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Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*

Kate Glover*

I. INTRODUCTION: THE META-STRUCTURE

By the time the *Reference re Senate Reform*¹ came along, the Supreme Court of Canada had already expressed its view that Canada's Constitution has a "basic structure" or "internal architecture".² It had also already expressed the view, although not without controversy, that this "basic structure" has some measure of normative and interpretive force.³

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¹ *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32 (S.C.C.) [hereinafter "*Senate Reform Reference*"].

² *Senate Reform Reference*, *id.*, at para. 26, citing *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 50 (S.C.C.) [hereinafter "*Secession Reference*"]; *OPSEU v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at 57 (S.C.C.) [hereinafter "*OPSEU*"]; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.) [hereinafter "*Remuneration Reference*"]; *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21, at para. 82 (S.C.C.) [hereinafter "*Supreme Court Act Reference*"].

³ On using the structural dimensions of the Constitution in the process of constitutional interpretation and application, see, e.g., *Secession Reference*, *id.*, at paras. 49-54, 148; *OPSEU*, *id.*; *Supreme Court Act Reference*, *id.*; *Remuneration Reference*, *id.*; *Reference re B.C. Motor Vehicle Act*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 499-513, esp. 500-504 and 511-33 (S.C.C.) [hereinafter "*Motor Vehicle Reference*"]; *R. v. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489, 2004 SCC 46, at para. 86 (S.C.C.) [hereinafter "*Demers*"], *per* LeBel J.; Mark D. Walters, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 245, at 265ff.

While questions remained, we also already knew that the building blocks of the Constitution are linked to one another and that their meaning depends on the structure of the Constitution as a whole.⁴ Further, we knew that the structure of the Constitution contemplates the existence of certain political and judicial institutions and the “basic structural imperatives” that govern them.⁵ Moreover, we knew that the “castle of the Constitution”⁶ rests on a foundation of fundamental yet unstated values and assumptions.⁷ These values and principles are the scaffolding around which the Constitution as a whole is constructed and are mixed into the mortar that holds the building blocks together.⁸

The Court’s unanimous reasons in the *Senate Reform Reference* add to what we already knew about the structure of the Constitution. The Court reiterated that the Constitution is not a “mere collection of discrete textual provisions”, but rather has “an architecture, a basic structure”.⁹ It affirmed that elements of this architecture must be considered when interpreting, understanding and applying the Constitution.¹⁰ Further, the Court held that constitutional architecture is not merely an aid to interpretation. Rather, at least some architectural elements are constitutionally entrenched and therefore can be altered only by virtue of the amending procedures set out in Part V of Canada’s *Constitution Act, 1982*¹¹

[hereinafter “Walters, ‘Written and Unwritten’”]; Robin Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80 Can. Bar Rev. 67 [hereinafter “Elliot”]. On structural analysis generally, see e.g., Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969) [hereinafter “Black”]; Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford: Oxford University Press, 1982) [hereinafter “Bobbitt”]; and J. Harvie Wilkinson III, “Our Structural Constitution” (2004) 104 Colum. L. Rev. 1867 [hereinafter “Wilkinson”].

⁴ *Secession Reference*, *supra*, note 2, at para. 50.

⁵ *OPSEU*, *supra*, note 2, at 57. See also *Supreme Court Act Reference*, *supra*, note 2. The institutional configuration created by the Constitution establishes and governs relationships between the individual and the state, as well as between the institutions themselves: *Demers*, *supra*, note 3, at para. 86, *per* LeBel J., and the sources cited therein.

⁶ *Remuneration Reference*, *supra*, note 2, at para. 109.

⁷ *Secession Reference*, *supra*, note 2, at paras. 49-51.

⁸ *Secession Reference*, *id.*, at paras. 49-51. The “castle” and “bricks and mortar” metaphor only goes so far in light of the primary metaphor that describes the Constitution of Canada, the living tree: *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, at 136 [hereinafter “*Edwards*”]. The former should not be read as suggesting that the Constitution is cemented into any particular configuration. Even a castle and bricks and mortar can be renovated and rearranged.

⁹ *Senate Reform Reference*, *supra*, note 1, at para. 27.

¹⁰ *Id.*, at para. 26.

¹¹ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. In this article, all constitutional provisions are references to the *Constitution Act, 1982*, unless otherwise indicated.

(“Part V”).¹² Further, the Court showed that when determining which amending procedure applies to a particular reform proposal, we should consider the effect of the reform on the constitutional order as a whole. Finally, the Court explained the Senate’s role within the structure of Canada’s Constitution, namely, as a core but complementary legislative body of sober second thought within a bicameral Parliament.¹³ This sketch of the Senate within the bigger constitutional picture also illuminated the rationale behind the Senate’s internal structural design. The Court’s reasoning shows how particular features of the Senate’s institutional configuration, such as the appointed status of senators and their potentially long tenure, were ways in which the framers sought to bring to life their vision of a complementary, independent, regionally representative chamber of legislative review.

But while the Court’s reasons in the *Senate Reform Reference* advance our understanding, they also raise questions about the normative force of Canada’s constitutional structure and about the extent and implications of its entrenchment. Moreover, the reasons reveal that traditional understandings of structural analysis offer an incomplete account of how and why constitutional structure matters in the specific context of interpreting Part V’s amending procedures.

In light of these questions and ambiguities, this paper aims to shed light on what we did and did not learn from the *Senate Reform Reference* about the structure of the Constitution and about its role in constitutional interpretation. In the next Part, I summarize the issues and outcomes in the *Senate Reform Reference* and explain what this paper contributes to the post-*Reference* constitutional conversation. I show that the case is more about reform than it is about the Senate, and that we must care about proper procedure when amending the Constitution. In Part III, I show that traditional approaches to structural analysis rightfully played an important role in the Court’s interpretation of Part V in the *Reference*. The principles that course through the veins of the Constitution¹⁴ give reason and spirit to the technicalities of Part V. In Part IV, I argue that the Court could have relied on the internal structure of Part V in order to

¹² *Senate Reform Reference*, *supra*, note 1, at paras. 27, 54-60, 107. For further discussion of the entrenchment of constitutional architecture, see Section V below, in particular under the heading “Step One: Scope”.

¹³ See, e.g., *Senate Reform Reference*, *id.*, at paras. 54-60, 95-110.

¹⁴ As the Court notes in the *Secession Reference*, *id.*, at para. 51, the principles underlying the constitution “dictate major elements of the architecture of the Constitution itself and are as such its lifeblood”.

determine the meaning of each amending formula. In Part V, I contend that the logic of Part V of the *Constitution Act, 1982* creates a two-step analytical structure for working through procedural disputes about constitutional amendment. Each step of the framework contemplates structural questions. I show that while the Court adopted this two-step framework, ambiguity remains as to when Part V is triggered.

I conclude this paper by summarizing the lessons learned from the *Senate Reform Reference* about constitutional architecture in the context of formal constitutional amendment. These lessons establish that first, in order to interpret and apply Canada's constitutional amending procedures, we should be attentive to various forms of constitutional structure — traditional, internal and analytical. Second, in the interpretation and application process, different types of constitutional structure matter to different degrees. For example, the Constitution's underlying principles will always set boundaries around the range of available interpretations. Further, structural factors may have the most interpretive weight when they help justify non-formalistic readings of the text and when they help make sense of generic language that is of open descriptive value. They may have the least weight when relied on to read in language that does not otherwise have an explicit textual hook within Part V. Third, we learn from the *Reference* that constitutional structure is not merely a formal issue or tool; it is a matter of substance.

II. THE ISSUES AND OUTCOMES OF THE *SENATE REFORM REFERENCE*

In February 2013, the Governor in Council submitted six questions to the Supreme Court of Canada for hearing and consideration.¹⁵ The Court was asked to determine whether Parliament was constitutionally required to obtain the provinces' consent before changing the legislative and constitutional configuration of the Senate. The questions contemplated four areas of possible reform: the length of senatorial terms; the process for nominating candidates for Senate seats; the eligibility of candidates; and abolition of the Senate. The Attorney General of Canada argued that Parliament could unilaterally set term

¹⁵ P.C. 2013-70.

limits for senators,¹⁶ revoke the net worth and real property qualifications for senators¹⁷ and legislate a framework for advisory elections for senatorial candidates.¹⁸ In addition, it submitted that Parliament could abolish the Senate with the consent of the legislative assemblies of seven provinces representing 50 per cent of the population.¹⁹

The Court's task in the *Senate Reform Reference* was to determine the proper constitutional procedure for implementing the reforms contemplated in the reference questions.²⁰ This determination turned on the Court's interpretation of Part V. Part V, the "Procedure for Amending [the] Constitution of Canada", contains multiple amending procedures.²¹ Together, the procedures prescribe which orders of government, in what numbers, must consent to which amendments, in what circumstances.²² The general amending procedure (section 38(1)) provides that constitutional amendments require the consent of Parliament and the legislative assemblies of at least two-thirds of the provinces representing 50 per cent of the population. This "7/50 rule" applies generally, as well as to amendments in relation to some expressly listed matters, including the powers of the Senate, the method of selecting senators, the number of

¹⁶ At present, the *Constitution Act, 1867* (U.K.), 30 & 31 Vict, c. 3 [reprinted in R.S.C. 1985, App II, No. 5] provides that senators must be at least 30 years old when appointed (s. 23(1)) and can hold their seat until age 75 (s. 29(2)).

¹⁷ At present, a senator must own real property with net value of at least \$4,000 in the province for which he or she is appointed (*Constitution Act, 1867*, s. 23(3)) and have a net worth of at least \$4,000 (*Constitution Act, 1867*, s. 23(4)).

¹⁸ Senators are appointed by the Governor General (*Constitution Act, 1867*, s. 24) at the recommendation of the Prime Minister (by constitutional convention). There is currently no federal legislation setting out a selection procedure for senators. Some provinces have tabled or enacted legislation creating schemes by which electors in the province vote for their preferred senatorial candidates. The results of those elections are then submitted to the Prime Minister for consideration. In the existing legislative landscape, the Prime Minister is not legally bound to consider the provincial lists.

¹⁹ At present, s. 17 of the *Constitution Act, 1867* provides: "There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons."

²⁰ *Senate Reform Reference*, *supra*, note 1, at paras. 4, 20.

²¹ In any particular case, determining which procedure applies depends on the subject matter and scope of the proposed amendment. The amending procedures set out in ss. 38, 41, 42 and 44 apply to amendments "in relation to" a list of "matters", while the procedures set out in ss. 43 and 45 apply to amendments of particular scope. Section 43 applies to amendments to any provision of the Constitution of Canada that applies to one or more, but not all, provinces. Section 45 applies to amendments to the constitution of a province.

²² The provisions of Part V can be divided into two groups. One group — ss. 38(1)-(3), 41, 42, 43, 44, 45 and 47(1) — prescribes the consensus required for entrenching a formal constitution amendment. The other group — ss. 38(4), 40, 46, 47(2), 48 and 49 — deal with the logistics of the amendment process, including provincial compensation and timelines.

senators representing a province, and the residence qualifications of senators (section 42(1)(b), (c)).²³ In contrast, amendments in relation to the office of the Queen, the use of the English or French language, or the composition of the Supreme Court require the unanimous consent of Parliament and the provincial legislatures (section 41).²⁴ There is also a “special arrangement” procedure (section 43). It provides that an amendment to any provision of the Constitution of Canada that applies to one or more, but not all, provinces requires the consent of Parliament and the legislative assembly of the provinces to which the amendment applies. Finally, in some cases, federal (section 44) and provincial (section 45) actors can implement constitutional amendments unilaterally. In particular, Parliament alone can, with some exceptions, amend the Constitution in relation to the executive, the Senate and the House of Commons.

Prior to the *Senate Reform Reference*, Canadian courts had rendered opinions about the proper procedure for amending the Constitution.²⁵ However, at the time of the *Reference* hearing, the Court had never before interpreted Part V in any comprehensive way.²⁶ The issues in the *Senate Reform Reference* not only created the opportunity for such an interpretation, they called for it. Indeed, to answer the reference

²³ In addition, s. 42(1) applies to amendments in relation to the principle of proportionate representation in the House of Commons, the Supreme Court of Canada (subject to s. 41(d)), the extension of existing provinces into the territories and the establishment of new provinces. Sometimes, the provinces can opt out of amendments enacted by virtue of the general rule (s. 38(3)). No such opt-out is available for amendments that fall under s. 42(1) (s. 42(2)).

²⁴ In addition, s. 41 applies to amendments in relation to the office of the Governor General and the Lieutenant Governor of a province, the right of a province to a number of members in the House of Commons not less than the number of senators by which the province was entitled to be represented in 1982, and Part V.

²⁵ *Reference re Legislative Authority of Parliament in Relation to the Upper House*, [1979] S.C.J. No. 94, [1980] 1 S.C.R. 54 (S.C.C.) [hereinafter “*Upper House Reference*”]; *Reference re Resolution to amend the Constitution*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753 (S.C.C.) [hereinafter “*Patriation Reference*”]; *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] S.C.J. No. 101, [1982] 2 S.C.R. 793 (S.C.C.) [hereinafter “*Veto Reference*”]; *Secession Reference*, *supra*, note 2; *Reference re Bill C-7 Concerning the Reform of the Senate*, [2013] Q.J. No. 7771, 2013 QCCA 1807 (Que. C.A.) [hereinafter “*Q.C. Senate Reference*”]; *Hogan v. Newfoundland (Attorney General)*, [2000] N.J. No. 54, 2000 NFCA 12 (Nfld. C.A.), leave to appeal refused [2000] S.C.C.A. No. 191 (S.C.C.) [hereinafter “*Hogan*”]; *Penikett v. R.*, [1987] B.C.J. No. 2543, 21 B.C.L.R. (2d) 1 (B.C.C.A.), leave to appeal refused [1988] S.C.C.A. No. 125, 46 D.L.R. (4th) vi (note) (S.C.C.) [hereinafter “*Penikett*”]; *Campbell v. Canada*, [1988] B.C.J. No. 442, 49 D.L.R. (4th) 321 (B.C.C.A.), leave to appeal refused [1988] S.C.C.A. No. 150 (S.C.C.) [hereinafter “*Campbell*”]; *Potter v. Quebec (Attorney General)*, [2001] J.Q. no 5553 (Que. C.A.), leave to appeal refused [2002] 3 S.C.R. x (S.C.C.) [hereinafter “*Potter*”].

²⁶ By the time the *Senate Reform Reference* opinion was released, the Court had begun its interpretation of Part V in the *Supreme Court Act Reference*, *supra*, note 2, at paras. 72-106.

questions, the Court had to determine whether the government's proposals for Senate reform triggered Part V and if so, which amending procedures applied. The answers were not obvious on the face of the constitutional text, the proposed amendments or the jurisprudence.

Ultimately, a unanimous eight-judge panel of the Court rejected the lion's share of the government's submissions. The judges concluded that the 7/50 rule applied to the government's proposals to implement advisory elections.²⁷ According to the Court, introducing such elections would endow senators with a popular mandate inconsistent with the Senate's role as a complementary legislative chamber of sober second thought. This would constitute an amendment to the Constitution of Canada in relation to the method of selecting senators and would thus require substantial provincial consent. Similarly, the Court held that the proposal to implement defined terms for senators triggered the general amending procedure.²⁸ According to the Court, the contemplated changes to tenure would affect the "fundamental nature and role" of the Senate by weakening senatorial independence. This engaged the interests of all parties to Confederation and thus called for substantial provincial input.²⁹

In addition, the Court concluded that unanimous provincial consent was required to abolish the Senate.³⁰ Abolition would remove the bicameral form of government underlying Canada's constitutional order. This would fundamentally alter the process of constitutional amendment in Canada and thereby require the unanimous consent of Parliament and the provinces.

Finally, the Court accepted the Attorney General of Canada's submission that Parliament is authorized to unilaterally repeal the requirement that senators have a personal net worth of at least \$4,000.³¹ Moreover, it accepted the submission that Parliament has the authority to unilaterally repeal the requirement that all senators own real property worth at least \$4,000 in the province for which they are appointed. The latter holding had one qualification.³² The Court held that fully repealing

²⁷ *Senate Reform Reference*, *supra*, note 1, at paras. 49-70.

²⁸ *Id.*, at paras. 71-83.

²⁹ *Id.*, at para. 77.

³⁰ *Id.*, at paras. 95-110.

³¹ *Id.*, at paras. 87-90.

³² *Id.*, at paras. 91-94.

the real property requirement would have a unique impact on Quebec,³³ and therefore called for the consent of that province's national assembly.³⁴

In the remainder of this paper, I explore how and when the structure of the Constitution matters, according to the Court in the *Senate Reform Reference*, in understanding and applying Part V. I focus primarily on the general interpretation of Part V rather than on the specifics of Senate reform. This inquiry treads some technical ground, but is not as dry as it sounds. Paying close attention to the meaning of Part V respects Part V's status as an official mechanism for safeguarding Canada's formal constitutional order against unchecked attempts at change.³⁵ In the context of constitutional amendment, disputes over whose voice matters are deeply entrenched in Canada's national psyche. They have been at the heart of some of Canada's most polarizing constitutional cases³⁶ and at the core of the political mêlée that gave rise to Part V. In this sense, the Part V procedures are a culmination of anxieties about Canada's basic values of statecraft.³⁷ They are a statement of the strength of Canada's commitment to the laws and values that are constitutionally entrenched. The key task for the Court in the *Senate Reform Reference* was to measure that strength.

It is particularly important to be attentive to the Court's interpretation of Part V in the *Senate Reform Reference*. The Court's reasons in this case are the most recent and comprehensive judicial interpretation of Part V. In the formal legal sphere, they are the authoritative statement on the meaning of Part V and can be formally changed only by subsequent

³³ *Id.*, at paras. 91-94.

³⁴ *Id.*, at paras. 93-94. Unlike any other province, Quebec is divided into senatorial districts and one senator must be appointed from each district: *Constitution Act, 1867*, s. 22. Under s. 23(6) of the *Constitution Act, 1867*, Quebec senators must either own real property worth at least \$4,000 in the district for which they are appointed or live in that district. If the real property qualification set out in s. 23(3) is repealed, Quebec senators would have to live in the district for which they are appointed or risk running afoul of s. 23(6).

³⁵ When Part V was entrenched in 1982, it displaced the existing rules governing constitutional amendment and became the exclusive roadmap for formally amending the Constitution of Canada: *Veto Reference*, *supra*, note 25, at 806.

³⁶ See, e.g., the *Upper House Reference*, *supra*, note 25; *Patriation Reference*, *supra*, note 25; *Veto Reference*, *id.*; *Secession Reference*, *supra*, note 2; and the recent *Supreme Court Act Reference*, *supra*, note 2. Each of these cases arose out of unilateral action to amend the Constitution by one order of government.

³⁷ John D. Whyte, "A Constitutional Conference...Shall Be Convened": Living with Constitutional Promises" (1996) 8:1 Const. Forum Const. 15, at 15; Adam Dodek, "Amending the Constitution: The Real Question before the Supreme Court" (March/April 2014) Policy 35.

interpretations of the Court or the collective action of Parliament and all the provincial legislatures.³⁸

Finally, being attentive to constitutional structure is an affirmation of constitutional humility. When we examine the Constitution through an architectural lens, we abandon the fiction that constitutional meaning is found in the content of explicit language alone.³⁹ We embrace the possibility that we cannot, and need not, explicitly capture in words the implicit values, tacit understandings and animating principles that underlie the Constitution.⁴⁰ We come to appreciate the expressive character of structure.⁴¹

³⁸ Section 41(e) provides that an amendment in relation to Part V requires unanimous consent of Parliament and the provinces.

³⁹ The Court often reminds us that constitutional interpretation is an iterative process that must start and end with the text, but which must also account for the text's linguistic, historical and philosophic context (see, e.g., *Senate Reform Reference*, *supra*, note 1, at para. 25 and the cases cited therein), as well as the unwritten assumptions and theories of which the written provisions are particular manifestations and the way that the provisions are intended to fit together: see, e.g., *Senate Reform Reference*, *id.*, at para. 26; *Remuneration Reference*, *supra*, note 2; *Secession Reference*, *supra*, note 2. On this issue, see the Supreme Court's comments on the place of democracy in the Constitution, at para. 62 of the *Secession Reference*:

[T]he democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers. ... [T]his merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.

On this theme of finding meaning in the semiotic and formal dimensions of law, see, e.g., Gerald Postema, "Implicit Law" (1994) 13 *Law & Phil.* 361 and Roderick A Macdonald, "The Fridge-Door Statute" (2001) 47 *McGill L.J.* 11, at 29-38.

⁴⁰ For an example, see the Court's explanation of why it was unnecessary for the framers of the *Constitution Act, 1867* to "textually specify how the powers of the Senate relate to those of the House of Commons or how to resolve a deadlock between the two chambers": *Senate Reform Reference*, *supra*, note 1, at para. 59. In short, the appointed status of senators, which is expressly provided for in the *Constitution Act, 1867*, was a textual manifestation of the framers' intention that the Senate be complementary to the House of Commons rather than of equal authority. It was assumed that the absence of a popular mandate would prevent senators from overstepping their proper role in the constitutional order: *Senate Reform Reference*, *id.*, at paras. 54-60.

⁴¹ See, e.g., Walters, "Written and Unwritten", *supra*, note 3, at 265ff.; Lon Fuller, *The Anatomy of Law* (Westport, CT: Greenwood Press, 1968) [hereinafter "Fuller, *Anatomy of Law*"]; Laurence Tribe, *The Invisible Constitution* (Oxford: Oxford University Press, 2008) [hereinafter "Tribe"]; Black, *supra*, note 3. The architecture of Canada's Constitution is both constitutive of and constituted from a "blueprint for governance": Wilkinson, *supra*, note 3. On assumptions about the privileged status of the written word in Anglo-American legal orthodoxy and about the content of the written word as definitive of law, see Roderick A. Macdonald, "Custom Made - For a Non-Chirographic Critical Legal Pluralism" (2011) 26:2 *C.J.L.S.* 301 and Mark Greenberg, "The Moral Impact Theory of Law" (2014) 123:5 *Yale L.J.* 1118, respectively.

III. TRADITIONAL STRUCTURAL ANALYSIS AND PART V

Structural analysis is a common interpretive technique in Canadian constitutional jurisprudence. Traditional structural analysis rests on the premise that we can draw inferences about the meaning of the Constitution from the structures of government and institutional relationships that are created by, and reflected in, the Constitution.⁴² As the Court explained in its reasons in the *Senate Reform Reference*, traditional structural analysis is a necessary part of constitutional interpretation. The Constitution must be interpreted “by reference to the structure of the Constitution as a whole”, “with a view to discerning the structure of government that it seeks to implement”.⁴³

In past cases, structural inferences have sustained conclusions that, *inter alia*, the courts cannot enforce constitutional conventions,⁴⁴ that the doctrine of interjurisdictional immunity should be deployed sparingly,⁴⁵ and that the existence and essential characteristics of the Supreme Court of Canada are constitutionally entrenched.⁴⁶ Moreover, structural inferences have been used to, among other things, interpret the Constitution,⁴⁷ determine the scope of legislative action,⁴⁸ delineate the division of powers,⁴⁹ allocate

⁴² See Walters, “Written and Unwritten”, *supra*, note 3; Elliot, *supra*, note 3; Demers, *supra*, note 3, at paras. 79-86. See also Black, *id.*; Bobbitt, *supra*, note 3; and Wilkinson, *id.*, at 38. Ultimately, every judgment from a court is an implicit exercise of structural reasoning because it reflects a particular understanding of the institutional mandate of the courts. In some cases, structural reasoning on the role of the courts is made explicit. See, e.g., cases on the legitimacy of judicial review under the *Canadian Charter of Rights and Freedoms*: *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.); *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.); *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 (S.C.C.); cases on the Supreme Court’s reference jurisdiction and justiciability in reference cases: *Secession Reference*, *supra*, note 2, at paras. 6-31; *Reference re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525 at 545 (S.C.C.); and cases on the interpretation of ss. 96 and 101 of the *Constitution Act, 1867*: *Remuneration Reference*, *supra*, note 2; *Supreme Court Act Reference*, *supra*, note 2.

⁴³ *Senate Reform Reference*, *supra*, note 1, at para. 26.

⁴⁴ See, e.g., *Patriation Reference*, *supra*, note 25.

⁴⁵ See e.g., *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) [hereinafter “*Canadian Western Bank*”].

⁴⁶ See, e.g., *Supreme Court Act Reference*, *supra*, note 2.

⁴⁷ *Remuneration Reference*, *supra*, note 2.

⁴⁸ *Hunt v. T&N plc*, [1993] S.C.J. No. 125, [1993] 4 S.C.R. 289 (S.C.C.) [hereinafter “*Hunt*”]; *Reference re Alberta Statutes*, [1938] S.C.J. No. 2, [1938] S.C.R. 100 (S.C.C.); *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.); *OPSEU*, *supra*, note 2.

⁴⁹ See, e.g., *Canadian Western Bank*, *supra*, note 45; *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66, [2011] 3 S.C.R. 837 (S.C.C.) [hereinafter “*Securities Reference*”]. While the Court’s division of powers jurisprudence provides many examples of structural reasoning, it also shows that understandings of constitutional architecture change over time. Because both Canada’s constitutional text and its governing institutions have changed to accommodate social

constitutional remedies,⁵⁰ ground substantive obligations for state actors,⁵¹ determine the constitutional status of institutions,⁵² and support claims about what counts as an unwritten principle underlying the Constitution.⁵³ In light of this history, it may come as no surprise that in the *Senate Reform Reference*, the Court relied on traditional structural analysis to make sense of both the purpose and the particulars of Part V.⁵⁴ Of particular relevance were the principle of federalism, in its distinctive Canadian iteration, and its consequences for provincial equality and intergovernmental comity.⁵⁵ For the Court, these values provided a lens through which to see the formalities of Part V in the bigger constitutional picture. They revealed the animating spirit of Part V and helped to make sense of the individual amending formulae by unveiling the tensions and choices that gave rise to them.⁵⁶

realities, the inferences drawn therefrom must also change. For examples, see the discussion in R. Blake-Brown, “The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff” (2002) 47 McGill L.J. 559 and *Securities Reference*, *id.*, at paras. 54-62. According to Deschamps J., this evolution and the idiosyncrasies of judicial conceptions of federalism are cautionary tales for structural analysis: see *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, [2005] S.C.J. No. 57, [2005] 2 S.C.R. 669, at para. 10 (S.C.C.). Note, however, that Deschamps J.’s warning is itself an exercise in structural reasoning insofar as it is based on an understanding of the proper role of the courts.

⁵⁰ *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.).

⁵¹ *Secession Reference*, *supra*, note 2, at paras. 52-54; *Remuneration Reference*, *supra*, note 2, at para. 104; *Hunt*, *supra*, note 48.

⁵² *Supreme Court Act Reference*, *supra*, note 2; *OPSEU*, *supra*, note 2.

⁵³ See, e.g., *Secession Reference*, *supra*, note 2; *Remuneration Reference*, *supra*, note 2; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319 (S.C.C.) [hereinafter “*N.B. Broadcasting*”].

⁵⁴ That the Court’s reasoning in the *Senate Reform Reference*, *supra*, note 1, was an exercise in structural analysis fits with the tradition of advisory opinions dealing with constitutional amendment over the past several decades — the *Upper House Reference*, *supra*, note 25, the *Patriation Reference*, *supra*, note 25, the *Veto Reference*, *supra*, note 25, the *Secession Reference*, *supra*, note 2 and the *Supreme Court Act Reference*, *supra*, note 2. In each of these cases, the Court called on first principles of the constitutional order to answer controversial and unprecedented questions about the foundations of the Constitution and the procedure for constitutional change.

⁵⁵ For a discussion of the principle of intergovernmental comity, see Mark D. Walters, “The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7” (2013) 7 J.P.P.L. 37 [hereinafter “Walters, ‘Form and Reform’”].

⁵⁶ Peter Oliver explains:

The process of constitutional amendment provides important information about the political culture of a country. The discussion which preceded selection of the formula and the negotiations which accompany each attempt to use the formula once in place often expose the stress spots and irregularities in a country’s overall political structure. While the politics of constitution making and amending are very revealing, the amending formula itself is usually slightly unforthcoming ... In Canada such is not and was never likely to be the case [given t]he federal nature of the country, the numerous differences

Before turning to some examples of how a traditional structural analysis played out in the *Senate Reform Reference*, it is important to note that in any invocation of (or attempt to avoid) Part V, the ultimate question is: which voices have a right to participate in the decision to amend the Constitution in a particular way? The traditional architectural version of this question is: Given the structure of government that the Constitution seeks to implement and the values that that structure embodies and constitutes, which levels of government, in which numbers, must consent to the proposed action before it comes into force? But, before answering any question about how Part V applies in a particular case, it will always be necessary to have a solid grasp on the meaning and operation of Part V as a whole. The architectural version of this inquiry is: Do the institutional structures and relationships created by, or reflected in, the Constitution assist in understanding Part V? And, if yes, how?

It is also important to note that for the purposes of answering the reference questions, the relevant issue for the Court was never whether constitutional values or principles would be enhanced or diminished by the proposed reforms to the Senate. It was not relevant whether the Senate would be more or less democratic with term limits or more or less representative with consultative elections. While these are important issues for the public and our political representatives to consider when deciding how to reform the Senate, they were not relevant to the procedural questions before the Court.

Now we can consider how traditional structural analysis can help us understand Part V and how it was and was not used by the Court in the *Senate Reform Reference*. For the Court, the principle of federalism was particularly helpful in ascribing meaning to Part V. According to the Court, the Part V amending procedures, both collectively and individually, reflect the principle that “constitutional change that engages provincial interests requires both the consent of Parliament and a significant degree of provincial consent”.⁵⁷ In the spirit of cooperative

between the provinces of the federation and the extended process of finding an appropriate amending formula ...

Peter Oliver, *Patriation and Amendment of the Constitution of Canada* (Ph.D. Thesis, University of Oxford, 1992) [unpublished], at 180.

⁵⁷ *Senate Reform Reference*, *supra*, note 1, at para. 29.

federalism,⁵⁸ they “foster dialogue between the federal government and the provinces on matters of constitutional change”.⁵⁹ Moreover, in the spirit of facilitating dialogue, they consecrate the constitutional equality of the provinces such that “no province stands above the others with respect to constitutional amendments, and all provinces are given the same rights in the process of amendment”.⁶⁰

The Court identifies the principled basis of some of the amending procedures within Part V, each of which is a manifestation of the demands of Canada’s brand of federalism. The general amending formula reflects the principle that “substantial provincial consent must be obtained for constitutional change that engages provincial interests”.⁶¹ The unanimous consent procedure is driven by the aim to grant to each of the partners in Canada’s confederation a veto over amendments dealing with matters that are “the most essential to the survival of the state”.⁶² And the unilateral amending procedures embody the principle that “[n]either level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution”.⁶³

It is unsurprising that federalism plays such a prominent role in the Court’s analysis in the *Senate Reform Reference*. Federalism is inherent in the structure of the Canadian Constitution and has been the “lodestar” guiding judicial interpretation of the Constitution from the beginning.⁶⁴ Moreover, at the heart of the issues in the *Senate Reform Reference* is the question of how to manage the relationship between the provincial and federal governments in moments of constitutional change. The question is always, how can the dynamism of constitutional crystallization and evolution be reconciled with an agreement between the provincial and federal governments to amend the Constitution only by virtue of prescribed procedures?

But while federalism is the principle that gained the most traction with the Court in the *Senate Reform Reference*, other constitutional principles also helped to limit the range of possible interpretations of Part V.

⁵⁸ On the cooperative and non-hierarchical nature of Canadian federalism today, see, e.g., *Securities Reference*, *supra*, note 49, at para. 71; *Canadian Western Bank*, *supra*, note 45, at paras. 21-24; *Secession Reference*, *supra*, note 2, at paras. 55-60.

⁵⁹ *Senate Reform Reference*, *supra*, note 1, at para. 31.

⁶⁰ *Id.*, at para. 31.

⁶¹ *Id.*, at para. 34.

⁶² *Id.*, at para. 41, citing B. Pelletier, *La modification constitutionnelle au Canada* (Scarborough: Carswell, 1996), at 208 [hereinafter “Pelletier”].

⁶³ *Senate Reform Reference*, *id.*, at para. 48.

⁶⁴ *Secession Reference*, *supra*, note 2, at para. 56.

For example, Part V makes sense within a constitutional arrangement that attempts to balance the demands of democracy and federalism.⁶⁵ On the one hand, democracy calls for a mechanism by which the Constitution can evolve through a consensus of the Canadian people, as represented by their elected officials. On the other, federalism justifies the expectation that the Constitution will be subject to change only when the coordinate authority of the provincial and federal legislatures is respected. To achieve this balance, Part V entrenches the right of the House of Commons, the Senate and the provincial legislatures to initiate negotiations for constitutional change (section 46(1)) and the obligation of each of the federal and provincial governments to come to the negotiating table following “democratic expressions of a desire for change”.⁶⁶ Moreover, it entrenches the principle that any matter “indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union”⁶⁷ can be amended only with the consent of some configuration of Parliament and the provincial legislatures. At the same time, in the spirit of the bicameral form of democratic government in Canada, Part V entrenches a procedure whereby both legislative houses review constitutional amendments and must consent to them, except in specified circumstances where the elected representatives of the House of Commons can override the absence of consent from the Senate (section 47(1)).

As a second example, Part V is an expression of the rule of law, constitutionalism and the protection of minorities.⁶⁸ Part V establishes thresholds of consent that must be met in order for the Constitution to be formally changed and identifies the types of amendments subject to each

⁶⁵ On balancing the demands of federalism and democracy, see *id.*

⁶⁶ *Id.*, at para. 69.

⁶⁷ *OPSEU*, *supra*, note 2, at 40.

⁶⁸ *Constitution Act, 1982*, *supra*, note 11, ss. 38, 41, 42, 43, 47, 52(3); *Secession Reference*, *supra*, note 2, at paras. 72-78. The Supreme Court has held that, “[b]y requiring broad support in the form of an ‘enhanced majority’ to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.” *Id.*, at para. 77. However, whether Part V protects minority interests is questionable. The bilateral and multilateral amending procedures shield fundamental constitutional values from unilateral majority action. But they do not protect against concerted action by majorities across jurisdictions. Moreover, s. 35.1 of the *Constitution Act, 1982* provides that representatives of Aboriginal peoples will be invited to discuss any amendment to s. 91(24) of the *Constitution Act, 1867* or s. 25 of the *Constitution Act, 1982* before the amendment is entrenched. However, s. 35.1 does not offer anything beyond an invitation to the table. At the hearing of the *Senate Reform Reference*, *supra*, note 1, the issue of participation by Aboriginal people in the amending procedure was raised repeatedly.

threshold. By doing so expressly and by requiring a measure of transparency in the final stages of constitutional amendment, the provisions of Part V are part of the orderly, stable, enduring and predictable framework of social life and political decision-making that a constitution shaped by the rule of law and constitutionalism should strive to achieve.⁶⁹ Of course, the nature of the amending procedure, along with the Court's understanding of how the Constitution evolves over time, ensures that any promise of predictability attached to Part V is not absolute. Uncertainty is inevitable when the governing amending procedure sets thresholds of consent defined by subject matter, all of which are laden with political histories and are subject to interpretation. Uncertainty is further inevitable when the scope of what is entrenched within the Constitution is in perpetual flux and the processes of entrenchment are multiple and still coming to light.⁷⁰

The Court's use of traditional structural reasoning when trying to make sense of Part V helps to ensure that the "Procedure for Amending [the] Constitution of Canada" is a functioning part of a larger constitutional scheme. Moreover, it facilitates an interpretation of Part V that both reflects and perpetuates the distinctive vision of government embodied and evolving in the Constitution as a whole. That the Court attributed particular interpretive force to the principle of federalism in order to constrain the range of possible meanings of Part V is consistent not only with federalism's prominence in Canada's constitutional history, but also with the nature of the constitutional principles generally. These principles are the implicit assumptions that make sense of the text.⁷¹ They are inherent in Canada's constitutional arrangements,⁷² as they represent the "fundamental norms so basic" that they are part of the legal structure of governance in Canada.⁷³

⁶⁹ *Secession Reference*, *supra*, note 2, at paras. 70, 78. As the Court explained at para. 31 of the *Senate Reform Reference*, *id.*, the Part V amending formulas are "designed ... to protect Canada's constitutional *status quo* until such time as reforms are agreed upon".

⁷⁰ On entrenchment, see *Supreme Court Act Reference*, *supra*, note 2, at paras. 76-106.

⁷¹ *Secession Reference*, *supra*, note 2, at paras. 49-53, 148.

⁷² *Id.*, at para. 50.

⁷³ Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006) 4 N.Z.L.J. 147, at 148. The principles, while said by some to be so "unremarkable" as to be "trite" (Justice Ian Binnie, "Justice Charles Gonthier and the Unwritten Principles of the Constitution" in Michel Morin, *Responsibility, Fraternity and Sustainability in Law: In Memory of the Honourable Charles Doherty Gonthier* (Markham, ON: LexisNexis Canada Inc., 2012) 441, at 442) and "fundamental" by others (McLachlin, *id.*, at 148), have been controversial for many. Critics denounce the principles as improper judicial amendments to the Constitution and challenge the "hard" use of the principles to strike down legislation or impose legal obligations not otherwise anchored in constitutional

It follows from the status of the constitutional principles that every exercise of constitutional interpretation must bring the principles to life in ways that are consistent with a deep understanding of the text, subtext and context of the Constitution. This is structural analysis at work. Such an approach does not endorse stretching or ignoring the constitutional text; rather, it calls for interpreting the text in a way that is true to the theories on which the text is based. On the flip side, it means that any interpretation of the Constitution that is inconsistent with the collection of constitutional values and principles *writ large* is antithetical to the existing constitutional order.⁷⁴ Since the principles are “implicit in the very nature of a Constitution”,⁷⁵ if we interpret the Constitution in a way that is contrary to them, we will have abandoned the current constitutional arrangement in favour of a radically different configuration of governance.

But while the reasoning in the *Senate Reform Reference* is in many ways an exercise in traditional structural reasoning, the Court’s willingness to rely on structure was not without its limits. On the one hand, the Court ascribed interpretive force to architectural concerns in order to both reject the formalist trope of textualism and to read the Constitution’s explicit text both up and down. The Court read up in its interpretation of sections 24 and 32 of the *Constitution Act, 1867*, both of which provide for the appointment of senators. The Court reasoned that behind the language of senatorial appointment in sections 24 and 32 was a grander vision of the Senate as the House of Commons’ complementary, sober-thinking, independent legislative counterpart.⁷⁶ The Court read down in its interpretation of section 44 in relation to section 42.⁷⁷ In essence, the Court held:

text. The *Secession Reference*, *supra*, note 2 and the *Remuneration Reference*, *supra*, note 2, have been particularly controversial. Critics fear that such unwritten principles, with their Dworkinian generality and flexibility, give judges too much leeway to decide cases according to, at worst, their whims and, at best, unpredictable interpretations of abstract concepts. The “weak” interpretive use of the principles has been more palatable: see, e.g., Elliot, *supra*, note 3; Binnie, *id.*; Tsvi Kahana, “Canada” in Dawn Oliver & Carlo Fusaro, eds., *How Constitutions Change: A Comparative Study* (Oxford: Hart Publishing, 2011) 9 [hereinafter “Kahana”].

⁷⁴ This is not to say that the meaning of the unwritten constitutional principles is frozen in time. The principles evolve just as the limbs of the living tree grow. Consider, e.g., the changes to Canada’s brand of federalism and democracy since Confederation (regarding federalism, see *supra*, note 49; regarding democracy, see, e.g., *Secession Reference*, *supra*, note 2, at paras. 61-69; for an account of a specific example, see, e.g., Robert J. Sharpe & Patricia I. McMahon, *The Persons Case: The Origins and Legacy of the Right for Legal Personhood* (Toronto: University of Toronto Press, 2007)).

⁷⁵ *Secession Reference*, *id.*, at para. 50.

⁷⁶ *Senate Reform Reference*, *supra*, note 1, at paras. 54-63.

⁷⁷ *Id.*, at paras. 72-77.

The Senate is a core component of the Canadian federal structure of government. As such, changes that affect its fundamental nature and role engage the interests of the stakeholders in our constitutional design — i.e. the federal government and the provinces — and cannot be achieved by Parliament acting alone.⁷⁸

On the other hand, the Court showed that structural concerns must be tempered by other interpretive factors. It was unwilling to read words or principles into the Constitution on structural grounds without an explicit textual hook. For example, one reading of Part V that privileges traditional structural concerns provides that the threshold of consensus required to amend the Constitution should increase in proportion to the significance of the amendments in question. In the context of Senate reform, this would entail that significant constitutional amendments to the Senate — a national institution in which the provinces necessarily have an interest⁷⁹ — require a commensurate degree of consensus between federal and provincial authorities. On this reading, constitutional amendments that alter the fundamental institutional architecture of the Constitution of Canada, like abolition of the Senate, would automatically warrant unanimous consent of all parties to the federation. Moreover, amendments in relation to the Senate in which all the provinces had an equal interest would fall within the 7/50 rule, without the possibility of provinces opting out (section 42(1)). All other amendments in relation to the Senate would be accomplished by Parliament acting unilaterally (section 44) or bilaterally (section 45).

The Supreme Court's reading of Part V does not go this far. It did not accept a reading of Part V that would expand the scope of sections 41 and 42 beyond the subject matters expressly listed. We see this in the Court's holding that the abolition of the Senate requires unanimous consent of Parliament and the provinces. The Court reached this conclusion not because abolition would fundamentally alter the foundational architecture of the Constitution as imagined in 1867, but rather because abolition would rearrange the structure of the Part V amendment process agreed to in 1982.⁸⁰

⁷⁸ *Id.*, at para. 77.

⁷⁹ As the Court explained in the *Senate Reform Reference*, *id.*, at para. 77: "The Senate is a core component of the Canadian federal structure of government. As such, changes that affect its fundamental nature and role engage the interests of the stakeholders in our constitutional design — i.e. the federal government and the provinces — and cannot be achieved by Parliament acting alone."

⁸⁰ *Senate Reform Reference*, *id.*, at paras. 103-110. We see another example in the Court's conclusion that the government's proposal to impose term limits on senators fell under the general

IV. THE INTERNAL STRUCTURE OF PART V

Whereas the preceding section dealt with structural interpretation in the traditional sense, this section asks whether the internal, formal or “codal” structure of Part V has interpretive force.⁸¹ Like above, the answer according to the *Senate Reform Reference* is “sort of” and that “sort of” is constrained within narrow limits.

“Formal structure” refers to the scope of each provision of Part V and of Part V as a whole, as well as the way that they are presented and configured. If we pay attention to internal structure, we see that the formal dimensions of Part V extend an implicit “interpretive invitation”⁸² to readers of the Constitution and “ordain ... modes of intelligible analysis” for thinking about constitutional amendment.⁸³ We accept that we can garner a “truer sense”⁸⁴ of the meaning and operation of Part V by closely examining the assumptions embedded within the form, style, language and arrangement of its provisions, and of the provisions in relation to each other. Ultimately, we affirm that the meaning of Part V is greater than the sum of the words on the page, it is a function of the means *and* the ends of constitutional expression.⁸⁵

In addition, paying attention to the formal structure of Part V is a reminder that Part V is articulated and presented in a particular way for particular reasons. The framers were not bound to any particular

amending procedure via s. 38 rather than s. 42(1): *Senate Reform Reference*, *id.*, at paras. 74-83. While the Court held that all changes to the fundamental nature and role of the Senate could not be achieved unilaterally (*Senate Reform Reference*, *id.*, at paras. 74-77) it was unwilling to locate all such changes (for which it might be important to have uniform application to the provinces) in s. 42(1) where the provincial opt-out is unavailable, instead of s. 38(1) (*Senate Reform Reference*, *id.*, at para. 83).

⁸¹ In referring to this structural context as “codal”, I am not claiming that Part V should be interpreted akin to a tax code or that Part V is a civil code of sorts. Rather, I use the term “codal” in part as a matter of convenience. It creates a helpful shorthand for distinguishing this type of structural analysis from its traditional counterpart discussed in Part III, above. But I also use the term as a matter of substance. The reference to Part V’s “codal” structure signifies that some techniques and assumptions of codal interpretation in civil law can contribute to the exercise of interpreting Part V. For a treatise on codal interpretation, see, *e.g.*, John E.C. Brierley & Roderick A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Edmond Montgomery, 1993) [hereinafter “Brierley & Macdonald”], esp at Ch. IV. Note that relying on internal structure as part of a complete interpretation is not limited to Part V (see, *e.g.*, the reasoning of Lamer C.J.C. in *Motor Vehicle Reference*, *supra*, note 3, at 499-513, esp. 500-504 and 511-13).

⁸² Brierley & Macdonald, *id.*, at 104.

⁸³ *Id.*, at 100.

⁸⁴ *Demers*, *supra*, note 3, at para. 86.

⁸⁵ On this relationship between means and ends, see Lon L. Fuller, “Means and Ends” in Kenneth I. Winston, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed. (Oxford: Hart Publishing, 2001) 61 [hereinafter “Fuller, ‘Means and Ends’”].

procedure of constitutional amendment or any particular presentation of that procedure. They made choices from a range of possibilities.⁸⁶ As a result, the form and style of the amending procedures are, like the substance of Part V, idiosyncratic — the culmination of Canada’s constitutional history, assumptions about the nature of the Canadian constitution and choices about how it should be changed. The procedures and disputes it generates are different from those that would arise if other choices had been made. An interpretation of Part V that is attentive to internal structure would account for the normative force of these choices.

Moreover, interpreting Part V with reference to its formal or codal structure shows respect for the principle of constitutional integrity.⁸⁷ It is consistent with the well-established belief that the Constitution of Canada is “a single entity”,⁸⁸ with individual parts that, in all their “diversity and complexity”, are linked⁸⁹ and cannot trump each other.⁹⁰ On such a reading, the rules governing formal constitutional amendment would be interpreted with an appreciation of that which is subject to amendment. The interpreter would accept the premise that a constitutional amending procedure only makes sense in relation to the constitution that is to be amended. Similarly, each rule governing constitutional amendment would be interpreted alongside the other rules for amendment. As the Court noted in the *Senate Reform Reference*, “the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text”.⁹¹

In order to get a better sense of how internal structure can inform a contextual interpretation of Part V and help to demystify some of the

⁸⁶ A comparative approach is a good reminder that Part V is the product of choice. Compare Part V to, for example, U.S. Const., art. V; the Constitution of India, art. 368; *Commonwealth of Australia Constitution Act*, 63 & 64 Vict, c. 12, s. 128; and the Constitution of Ireland, 1997, art. 46. Compare too all of the uncoded rules, principles and conventions of constitutional amendment.

⁸⁷ It may be that the principle of constitutional integrity is a free-standing unwritten principle of the Constitution (Elliot, *supra*, note 3, at 137-38) or flows from the principle of constitutionalism (Walters, “Form and Reform”, *supra*, note 55, at 57).

⁸⁸ *Secession Reference*, *supra*, note 2, at paras. 32, 49-51, 148-150; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] S.C.J. No. 25, 2004 SCC 30, at para. 16, [2004] 1 S.C.R. 789 (S.C.C.) [hereinafter “*Québec Commission des droits*”].

⁸⁹ *Secession Reference*, *id.*, at paras. 50, 48; *Québec Commission des droits*, *id.*, at para. 16.

⁹⁰ *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] S.C.J. No. 44, [1987] 1 S.C.R. 1148 (S.C.C.); *N.B. Broadcasting*, *supra*, note 53; *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 (S.C.C.).

⁹¹ *Senate Reform Reference*, *supra*, note 1, at para. 26.

technicalities of the amending procedures, consider two examples. First, the formal structure of Part V suggests that Part V was designed to be a coherent and complete code of constitutional procedure.⁹² We see this in the way that the multiple amending formulas fit together as a series of exceptions to a residual general rule. The Court adopted this reading of Part V in the *Senate Reform Reference*.⁹³ As the Court explained, section 38 is “the procedure of general application for amendments to the Constitution of Canada”.⁹⁴ It “represents the balance deemed appropriate by the framers of the *Constitution Act, 1982* for most constitutional amendments, apart from those contemplated in one of the other provisions in Part V”.⁹⁵ In this sense, section 38 is residual. When an amendment is plugged into the Part V algorithm and does not trigger any of the exceptions, the general rule applies.⁹⁶ Accordingly, Part V governs all possible formal amendments to the Constitution of Canada. No formal amendment can fall outside the scheme.⁹⁷

Second, the formal structure of Part V could support the claim that each amending procedure within Part V has a principled basis. This principled basis would emerge from, and “define the range of meaning” of, the procedure as a whole and each subject matter listed within it.⁹⁸ As discussed above, in the *Senate Reform Reference*, the Court accepted that each amending procedure was animated by a particular principle. For example, section 41, the unanimity formula, was designed to apply to

⁹² In the *Veto Reference*, *supra*, note 25, at 806, the Court noted that Part V was a complete code governing constitutional amendment.

⁹³ *Senate Reform Reference*, *supra*, note 1, at paras. 32, 36. Note that the Court referred only to exceptions to the general rule, not variations. It held that s. 42 is complementary to s. 38(1) because the section identifies certain categories of amendments that are subject to the 7/50 rule. Section 42 could also be called a “variation” of the general rule, given that it identifies certain subject matters, amendments in relation to which trigger the general amending procedure but not the provincial opt-out contemplated in s. 38(3). Moreover, the Court does not include s. 47(1) in its review of the amending procedures. Section 47(1) could also be called a variation because it provides that in certain circumstances, an “amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation”.

⁹⁴ *Senate Reform Reference*, *id.*, at para. 36.

⁹⁵ *Id.*

⁹⁶ *Id.* When the individual procedures are taken together, we can see that the provisions of Part V are arranged in a cascading scheme, establishing an algorithm of sorts. At the top of the scheme is s. 41, which represents the most onerous burden for formal amendment — unanimity. At the bottom is the residual procedure set out in s. 38(1), which is triggered in the absence of any other applicable formula. Between the top and the bottom is a sequence of exceptions.

⁹⁷ This is consistent with s. 52(3), which provides that amendments to the Constitution of Canada “shall be made only in accordance with the authority contained in the Constitution of Canada”.

⁹⁸ Brierley & Macdonald, *supra*, note 81, at 104.

“certain fundamental changes to the Constitution of Canada”.⁹⁹ In the Court’s view, unanimity is required for fundamental changes because each party to the federal compromise is entitled to a veto on the “most essential” matters.¹⁰⁰

For the purposes of the *Senate Reform Reference*, the Court sought no further elaboration of the principled basis of section 41. It did not need it. Undoubtedly, the individual matters listed in section 41 are, as the Court suggested, all issues that are central to the conception and preservation of the Canadian state. But, looking deeper, these matters are also linked because they all engage the federalism principle (thereby requiring a meaningful level of consent by both Parliament and the provincial legislatures) while simultaneously being of unique interest to one or some provinces (thereby warranting a veto for those provinces).¹⁰¹ For example, the Senate floor rule is of special concern to provinces with small and/or declining populations whose Senate seats would otherwise outnumber their representation in the House of Commons. By virtue of section 41(b), these smaller provinces are guaranteed a veto over amendments that alter their minimum level of political representation. Similarly, section 41(c) requires unanimous consent for amendments in

⁹⁹ *Senate Reform Reference*, *supra*, note 1, at para. 41.

¹⁰⁰ *Id.*, at para. 41, citing Pelletier, *supra*, note 62.

¹⁰¹ See *Constitution Act, 1982*, s. 41(b), (c), (d). Similar results could flow from the internal structure of s. 42(1). Section 42 is a particularization of and a “complement” to the general s. 38 rule: *Senate Reform Reference*, *id.*, at para. 37. It establishes a class of amendments that are subject to the 7/50 threshold of consent set out in s. 38(1) but not the “supermajority” requirement or the provincial opt-out scheme in s. 38(2) to (4). Again, the matters listed in s. 42(1) could be thought of as random or as a reaction to the *Upper House Reference*, *supra*, note 25. But, taken together, the matters support an argument that s. 42 applies to amendments that are “indivisibly related to the implementation of the federal principle” (*OPSEU*, *supra*, note 2, at 40) and amendments to essential features of national institutions that engage the interests of the provinces fully but equally. These types of amendments are properly subject to the 7/50 threshold because they require the consensus of a majority of the provinces but not any particular province. At the same time, they are properly particularized outside of s. 38(1) because, given the interests at stake, it is neither feasible nor principled to permit some provinces to “opt out” of amendments in relation to the features of national institutions. In the *Senate Reform Reference*, *id.*, the Court affirmed these dimensions of s. 42(1) (see paras. 37-38) but rejected the idea that any principle underlying s. 42 would justify applying s. 42 to an amendment that did not fall squarely within the language of the matters expressly listed in s. 42(1)(a)-(e) (see paras. 74, 83). This is true to the constitutional text and understandings of the legitimacy of the Court’s role (see, *e.g.*, para. 64). The risk is that in future cases, amendments touching on national institutions that fall within s. 38(1) could also trigger the opt-out provision in s. 38(3). This would be the case if, for instance, the Constitution were amended in the future such that provinces could both hold consultative elections for senatorial nominees and vote on how long their senators should sit for. Any subsequent amendment to this latter provision could, if it fell within s. 38(1), also trigger the opt-out in s. 38(3).

relation to the use of English or French. This protects the interests of linguistic minorities against national majorities.¹⁰² Moreover, section 41(d) requires unanimous consent for amendments in relation to the “composition of the Supreme Court of Canada”. The Court explained the reasoning behind this decision in the *Supreme Court Act Reference*:

... the central bargain that led to the creation of the Supreme Court in the first place was the guarantee that a significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture. ... Requiring unanimity for changes to the composition of the Court gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent. *Protecting the composition of the Court under s. 41(d) was necessary because leaving its protection to s. 42(1)(d) would have left open the possibility that Quebec’s seats on the Court could have been reduced or altogether removed without Quebec’s agreement.*¹⁰³

The virtue of locating a principled basis within the individual matters listed in each amending procedure is that it would carve out a defined scope for each procedure *vis-à-vis* the other procedures. In addition, it would offer interpretive guidance on the meaning of the individual matters listed within each provision of Part V. Moreover, it would support an interpretation of each amending procedure that both endures over time and provides guidance in particular cases.¹⁰⁴ In this way, locating the principled basis of each amending procedure would assist in matching an amendment to an appropriate amending procedure according to the significance of the proposed change — an assessment that persists over time even as reform agendas evolve — rather than on a strict adherence to the text of the listed matters.

In the *Senate Reform Reference*, the Court’s attribution of interpretive force to the formal structure of Part V did not go this far. On the one hand, the Court’s reasons suggest that it is important to identify the principled basis of each amending procedure in order to distinguish

¹⁰² Section 41(c) is subject to the special arrangements procedure set out in s. 43.

¹⁰³ *Supreme Court Act Reference*, *supra*, note 2, at para. 93 (emphasis added).

¹⁰⁴ This result corresponds to an assumption embedded within codal structure and interpretation, namely, that rules can be meaningfully expressed with a degree of generality to ensure stability and permanence, a degree of flexibility to establish baselines for individual action and a sufficient degree of specificity to convey the limits of the rule in future cases: Brierley & Macdonald, *supra*, note 81, at 99, 100.

one procedure from another.¹⁰⁵ But, on the other hand, as with traditional structural analysis, the Court was not willing to rely on formal structural concerns to read language into Part V that did not otherwise have an explicit textual basis. For example, consider again the issue of abolishing the Senate. If we truly accepted the notion that the level of federal and provincial consensus on formal constitutional amendments should increase in proportion to the significance of the modifications in question, then categorizing a proposal for abolition on the basis of its effect on the amending procedures, as the Court did,¹⁰⁶ would be unsatisfying. It would not do justice to the revolutionary effect that abolition of the Senate would have on Canada's constitutional architecture.¹⁰⁷ The more satisfying conclusion would be that abolition should attract unanimous consent because of its significance rather than because of its effect on the Part V amending formula.¹⁰⁸ This conclusion would be reinforced if we imagine proposals to dismantle institutions of governance that are not specifically mentioned in Part V, such as the superior courts. If significance were the test, the constitutional renovation that would flow from abolishing the superior courts would

¹⁰⁵ See, e.g., *Senate Reform Reference*, *supra*, note 1, at para. 75. See also paras. 48, 68-69, 71-83, and 87-94 generally.

¹⁰⁶ *Id.*, at paras. 103-110.

¹⁰⁷ See the Court's description of the Senate as a "core component of the Canadian federal structure", *id.*, at para. 77. In short, abolition would replace the "bicameral form of government that gives shape to the *Constitution Act, 1867*" with a unicameral alternative (*id.*, at para. 97; see also paras. 14-19). This is a profound reimagining of Canada's constitutional order and the system of government it seeks to implement. It would necessarily entail dramatic reallocations of constitutional authority and responsibility between new or existing constitutional actors.

¹⁰⁸ It could be argued that classifying a proposal to abolish the Senate under s. 41(e) runs afoul of the Court's mantra in the *Senate Reform Reference*, *id.*, that the process of constitutional amendment cannot favour form over substance. This argument is unlikely to hold water given that the Court's mantra only goes so far as to favour substantive rather than formal readings of the words expressly on the constitutional page. Even this reading of the mantra pushes up against the Court's statement, albeit in *obiter*, in the *Supreme Court Act Reference*, *supra*, note 2, at para. 91, that a proposal to abolish the Supreme Court would warrant unanimous consent under s. 41(d) because abolition would wipe out the Court's composition. As with abolition of the Senate, the Court's conclusion does not do justice to the profound constitutional transformation that would result from abolition of the Supreme Court. At the same time, it sits uncomfortably with the core of the Court's analysis in the *Supreme Court Act Reference*, which turned on the revelation that the Supreme Court is an entrenched and "essential part of Canada's constitutional architecture" (at para. 100). Moreover, the Court's conclusion that abolition of the Supreme Court falls within s. 41(d) is inconsistent with its subsequent holding that abolition of the Senate could not fall within s. 42(1)(b) or (c) because these provisions contemplate the continued existence of the Senate: *Senate Reform Reference*, at para. 99. It is not obvious why the same reasoning does not exclude abolition of the Court from the scope of the Court's "composition" in s. 41(d).

merit the highest level of constitutional consensus regardless of the fact that it is not expressly listed in section 41.

Ultimately, even though the Court accepted that the purpose of the unanimity threshold is to ensure that each partner to Canada's federal compromise has a veto on the topics "most essential to the survival of the state",¹⁰⁹ the Court also makes clear that significance is not the determinative factor when allocating proposed constitutional amendments to the amending formulas. As the Court explained, the 7/50 rule "represents the balance deemed appropriate by the framers of the *Constitution Act, 1982* for most constitutional amendments, apart from those contemplated in one of the other provisions of Part V".¹¹⁰ In other words, constitutional text trumps qualitative measures of significance.

V. THE ANALYTICAL STRUCTURE OF PART V

The two preceding sections deal with constitutional structure primarily as an interpretive tool. In both, the question was how the architecture of the Constitution informs our understanding of the constitutional amending procedures. In this section, the focus shifts to how the Constitution is constitutive of analytical architecture. The claim is that the logic and structure of Part V give rise to a two-stage analytical framework for determining which amending procedure, if any, applies in particular cases.

1. The "Constitution of Canada" and Its Amendments

Before turning to the analytical framework of Part V, let me briefly review the scope of the "Constitution of Canada" and the ways in which the Constitution can change. As is discussed below, these two issues are central to understanding the application of Part V.

The "Constitution of Canada" "includes" 30 texts listed in the Schedule to the *Constitution Act, 1982*, along with their amendments.¹¹¹ Yet these texts are not exhaustive. In the *Senate Reform Reference*, the Court repeated what it has said many times before, namely, that the

¹⁰⁹ *Senate Reform Reference*, *id.*, at para. 41.

¹¹⁰ *Id.*, at para. 36.

¹¹¹ *Constitution Act, 1982*, s. 52(2). The list of texts in s. 52(2) may not be complete. In the *Supreme Court Act Reference*, *supra*, note 2, the Court held that ss. 4(1), 5 and 6 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, are constitutionally codified.

Constitution is an exhaustive yet flexible framework of rules and principles that shape Canada's system of government and reflect the aspirations of the citizenry.¹¹² The Constitution is not a list of texts, but rather is an aggregate of intersecting pieces that "defines the powers of the constituent elements of Canada's system of government" and "governs the state's relationship with the individual".¹¹³ The various parts of the Constitution are written and unwritten,¹¹⁴ legal and political,¹¹⁵ entrenched and unentrenched,¹¹⁶ formal and informal,¹¹⁷ implicit and explicit,¹¹⁸ and small "c" constitutional and big "C" Constitutional.¹¹⁹

¹¹² *Senate Reform Reference*, *supra*, note 1, at para. 23; *Secession Reference*, *supra*, note 2, at para. 32; *OPSEU*, *supra*, note 2; *N.B. Broadcasting*, *supra*, note 53.

¹¹³ *Senate Reform Reference*, *id.*, at para. 23. See also *Patriation Reference*, *supra*, note 25, at 876-84.

¹¹⁴ *Secession Reference*, *supra*, note 2, at para. 32; *Remuneration Reference*, *supra*, note 2, at para. 92. Written parts of the Constitution of Canada include the texts listed in s. 52(2) of the *Constitution Act, 1982*, orders in council, "ordinary" statutes that bear on the organs of government, common law rules found in judicial decisions, conventions that are reduced to writing in some form: *OPSEU*, *supra*, note 2; *Osborne v. Canada (Treasury Board)*, [1991] S.C.J. No. 45, [1991] 2 S.C.R. 69 (S.C.C.) [hereinafter "*Osborne*"]; *Patriation Reference*, *id.*, at 876-77, 880. Unwritten elements include the "unwritten principles", constitutional architecture, constitutional conventions, custom, practice, performance, and so on: *Patriation Reference*, *id.*, at 879-80; *Secession Reference*, *id.*; *Senate Reform Reference*, *id.*, at para. 27.

¹¹⁵ According to the Supreme Court, the "total constitution of the country" equals "constitutional conventions plus constitutional law": *Patriation Reference*, *id.*, at 884; *Osborne*, *id.* Constitutional conventions, along with the workings of Parliament, are part of the political constitution: *Secession Reference*, *id.*, at para. 32. They are not enforceable by the courts: *Patriation Reference*, *id.*, at 877-81. Constitutional law is found in the texts listed in s. 52(2) (as interpreted and amended), unwritten constitutional principles, statutes and common law rules and decisions: *Patriation Reference*, *id.*, at 877; *Osborne*, *id.*

¹¹⁶ The entrenched parts of the Constitution are the "supreme law of Canada" and set the standard to which all other valid laws must comply: *Constitution Act, 1982*, s. 52(2). The unentrenched parts of the Constitution are those that contribute to the constitutional apparatus, but are neither supreme nor protected by special rules for amendment. They include the elements of the political constitution, as well as statutes and the common law that crystallize constitutional conventions or bear on the operation of organs of government (*Patriation Reference*, *id.*; *Secession Reference*, *id.*, at para. 32; *Osborne*, *id.*, at 86-88; *Ontario English Teachers' Assn v. Ontario (Attorney General)*, [2001] S.C.J. No. 14, [2001] 1 S.C.R. 470, at paras. 63-64 (S.C.C.) [hereinafter "*Ontario Teachers*"]).

¹¹⁷ For different possible approaches to distinguishing the formal and informal elements of the Constitution, see, e.g., Kahana, *supra*, note 73, at 11-14; Larry D. Kramer, "Undercover Anti-Populism" (2004) 73 *Fordham L. Rev.* 1343; Roderick A. Macdonald, "Pluralistic Human Rights? Universal Human Wrongs?" in R. Provost & C. Sheppard, eds., *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer Press, 2012) 15.

¹¹⁸ This binary captures four types of constitutional norms and institutions — those that are explicit and canonical, implicit and canonical, explicit and inferential, and implicit and inferential. For an account of these typologies not restricted to the constitutional context, see R.A. Macdonald, "Pour la reconnaissance d'une normativité implicite et inférentielle" (1986) *XVIII Sociologie et sociétés* 47; R.A. Macdonald, "Les Vieilles Gardes. Hypothèses sur l'émergence des normes,

Canada's Constitution is a living tree,¹²⁰ the flowing sap of which fends off the petrification of originalism. The living tree metaphor anchors the principle that the Constitution should be interpreted in a way that "accommodates and addresses" the evolving realities of modern life.¹²¹ Moreover, it is a reminder that constitutional change is not a monopoly of the formalities of Part V. Rather, the Constitution changes through a variety of informal and formal means, including judicial action,¹²² individual interaction, political practice,¹²³ international agreement,¹²⁴ custom and attitudes, evolving institutional roles and functions over time,¹²⁵ execution of policy by the civil service, administrative and bureaucratic conduct, legislative enactment and reform,¹²⁶ technological developments, and so on.

2. The Analytical Framework

The *Senate Reform Reference* is not the first time the Court has been asked to advise on the proper procedure for Senate reform. In the *Upper House Reference* (1980), the Court concluded that Parliament could not

l'internormativité et le désordre à travers des institutions normatives" in J.-G. Belley, ed., *Le droit soluble. Contributions québécoises à l'étude internormativité* (Paris: Librairie générale de droit et de jurisprudence, 1996) 233. See also Tribe, *supra*, note 41; Fuller, *Anatomy of Law*, *supra*, note 41; Roderick A. Macdonald, "The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity: The Canadian Experiment" in K. Kulesar & D. Szabo, eds., *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Budapest: Royal Society of Canada – Hungary Academy of Sciences, 1996) 52.

¹¹⁹ Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950), at 3-23 [hereinafter "Gérin-Lajoie"]. Gérin-Lajoie defines the "small 'c' constitution" as the full body of basic (legal and political) rules governing state organization and activities, and the "big 'C' Constitution" as the constitution that embodies the most "fundamental law" of the Constitution, as is captured in written text and which should be subject to higher thresholds for amendment.

¹²⁰ *Edwards*, *supra*, note 8, at 136.

¹²¹ *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698, 2004 SCC 79, at para. 22 (S.C.C.).

¹²² See Gérin-Lajoie, *supra*, note 119, at 31-32. Some distinguish between judicial pronouncements of what the Constitution is (*i.e.*, interpretation) from judicial pronouncements of what the Constitution implies (*i.e.*, norm creation), with the latter amounting to formal (but improper) constitutional amendment: see, *e.g.*, Kahana, *supra*, note 73, at 33-39.

¹²³ Consider the decision of the federal Liberal Party to expel all senators from the Liberal caucus and requiring all (former) "Liberal Senators" to sit in the upper house as independents: "Justin Trudeau Statement: 'Senate is broken, and needs to be fixed'" (January 29, 2014), online: CBC <www.cbc.ca>.

¹²⁴ See Kahana, *supra*, note 73, at 30-32.

¹²⁵ *Supreme Court Act Reference*, *supra*, note 2.

¹²⁶ *Osborne*, *supra*, note 114; *Ontario Teachers*, *supra*, note 116, at paras. 63-65.

alter the “essential characteristics” of the Senate without the consent of the provinces.¹²⁷ In the *Senate Reform Reference* (2014), the parties often framed their submissions in terms of the analysis in the *Upper House Reference*. They often argued that the scope of Parliament’s unilateral amending power turned on whether the proposal for reform altered an essential characteristic of the Senate. The problem with this approach was that it does not account for the constitutional events of 1982, including the significant rewrite of the constitutional amending formulas. By mapping the *Upper House Reference* approach directly onto Part V, this analytical approach ignored the effect of Part V.¹²⁸

The text of Part V does not expressly set out the analytical steps that should be followed when deciding which amending formula applies to a particular constitutional amendment. But the substance, logic and configuration of Part V point to a two-step framework that can apply in all cases: Is the proposal an amendment to the Constitution of Canada? If yes, which amending formula applies? Indeed, in the *Senate Reform Reference*, the Court accepted this framework as the applicable analytical approach.¹²⁹

(a) *Step One: Scope*

The first step of the framework deals with the scope of Part V. The question to be answered is: Is the proposed action an amendment to the Constitution of Canada within the meaning of Part V? This threshold question is true to the operative text of the amending procedures, which apply to “amendments” to the “Constitution of Canada”.¹³⁰

Recall, however, that the “Constitution of Canada” has multiple parts and there are multiple ways of changing it. If Part V is read to embody

¹²⁷ *Upper House Reference*, *supra*, note 25.

¹²⁸ The Court confirmed that Part V displaced all the existing rules of constitutional amendment in the *Veto Reference*, *supra*, note 25. The entrenchment of Part V does not render the Court’s reasoning in the *Upper House Reference* irrelevant. The particulars of Part V were, in part, a response to the *Upper House Reference*. The claim here is that in current cases of constitutional amendment, Part V must be the starting point. The task is to determine how, if at all, the *Upper House Reference* fits into the framework set by Part V, not the other way around.

¹²⁹ See, e.g., *Senate Reform Reference*, *supra*, note 1, at paras. 21, 52-53, 54-67, 71.

¹³⁰ Sections 38(1), 41, 42, 43 and 47(1) of the *Constitution Act, 1982* each prescribe a formula for how an “amendment” to the “Constitution of Canada” “may be made”. Section 44 provides that Parliament may exclusively make laws “amending the Constitution of Canada” in relation to certain matters. Note that s. 45 applies to amendments to “the constitution of a province”. For the purposes of this analysis, I focus on amendments to the Constitution of Canada.

such all-encompassing definitions, any amendment to the “entire global system” of constitutional rules and principles would trigger the Part V procedures. This cannot be the case. Defining “Constitution of Canada” in such broad terms for the purposes of Part V would legally entrench the entire political constitution and subject it to enforcement by the courts. This result would be contrary to the fundamental purpose and premises of a political constitution. Moreover, defining “Constitution of Canada” too broadly for the purposes of Part V would entrench the parts of the Constitution that are found within the common law and “ordinary” statutes, summarily elevating them to “supreme law”. Crystallization of these parts of the Constitution via judicial interpretation of “Constitution of Canada” would compromise the flexibility, exhaustiveness and responsiveness of the Constitution and raise concerns about the legitimacy of the courts in the process of constitution-making.¹³¹

Instead, for the purposes of Part V, “Constitution of Canada” should refer only to the formal entrenched legal constitution. This would include the text of the instruments enumerated in subsection 52(2) of the *Constitution Act, 1982*, as amended and interpreted over time.¹³² Moreover, it would include at least some parts of the architecture or basic structure of the Constitution.¹³³ As suggested in the *Senate Reform Reference*, it would include at least the foundational structures and core institutions of government envisioned by the Constitution, as well as their fundamental nature and role, as agreed to by the stakeholders in the federal compromise.¹³⁴

¹³¹ The political constitution evolves through informal means. The unentrenched parts of the legal constitution are subject to change through the “ordinary” process of the common law and legislative enactment and reform: *Secession Reference*, *supra*, note 2, at para. 98; *Osborne*, *supra*, note 114, at 86-88; *Patriation Reference*, *supra*, note 25, at 880; *Veto Reference*, *supra*, note 25, at 803; *Ontario Teachers*, *supra*, note 116, at 63-65. With respect to “supreme law”, see *Constitution Act, 1982*, s. 52(1).

¹³² *Constitution Act, 1982*, s. 52(1), (3); Gérin-Lajoie, *supra*, note 119.

¹³³ *Senate Reform Reference*, *supra*, note 1, at para. 27. See also *Supreme Court Act Reference*, *supra*, note 2.

¹³⁴ *Senate Reform Reference*, *id.*, at para. 26; *Supreme Court Act Reference*, *id.* In the *Senate Reform Reference*, the suggestion is that the Senate’s nature and role, while not described in explicit detail in the *Constitution Act, 1867*, is an assumption on which the constitutional text rests. That is, the internal architecture of the Senate’s design, and the structural relationships between the Senate and the House of Commons, reflect the framers’ vision of the government of Canada. This vision is not exhaustively set out in words, but the words that have been used are interpreted in light of the vision. The Court’s reasoning suggests that the architectural position of the Senate has always been part of the meaning of the Constitution because it reflects the common understanding of the parties to Confederation: see, e.g., *Senate Reform Reference*, at paras. 54-59. This differs from the Court’s reasoning in the *Supreme Court Act Reference*, in which the Court contends that the existence and

At the same time, just as “Constitution of Canada” cannot refer to all parts of the Constitution for the purposes of Part V, “amendment” cannot refer to all types of constitutional change. An amendment implemented by virtue of Part V becomes entrenched as part of the supreme law of Canada¹³⁵ and subject to formal amendment only by virtue of the Part V procedures. It requires express approval by a process that has legitimacy in our democratic governance structure. Given the effects and formalities of Part V, “amendment” in the context of Part V should be concerned only with official legislative action that, in purpose or effect, changes the formal, entrenched parts of the Constitution of Canada. On this reading, a declaratory measure external to the constitutional texts would be insufficient to trigger Part V,¹³⁶ but a “qualitative” or “substantive” change to the fundamental nature and role of a core constitutional institution could be enough.¹³⁷

The importance of the threshold question in the two-step analysis under Part V is obvious in the *Senate Reform Reference*. Any proposal that modifies the existing text of a constitutional document will clearly fall within the scope of Part V. Such was the case with the federal government’s questions about term limits for senators, removing the property qualifications for senators and abolishing the Senate.¹³⁸ In contrast, the government’s proposal to implement a framework for consultative elections would not have added or deleted text from any constitutional document. But, as the Court confirmed, a constitutional amendment can alter the Constitution’s meaning without any textual change.¹³⁹ With respect to consultative elections, “[w]hile the provisions regarding the appointment of Senators would remain textually untouched,

essential features of the Supreme Court of Canada became constitutionally entrenched over time, through the operation of history, political practice and constitutional operation, and as confirmed in the patriation of the Constitution (paras. 76-95). In the *Supreme Court Act Reference*, the Court relies on traditional structural analysis not only to support the conclusion that dimensions of the Court are constitutionally entrenched, but also as support for the conclusion that the government is now obligated to maintain and protect the Supreme Court pursuant to s. 101 of the *Constitution Act, 1867*, which on its face is a permissive grant of power to the federal government to establish a general court of appeal for the country (para. 101). While the Court’s analysis of the evolving role of the Supreme Court in Canada’s constitutional order is persuasive, accurate and an important account of our constitutional history, it raises questions about legitimacy in the process of entrenchment and the normative force of constitutional architecture.

¹³⁵ *Constitution Act, 1982*, s. 52(1), (3).

¹³⁶ *Supreme Court Act Reference*, *supra*, note 2, at para. 106.

¹³⁷ *Senate Reform Reference*, *supra*, note 1; *Supreme Court Act Reference*, *id.*, at para. 105.

¹³⁸ See reference questions 1, 4, 5, and 6, as set out in P.C. 2013-70.

¹³⁹ *Senate Reform Reference*, *supra*, note 1, at para. 52.

the Senate's fundamental nature and role as a complementary legislative body of sober second thought would be significantly altered."¹⁴⁰

Accordingly, when a proposed enactment does not alter the text of the Constitution, it will always be necessary to consider whether the proposal would modify the Constitution's meaning in ways that are not immediately obvious from a *prima facie* review of the text. Moreover, as the Court demonstrated in the *Senate Reform Reference*, determining whether a proposal would constitute a "qualitative change" to constitutional architecture will always entail a careful appreciation of the institutional and aspirational configuration and operation of the Constitution. It is only by understanding the Senate's internal configuration and its role within Canada's constitutional order that the Court could see the extent of the change that would flow from the implementation of a framework for consultative elections.¹⁴¹

The Court demonstrated its careful appreciation of constitutional architecture in its holding that Part V applies when the foundational nature and role of core constitutional institutions are at stake. In doing so, it affirmed that the structure of the Constitution can have substantive status. Of course, many questions remain for future cases: What is the scope of the constitutional architecture that is entrenched? How do we determine the difference between entrenched and unentrenched architecture? What are the essential features of the institutions that comprise Canada's constitutional architecture? Are there architectural elements, like the unwritten principles perhaps, that cannot be amended under Part V? At what point does an amendment to the constitutional architecture take us outside the existing constitutional scaffolding and into a new constitutional order?

At the same time, the Court's analysis of the consultative elections issue creates some confusion about the scope of Part V. By concluding that section 42(1)(b) applies to the "entire process" by which senators are selected, the Court rightly affirmed that the "method of selecting senators" is broader than simply the means by which senators are appointed.¹⁴² However, it simultaneously failed to distinguish between the entrenched and unentrenched parts of the selection process. The Court seemed to suggest that at least some of the conventional dimensions of the selection process are subject to the Part V amending

¹⁴⁰ *Id.*

¹⁴¹ The same was true in the *Supreme Court Act Reference*, *supra*, note 2.

¹⁴² *Senate Reform Reference*, *supra*, note 1, at para. 65.

procedures. If this is so, and if it is an indicator that constitutional conventions generally are subject to Part V, the future of constitutional evolution will be much more rigid than is called for by Part V. Moreover, it would raise concerns about how the conventions became entrenched and the legitimacy of that process.

(b) Step Two: Characterization

If the proposed state action constitutes an amendment to the Constitution of Canada within the meaning of Part V, we move to the second step of the analysis. The second stage is an exercise in characterization and classification. The question is: Given that the proposed action is an amendment that falls within the scope of Part V, which amending formula applies? Akin to a “pith and substance” analysis in division of powers cases,¹⁴³ answering this question involves construing the proposed amendment and the “heads of amendment” set out in Part V.¹⁴⁴ The objective at the second stage of the analysis is to determine whether the amendment, in either subject or scope, looking to both purpose and effect, triggers an exception or variation to the general amending procedure. If it does not, then the general procedure applies.

The analysis undertaken at the two stages of the framework should line up. We see this correspondence in the Court’s analysis of the tenure, property and abolition issues in the *Senate Reform Reference*. But the line is not as straight in the Court’s analysis of the consultative elections issue. At the first stage, the Court established that the government’s proposals to implement consultative elections were constitutional amendments within the scope of Part V because they would endow senators with a popular mandate inconsistent with the Senate’s role as a complementary legislative chamber of sober second thought.¹⁴⁵ Yet, at the second stage, the Court held that the amendment would fall under “method of selecting senators” in section 42(1)(b) because the elections would change the process by which senators are selected. While it makes intuitive sense to conclude that a proposal to implement consultative

¹⁴³ For an overview of pith and substance, see *Securities Reference*, *supra*, note 49, at paras. 63-65 and *Canadian Western Bank*, *supra*, note 45, at paras. 25-27.

¹⁴⁴ In the *Senate Reform Reference*, *supra*, note 1, the Court rejects the Attorney General of Canada’s arguments that certain doctrines of pith and substance assist in the interpretation of Part V: see, e.g., paras. 66-67. I agree. My point is that the thought process at the second stage of the Part V analysis is akin to that of a pith and substance analysis.

¹⁴⁵ *Senate Reform Reference*, *id.*, at paras. 54-63, 70.

elections is an amendment in relation to “method of selecting senators”, the Court missed the step of explaining how the constitutional amendment it identified — a change to the fundamental character of the Senate — was in relation to the “method of selecting senators”. That is, the amendment was identified because of the effect of consultative elections on the Senate’s nature and role, but the amending formula was chosen because of the effect of consultative elections on the steps of the senatorial selection process. To straighten the line, the Court simply needed to explain that “method of selecting senators” in Part V captures not only the steps of the selection process, but also the unelected status of the Senate.

VI. CONCLUSION: ALL I NEEDED TO KNOW ABOUT CONSTITUTIONAL STRUCTURE ...

The main issue in the *Senate Reform Reference* is how we should make sense of the amending formulae in Part V of the *Constitution Act, 1982*. The Supreme Court’s analysis of this issue offers a lesson in constitutional structure. In fact, the lessons are multiple.

First, we learn that traditional structural analysis helps in ascribing meaning to Part V. The theories of government and foundational values that underlie the Constitution of Canada give life to Part V; they infuse its formalities with meaning; they are its animating spirit; and they set the outer limits on the range of possible meanings of Part V. A traditional structural lens helps us to see how the amending formulae are a distinctly Canadian attempt to address the idiosyncrasies and insecurities that arise in the process of constitutional amendment. They provide a constitutional guarantee that the representative bodies of the Canadian electorate will have a voice in negotiations about the formal changes to the Constitution of Canada that meaningfully engage their interests.

While the Court’s reasoning in the *Senate Reform Reference* confirms that structure is not a complete answer to interpretive questions, it teaches us that constitutional architecture is substantively significant. The architecture of the Constitution is constructed from the key presuppositions on which the rest of the Constitution is based; it contemplates the existence of particular institutions, their fundamental nature and role and the “basic structural imperatives” that govern them; it reflects a particular moment in constitutional history, linked to preceding

moments; and it has some measure of normative force.¹⁴⁶ It is, in other words, not just an interpretive aid, but is also, at least in part, an entrenched part of the Constitution.

Second, we learn from the *Senate Reform Reference* that Part V has an internal structure with some measure of interpretive force. While attention to internal structure can support the conclusion that Part V is a complete, comprehensive and principled code of amending formulae with coherent and principled units, the Court's reasons show that internal structure does not have much interpretive weight beyond drawing attention to the ways in which the various amending formulas fit together. As the Court explained, "the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text".¹⁴⁷ But while formal structure was one factor that helped the Court determine the scope of each amending procedure in relation to the others, it was not a priority when determining the internal meaning of each individual procedure.

Third, the *Senate Reform Reference* teaches us that the logic of Part V is constitutive of constitutional structure. It establishes a two-step analytical framework that can be used to determine whether any enactment or proposal triggers Part V and, if so, which amending formula applies. The first step of the analysis is a matter of scope and the second a matter of classification. This framework can assist in safeguarding the non-entrenched parts of the Constitution from *ad hoc* crystallization and in shielding the entrenched Constitution from indirect formal change that would have been more onerous, if not impossible, if done directly.

The two-stage analytical framework offers a way to organize our thinking about how to formally amend the Constitution. Such organization requires a deep understanding of the Constitution as a whole. In addition, the framework serves as an ongoing reminder that the Constitution changes in multiple ways, both within and outside of the Part V procedures.¹⁴⁸ In the context of the *Senate Reform Reference*, for example, the requirements of formal amendment may create the conditions in which a wider range of proposals and procedures for Senate reform can be imagined.

¹⁴⁶ *Secession Reference*, *supra*, note 2, at paras. 49-50; *OPSEU*, *supra*, note 2, at 57; *Demers*, *supra*, note 3, at para. 86, *per* LeBel J.

¹⁴⁷ *Senate Reform Reference*, *supra*, note 1, at para. 26.

¹⁴⁸ With respect to "liberat[ing] the creative spirit" through limits on freedom, see Fuller, "Means and Ends", *supra*, note 85, at 65-75.

Finally, from these structural lessons, we learn another: that the design of Part V all but guarantees the courts a role in formal constitutional amendment. This guarantee flows from the text and structure of Part V, as well as the nature of the legal and political culture in Canada. In short, Part V sets out multiple amending procedures. To apply Part V, we must characterize and categorize proposed enactments according to their scope and subject matter. This is a familiar analytical exercise — it replicates the analysis in division of powers cases. In both, the nature of a proposed enactment and the meaning of constitutional heads of power must be interpreted and matched. In both, there are multiple items to be interpreted and multiple possible interpretations. And, in both, this process will often fall to the courts. The reliance on the courts flows from the inevitable interpretive controversies, the court-centric orthodoxy of the Canadian legal environment, public confidence in the judicial process, a political culture that supports the use of the Court's reference jurisdiction to resolve controversial questions, and the fraught climate that often surrounds proposals for constitutional change in Canada.¹⁴⁹

This is not to say that the courts will be, or should be, involved whenever we try to formally amend the Constitution. The Constitution of Canada has been amended pursuant to Part V without triggering litigation and will be so amended in the future.¹⁵⁰ But, for the reasons already mentioned, it is likely that future attempts at formal constitutional amendment will be steered by the courts, whether directly or indirectly. Indeed, while critics often lament the fact that patriation bestowed greater power on the courts through the *Canadian Charter of Rights and Freedoms*,¹⁵¹ it should not be forgotten that the courts also secured a significant grant of power by virtue of the design of Part V. In the wake of the Court's recent advisory opinions in the *Senate Reform*

¹⁴⁹ In the constitutional amendment context, see e.g., *OPSEU*, *supra*, note 2; *Hogan*, *supra*, note 25; *Potter*, *supra*, note 25; *Penikett*, *supra*, note 25; *Campbell*, *supra*, note 25; *Secession Reference*, *supra*, note 2; *Q.C. Senate Reference*, *supra*, note 25; *Senate Reform Reference*, *supra*, note 1; *Supreme Court Act Reference*, *supra*, note 2. Even if the Court's opinions in these cases render formal constitutional amendment more difficult to achieve in practice than it has already proven to be, the number of disputes over whether legislative enactments fall within the scope of Part V could rise as political actors try to implement constitutional change in indirect or peripheral ways.

¹⁵⁰ Moreover, it is possible that the Constitution has been formally amended in contravention of Part V without triggering litigation. Consider whether the *An Act respecting constitutional amendments*, S.C. 1996, c. 1 should have been enacted under Part V.

¹⁵¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Reference and the *Supreme Court Act Reference*, some see this power as a hindrance to important institutional reforms and improper interference with political action. Yet ultimately the Supreme Court's role in disputes over constitutional amendment is consistent with the metaphors that are often used to describe the Court's role in constitutional judicial review generally, namely, guardian of the Constitution and umpire of federal-provincial relations. Two questions that follow are: Are these the metaphors that we want to describe the Court's role in cases of constitutional amendment? And, if yes, is constitutional amendment the inevitable new context for analysis through dialogue theory? Of course, these too are structural questions.

