v Canada (AG)* (1988), 49 DLR (4th) 321, 25 BCLR (2d) 101 (CA).

138 Most recently, see *Toronto (City of)* ONSC, *supra* note 8 at paras 43, 60; *Toronto (City)* ONCA 2018, *supra* note 8 ("[s]ection 3 does not apply to municipal elections and has no bearing on the issues raised in this case" at para 12).

139 The Federal Court of Appeal in *Taypotat v Taypotat* held that section 3 should not be extended to band council elections in a dispute over rules relating to the qualifications of candidates (2013 FCA 192 at para 29). In the context of a school board election, see *Baier v Alberta*, *supra* note 38 (the Court states with regard to extending section 3: "[I]t is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so" at para 39).

a way that they did not in 1867. In the absence of a role for section 3, section 15 provides some protection, as it would bar discrimination against specific voters in election law. Political expression could fill in gaps as well, if section 2(b) treated voting as expressive activity and operated as a functional substitute for section 3 when applied to municipal elections. There is no controversy that section 2(b) applies to municipal elections. The issue is simply one of interpretation of the scope of the section 2(b) doctrine. If one accepts that the unwritten principle informs the interpretation of section 2(b) of the *Charter*, it follows that the provision guarantees fair procedures in municipal elections.

The Court of Appeal for Ontario, however, threw cold water on the prospect of constitutional protections for municipal elections by adopting an unnecessarily narrow interpretation of section 2(b). The issue came to a head in relation to the Ontario Legislative Assembly's Bill 5, which proposed to reduce the number of municipal wards for the City of Toronto.[140] The principled justification for the legislation was to ensure the number of wards and their boundaries were the same as for provincial and federal electoral districts.[141] There is a legitimate argument to be made that having consistent electoral boundaries across different orders of government has benefits for representation.[142] Undermining this claim of enhanced representation was the reality that the federal map copied for provincial districts and then Toronto's wards departed dramatically from the notion of "one person, one vote" or representation by population.[143] The implication is that a federal/provincial map that was potentially unconstitutional itself was being imported into Toronto.

The complicating factor at the heart of the litigation is that the province imposed the changes in the middle of the city's election campaign.[144] This change in the boundaries and reduction in the number of municipal wards

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[140] See *Better Local Government Act*, *supra* note 130, s 128.

[141] See *ibid*, s 128(1): "[T]he City is divided into wards whose boundaries are identical to those of the electoral districts for Ontario that are within the boundaries of the City." The legislation setting Ontario's *provincial* electoral districts, the *Representation Act, 2015*, RSO 2015, c 31, s 2(1)(2), requires that provincial electoral districts mirror *federal* ones. The exception is for districts in the north of the province, which differ from federal boundary lines (see *ibid*, s 2(1)(1) and the Schedule).

[142] See John C Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (Montreal: McGill-Queen's University Press, 2001) at 211: "[E]lectoral districts for federal, provincial, or territorial assemblies are frequently constructed to accord with local district boundaries. This makes a good deal of sense, for the local district ... constitutes a perceptible and understandable community of interests for the majority of its residents."

[143] I make this argument in Michael Pal, "The Fractured Right to Vote: Democracy, Discretion, and Designing Electoral Districts" (2015) 61:2 McGill LJ 231 at 255–58 in the section titled "Representation by Population as a Secondary Concern."

[144] See *Toronto (City of)* ONSC, *supra* note 8 at para 3.

mid-campaign was unprecedented. The boundaries of wards or districts should be set well in advance of elections—as they usually are in Canada—whether for federal, provincial, or municipal votes.

The application judge, Justice Edward Belobaba, garnered headlines for striking down the provisions in the law that altered the number of wards. He did so on the basis of section 2(b). He controversially imported the guarantee of "effective representation"[145] from section 3 of the *Charter* into section 2(b).[146] He found two breaches of section 2(b) where Bill 5 unduly diminished effective representation. First, he concluded that interference with the basic structure of the election mid-campaign harmed voters and candidates.[147] Second, he found that it was also a breach to increase the population of each ward, which was the direct result of decreasing the number of wards in the city.[148] In his holding, the population increase harmed voters because it hindered their effective representation, given the larger demands on their representatives in a more populous ward.

The Court of Appeal on a stay motion pending the appeal of Justice Belobaba's ruling expressed clear disapproval of his reasoning. A majority of the Court ultimately overruled him on the merits,[149] though with a dissent by Justice MacPherson based on freedom of expression. The majority of the Court of Appeal concluded that Justice Belobaba "wrongly imports the content of s. 3 into s. 2(b) in order to circumvent the decision of the constitutional framers not to extend the protection of s. 3 to municipal elections."[150]

Justice Belobaba was incorrect in my view in finding a second breach related to increases in the population of each ward, though not because it imported the section 3 doctrine into section 2(b). His conclusion that there was a second breach recognized constitutional damage caused by the presence of populous districts. The notion that populous districts harm their constituents is unknown in Canadian constitutional law, including in section 3 or elsewhere.[151] To the best of my knowledge, it is not a relevant

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145 The standard comes from *Reference re Provincial Electoral Boundaries*, *supra* note 35.

146 See *Toronto (City of)* ONSC, *supra* note 8 at para 46.

147 See *ibid* at paras 27–28.

148 See *ibid* at para 59.

149 See *Toronto (City)* ONCA 2018, *supra* note 8 at paras 11–12.

150 *Toronto (City)* ONCA 2019, *supra* note 131 at para 76. At para 118, Miller JA argues that *Haig*, *supra* note 116 establishes at 1040–41 that section 3 does not apply outside of provincial and federal elections. The main case on electoral boundaries under section 3 is *Reference re Provincial Electoral Boundaries*, *supra* note 35.

151 The leading work on Canadian electoral districts is John C Courtney's *Commissioned Ridings: Designing Canada's Electoral Districts* (*supra* note 142). It does not canvas the issue of the absolute population of a district causing harm.

concern in other comparable jurisdictions either.[152] The *relative* population of districts matters, not their *absolute* size.[153] A claim that more populous districts harm representation necessarily implies keeping the population of wards relatively constant. Such an outcome can only be achieved by endlessly increasing the number of members in the legislative body to keep pace with population growth. A larger legislative body has potentially negative consequences for representation.[154] The majority of the Court of Appeal was right to overrule Justice Belobaba on this particular point, though it did so for the wrong reasons.[155]

The first breach found by Justice Belobaba in relation to the harm caused by mid-election changes has more merit. Interpretation of the relevant *Charter* provisions directly raises the role of the unwritten principle of democracy in constitutional interpretation. Electoral districts are fundamental aspects of conducting elections. They shape representation, candidate strategy and communications, informal coalitions among representatives in a jurisdiction without political parties, and the diversity of representatives, among other matters.

The reasoning by the majority of the Court of Appeal on the impact of the mid-campaign interference leaves much to be desired. Municipalities are creatures of the provinces, they held, and if a province can create or eliminate a municipality, then it can legislate as to how municipal elections are to proceed. The province can change the rules mid-campaign, just as it could simply stop the practice of having municipal elections. In other words, there is no requirement of fair procedures in the election.[156] The consequences of this approach are untenable. The implication of the Court of Appeal's conclusion is that voters in Toronto could select a mayor, but then the premier could appoint the second-place finisher as the winner or simply declare that he would not respect the outcome. Even on the facts of the case, mid-election interference was a serious and unprecedented action.

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[152] See Lisa Handley & Bernard Grofman, eds, *Redistricting in Comparative Perspective* (New York: Oxford University Press, 2008).

[153] For a discussion of how population relates to electoral boundaries, see Courtney, *supra* note 142 at 195–200.

[154] See *ibid* at 19–20.

[155] See *Toronto (City)* ONCA 2019, *supra* note 131 at paras 72–77, per Miller JA (for the majority). Its reasons for doing so were not sound in my view, as set out in the remainder of this section of the article.

[156] See *ibid* at para 77:

> Instead of working from the text of the *Charter* and giving effect to the constitutional settlement it established, the application judge worked from the premise that, if he concluded that the *Act* was unfair to candidates and voters, it must therefore be unconstitutional. The Constitution does not work that way.

Imposing mid-election changes in the basic rules of the game is qualitatively different from amending legislation about municipal elections in the normal course of things outside of a campaign under the jurisdiction provided by section 92(8) of the *Constitution Act, 1867*.

The core of the majority's analysis focused on its disapproval of Justice Belobaba's approach to the relationship between sections 2(b) and 3 of the *Charter*. The alternative interpretive approach taken by the majority of the Court of Appeal on the relationship between different rights and freedoms guaranteed by the *Charter* is a novel one unsupported by the case law. The majority labels the application of the effective representation standard developed initially under section 3 to municipal elections through section 2(b) as a "workaround."[157] The assertion is that it runs counter to the text of the *Charter* to protect municipal elections in the same way as federal and provincial elections. There is a superficial logic to this point. Section 3 refers to "elections to the House of Commons or of a legislative assembly." It does not specifically refer to municipal elections and, therefore, the majority concludes that doctrines developed under section 3 cannot legitimately be used in interpretation of section 2(b) of the *Charter*.[158]

It is not "circumvention" or a "workaround" for judges to amend doctrines in light of unexpected new scenarios, however, including the unprecedented scenario of mid-election changes in electoral districts. There is no principled reason why *Charter* rights and content must be interpreted to have unique rather than overlapping content. Justice Miller for the majority acknowledged as much in writing that "[r]ights protections often overlap"[159] and that "the coverage of particular rights can overlap."[160] Using "effective representation" as a standard initially developed pursuant to section 3 under the auspices of section 2(b) was, in his view, impermissible because it violated the "basic structure" of the *Charter*, "subsumed" the right to vote within freedom of political expression, and "inflated [the] content" of section 2(b).[161] The only support for this conclusion in the case law that is provided is a reference to paragraphs 79–80 of *Thomson Newspapers Co. v. Canada (AG)*[162] and paragraph 67 of *Harper*.[163] These paragraphs require careful scrutiny.

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157 *Ibid* at para 71.

158 The relevant portions of the majority opinion on this point are *ibid* at paras 70–77, per Miller JA.

159 *Ibid* at para 75.

160 *Ibid* at para 76.

161 *Ibid*.

162 [1998] 1 SCR 877, 159 DLR (4th) 385 [*Thomson Newspapers*].

163 See *supra* note 37.

Thomson Newspapers does indeed state that sections 3 and 2(b) are "distinct," but it did so in the scenario where both might conceivably apply. The paragraphs cited by Justice Miller simply set out that where the two provisions "overlap or come into conflict," they are to be balanced rather than placed in any hierarchy.[164] It is an assertion of the now familiar approach by the Court that balancing is preferred to conflict in interpreting related rights.[165] They "must [each] be given effect"[166] when both are operative and need to be balanced. The case does *not* stand for the proposition that the right to vote and freedom of political expression are barred from having similar content where only one is operative. The passage cited from *Harper* relies on *Thomson Newspapers* for the conclusion that the provisions of the *Charter* are "distinct" and then holds that it is wrong to equate sections 3 and 2(b).[167] These statements in *Harper*, however, are again in the service of establishing the need to engage in balancing between rights and freedoms.[168] They do not establish a rule against overlapping content where only one right or freedom is in play.

A cleaner solution in my view would have been to rely on the unwritten principle of democracy as the interpretive guide in assessing whether section 2(b) prevents changing the rules in the midst of a municipal election in a manner that affects expressive freedom. This assessment is made independently of what analysis might proceed under section 3. If the "basic structure" of the Constitution is at stake, surely the principle of democracy is relevant. The Court of Appeal majority[169] and dissent[170] rejected the argument that the unwritten principle of democracy barred the mid-election dissolution of the electoral map. The reasoning of the majority is that unwritten principles should not on their own be the basis for invalidating legislation.[171] The notion that the democracy principle could inform the evolution of section 2(b) doctrine is not considered.[172] There is no analysis of the

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164 *Thomson Newspapers*, *supra* note 162 at para 80.

165 See *R v NS*, 2012 SCC 72 at para 52.

166 *Thomson Newspapers*, *supra* note 162 at para 80.

167 *Harper*, *supra* note 37 at para 67.

168 See also *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 877, 120 DLR (4th) 12 ("*Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights").

169 See *Toronto (City)* ONCA 2019, *supra* note 131 at paras 81–89, per Miller JA. The Court also rejected the claim that unwritten principles limited the jurisdiction over municipalities granted to the provinces in section 92(8) of the *Constitution Act, 1867*, *supra* note 17.

170 See *Toronto (City)* ONCA 2019, *supra* note 131 at para 99 (bullet point #3), per MacPherson JA.

171 *Ibid* at para 89.

172 The majority considers the unwritten principles in relation to the division of powers over municipalities and the possible role of section 92(8) in the case (see *ibid* at paras 90–95).

content of the principle as set out in the *Secession Reference*, as thick or thin, or otherwise.

Justice Miller justifies this approach by rejecting the view that the text has any "gaps" in relation to municipalities or municipal elections. He concludes that "[s]uch gaps are rare. No such gaps exist here."[173] He reaches this conclusion because section 92(8) of the *Constitution Act, 1867* assigns municipalities as creatures of the provinces in the division of powers. The framers turned their minds to municipalities, so it would be wrong for judges to alter the division of powers absent an amendment, in his view. This conclusion may be justified in relation to the division of powers, but it is not persuasive with regard to the *Charter*. It is true that municipalities are not a "new subject matter."[174] Yet their importance and role in Canadian democracy have shifted dramatically since 1867 as have legitimate public expectations of standards for the conduct of free and fair elections. The Supreme Court has grappled with the implications of the gaps in the Constitution in relation to municipalities in other contexts precisely because of the ill fit between the text of section 92(8) and the actual role of cities.[175]

The minimum conditions for democracy found in the unwritten principle include procedural fairness in the conduct of elections. Section 2(b) should be interpreted in that light. Such a role for the unwritten principle does not mean the untrammelled implementation of judicial preferences or arbitrary reliance on an elaborate or idiosyncratic theory of democracy. Courts should not require the creation of municipalities or the existence of municipal elections. As Justice Miller correctly points out, doing so would entail wholesale rewriting of the division of powers in a manner that would only be proper by formal constitutional amendment pursuant to Part V. No great disservice was done to the constitutional order by Justice Belobaba's holding, however, and, in fact, its consequences were quite narrow. It merely required that the province wait to change the ward boundaries until after the Toronto election was over. The legislative sovereignty and authority of the province under section 92(8) was undisturbed.

Interrupting an election mid-campaign to change the rules of the game, including the electoral districts upon which candidates have crafted their campaigns and voters will have their preferences channelled, should be seen as a clear violation of section 2(b). Changing the number and shape of the wards mid-election had a non-trivial impact on political expression. The events in Toronto were harmful to meaningful participation and accountability. Even on a thin, procedural account of democracy, no election is fair

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[173] *Ibid* at para 94.

[174] *Ibid*.

[175] See the cases in *supra* notes 135-36 and accompanying text.

if conducted under such conditions. While the drafters of the *Charter* may not have anticipated such circumstances as those involving the Toronto municipal election, there is nothing improper about interpreting it in a way that is consistent with a procedural account of the unwritten principle of democracy.

Conclusion

This article has sought to advance content for the unwritten principle of democracy that is narrow enough to ensure legitimacy and does not intrude on the purview of other principles, but which provides real constraints on government action that harms meaningful participation. In my view, the unwritten principles are likely to remain an important feature of the Canadian constitutional landscape. The gaps in the existing text, the need for reasoning to occur behind the text in order to ascertain its content, the Supreme Court's fondness for structural reasoning, and the reality that the onerous amendment procedures frustrate most attempts at constitutional change all point toward the continuing usefulness of the unwritten principles. If this assumption is correct, then the content of the unwritten principles will continue to be fundamental issues for the Canadian constitutional order.

The objections to the use of unwritten principles should be taken seriously. The legitimacy and interrelatedness critiques should give us pause in assessing how, when, and why unwritten principles are used in constitutional interpretation. Those critiques, however, can be addressed by defining the content of unwritten principles in a manner that is consistent with the separation of powers and the judicial role.

A thin, procedural account centred on meaningful participation is one promising way forward for the principle of democracy. Thicker accounts are incongruent with the role of the courts in the separation of powers. Even on a thin account, however, the democracy principle has an important functional role in ensuring fair elections wherever there is a democratic event.

Referendums and municipal elections are two clear areas where the unwritten principle of democracy can usefully inform the interpretation of the relevant doctrine. There is no controversy that sections 2(b) and 15 of the *Charter* apply to these democratic events. The issue is simply one of setting the scope of the doctrine under those provisions. The unwritten principle should inform and guide the evolution of judicial doctrine on those provisions of the *Charter*.