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Citation Information

Pal, Michael. "Constitutional Amendment After the Senate Reference and the Prospects for Electoral Reform." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 76. (2016).
<https://digitalcommons.osgoode.yorku.ca/sclr/vol76/iss1/17>

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Constitutional Amendment After the *Senate Reference* and the Prospects for Electoral Reform

Michael Pal*

I. INTRODUCTION

The new federal government committed that 2015 would be the last election¹ under the first past the post (“FPTP”) system used since 1867.² If the federal electoral system does change, it will be a break from the recent politics of reform. Over the last decade, numerous attempts to reform provincial electoral systems have failed.³ The additional potential hurdle facing the federal government, which was not relevant for the

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¹ Rosemary Barton, “Justin Trudeau Votes to End 1st-Past-the-Post Voting in Platform Speech”, *CBC News* (June 16, 2015). As of the time of writing, the House of Commons Committee tasked with studying reform options has not yet produced its report.

² On the use of FPTP in Canada, or as it is also known “single member plurality” (“SMP”), see Louis Massicotte, “Electoral Reform in Canada” in André Blais, ed., *To Keep or to Change First Past the Post?: The Politics of Electoral Reform* (Oxford: Oxford University Press, 2008), at 112; Henry Milner, ed., *Steps Toward Making Every Vote Count: Electoral System Reform in Canada and its Provinces* (Toronto: University of Toronto Press, 2004); Dennis Pilon, *Wrestling with Democracy: Voting Systems as Politics in the Twentieth Century West* (Toronto: University of Toronto Press, 2013); and Elections Canada, *A History of the Right to Vote in Canada* (Ottawa: Elections Canada, 2007) [hereinafter “Elections Canada, ‘History of the Right to Vote’”].

³ Mark E. Warren & Hillary Pearse, eds., *Designing Deliberative Democracy: The British Columbia Citizens’ Assembly* (Cambridge: Cambridge University Press, 2008); Patrick Fournier *et al.*, *When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform* (Oxford: Oxford University Press, 2011); Lawrence Leduc, “Electoral Reform and Direct Democracy in Canada: When Citizens Become Involved” (2011) 34:3 *West European Politics* 551.

provinces, is the uncertainty relating to the rules on constitutional amendment, particularly in light of the *Reference re Senate Reform*.⁴

The central questions I address in this article are whether federal electoral reform requires recourse to the formal amendment rules in Part V of the *Constitution Act, 1982*⁵ and, if so, whether provincial consent is required. Canada famously has one of the democratic world's most rigid regimes for constitutional amendment.⁶ If electoral reform requires provincial consent, then it is likely dead on arrival. While it is formally possible to amend the Constitution even where federal-provincial agreement is obligatory, it is likely to be constructively unamendable⁷ in the absence of a new round of mega-constitutional negotiations.⁸

There has always been some lack of clarity regarding the constitutional status of the electoral system, with two main traditional possibilities. The electoral system could be understood as a classic unwritten constitutional convention changeable through regular federal legislation, or as requiring a formal amendment under Parliament's authority in section 44 of the *Constitution Act, 1982*.⁹ In either scenario, Parliament could enact reform unilaterally.

The *Senate Reference* raises doubts about the validity of both of these options for unilateral federal reform. It expands the scope of constitutional changes to which Part V applies and makes provincial consent the default rule for constitutional amendment. The *Senate Reference* generates significant uncertainty as to whether Parliament can meaningfully alter federal institutions without provincial consent,¹⁰ including but not limited

⁴ [2014] S.C.J. No. 32, [2014] 1 S.C.R. 704 (S.C.C.) [hereinafter "*Senate Reference*"].

⁵ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "*Constitution Act, 1982*"].

⁶ Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 *Alberta L. Rev.* 85 [hereinafter "Albert, 'Constitutional Amendment'"].

⁷ Richard Albert, "Constructive Unamendability in Canada and the United States" (2014) 67 S.C.L.R. 181.

⁸ Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People*, 3d ed. (Toronto: University of Toronto Press, 2004) [hereinafter "Russell"]. On the *Senate Reference* and mega-constitutional politics, see Adam M. Dodek, "The Politics of the Senate Reform Reference: Fidelity, Frustration and Federal Unilateralism" (2015) 60:4 *McGill L.J.* 623.

⁹ I leave a discussion of the electoral reform and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"] for another day.

¹⁰ See Adam M. Dodek, "Uncovering the Wall Surrounding the Castle of the Constitution: Judicial Interpretation of Part V of the *Constitution Act, 1982*" in Emmett Macfarlane, ed., *Constitutional Amendment in Canada: The Law and Politics of Part V of the Constitution Act, 1982* (Toronto: University of Toronto Press) [forthcoming] [hereinafter "Dodek, 'Uncovering the Wall'"]; Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of

to electoral reform. Electoral reform now rests on uncertain constitutional ground as a consequence.

This article proceeds as follows. Section II analyzes the reasoning in the *Senate Reference*, in order to establish the baseline rules for when unilateral Parliamentary action is permitted and when provincial consent is mandated. Section III assesses the broader constitutional implications of the *Senate Reference*. It investigates what zones of certainty and uncertainty exist with regard to constitutional change and the main institutions of the federal government. Electoral reform lives squarely within the constitutional grey zone produced by the *Senate Reference*. Section IV outlines the considerations relevant to whether the formal amendment procedures apply to electoral reform. Section V considers what reforms can be achieved by Parliament alone, if electoral system change is deemed to constitute a Part V amendment. I conclude that on the Supreme Court's current jurisprudence, there is legitimate uncertainty surrounding the constitutionality of unilateral federal action introducing a mixed member proportional ("MMP")¹¹ or proportional representation ("PR") system. A ranked ballot, however, likely stands on firmer constitutional ground.

II. THE *SENATE REFERENCE*

1. The Supreme Court's Approach to Part V

The *Senate Reference* put a break on reform of the Upper House, by declaring that Parliament alone cannot abolish the Senate or alter its fundamental features. The Court found that abolition would amend Part V of the *Constitution Act, 1982* and therefore requires unanimous consent.¹² Consultative elections would shift the "method of selecting" Senators, which requires provincial agreement from at least seven provinces with

Constitutional Amendment in Canada" (2015) 60:4 McGill L.J. 883 [hereinafter "Macfarlane"]; and Yasmin Dawood, "The *Senate Reference*: Constitutional Change and Democracy" (2015) 60:4 McGill L.J. 737 [hereinafter "Dawood"]. For a more optimistic take that understands the Court to have provided important guidance, see Kate Glover, "Complexity and the Amending Formula" (2015) 24:2 *Constitutional Forum* 9.

¹¹ The Law Commission of Canada proposed MMP: *Voting Counts: Electoral Reform for Canada* (Ottawa: Law Commission of Canada, 2004).

¹² *Constitution Act, 1982*, *supra*, note 5, at s. 41.

50 per cent of the population (the “7/50” formula).¹³ Term limits are also possible only through a 7/50 amendment. The property qualifications for membership in the Senate¹⁴ can be repealed pursuant to Parliament’s unilateral authority in section 44, except for Quebec Senators.¹⁵

In reaching these conclusions, the Court developed a method of constitutional interpretation that potentially expands the range of matters captured by Part V. Silence in the text about a particular matter does not imply in the Court’s understanding that changes to it can be made outside of Part V. Whenever the “fundamental nature or role”¹⁶ of a central institution would be modified or the “constitutional architecture”¹⁷ would be affected by federal action, the formal amending procedures kick in. The Court puts its approach succinctly:

The concept of an “amendment to the Constitution of Canada”, within the meaning of Part V of the *Constitution Act, 1982*, is informed by the nature of the Constitution and its rules of interpretation. As discussed, the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution’s architecture.¹⁸

As a consequence of this approach, the formal amendment rules might potentially apply to electoral reform, even in the absence of any direct reference to FPTP in the text generally, or in Part V itself. The Court compels us to ask whether any proposed reform of the electoral system would alter the constitutional architecture¹⁹ or fundamentally change the basic institutions of the state? If the answer to either question is “yes”, then Part V applies.

¹³ Section 42(1)(b) imposes the 7/50 rule on changes to Senatorial selection. The 7/50 rule comes from s. 38 of the *Constitution Act, 1982*.

¹⁴ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 [hereinafter “*Constitution Act, 1867*”], at s. 23(3).

¹⁵ Quebec’s consent is required pursuant to s. 43, as it would amend the rules in s. 23(6) of the *Constitution Act, 1867*, which relate to a single province.

¹⁶ *Senate Reference*, *supra*, note 4, at paras. 48, 52, 69, 75, 77-79, 87-88 and 90-91. The Court uses the terms “fundamental nature *or* role” and “fundamental nature *and* role” (emphasis added) interchangeably.

¹⁷ *Id.*, at para. 60.

¹⁸ *Id.*, at para. 27.

¹⁹ On the architecture concept, see Warren J. Newman, “Of Castles and Living Trees: The Metaphorical Structural Constitution” (2015) 9 J.P.P.L. 471.

2. The Supreme Court's Approach to Section 44

Even if a matter is treated as triggering Part V, the possibility of unilateral federal action remains. Section 44 of the *Constitution Act, 1982* permits Parliament to “make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons”. Parliament’s space to manoeuvre unilaterally is scarce, however, as the Court adopted a narrow interpretation of section 44 in the *Senate Reference*. The Court read section 44 in relation to the procedures requiring provincial consent and in light of its view of 7/50 as the default rule for amendment.²⁰

The Court reasoned that in a federation “substantial provincial consent must be obtained for constitutional change that engages provincial interests”.²¹ Section 44 is an “exception”²² to the general procedure, “limited” in scope,²³ and can only apply to measures “which do not engage the interests of the other level of government”.²⁴ Only if “provincial interests”²⁵ are not engaged and the “fundamental nature and role”²⁶ of the House or Senate remains untouched can section 44 be invoked. This narrow construal of section 44 is consistent with the Court’s view of the precursor provision that existed before 1982.²⁷ The Court had few direct applications of the provision to draw upon as section 44 has only been invoked three times: to amend the formula that determines how many seats each province is apportioned in the House,²⁸

²⁰ *An Act Respecting Constitutional Amendments*, S.C. 1996, c. 1 (the “*Regional Veto Act*”) provides a veto to provinces or regions over constitutional amendments that require 7/50. See Andrew Heard & Tim Swartz, “The Regional Veto Formula and Its Effects on Canada’s Constitutional Amendment Process” (1997) 30:2 C.J.P.S. 339. Macfarlane, *supra*, note 10, at 902 and Albert, “Constitutional Amendment”, *supra*, note 6, at 97-98 argue it may be unconstitutional.

²¹ *Senate Reference*, *supra*, note 4, at para. 34.

²² *Id.*, at para. 75.

²³ *Id.*

²⁴ *Id.*, at para. 48; See Warren J. Newman, “Putting One’s Faith in a Higher Power: Supreme Law, The Senate Reform Reference, Legislative Authority and the Amending Procedures” (2015) 34:2 N.J.C.L. 99. Newman argues Parliament still has important powers in s. 44. Andrew Heard, “Tapping the Potential of Senate-Driven Reform: Proposals to Limit the Powers of the Senate” (2015) 24:2 *Constitutional Forum* 47 argues that significant reforms to the Senate remain achievable.

²⁵ *Senate Reference*, *supra*, note 4, at paras. 29, 34 and 67 among others.

²⁶ *Id.*, at paras. 48 and 75.

²⁷ *Re Upper House*, [1979] S.C.J. No. 94, [1980] 1 S.C.R. 54 (S.C.C.). Peter Hogg critiques that case for narrowly interpreting the unilateral federal power of amendment with regard to the Senate: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007), at 4-32 [hereinafter “Hogg, ‘Constitutional Law’”] and “Comment” (1980) 58 Can. Bar Rev. 631.

²⁸ Hogg, “Constitutional Law”, *supra*, note 27, at 1-7; Warren J. Newman, “Defining the ‘Constitution of Canada’ Since 1982: The Scope of the Legislative Powers of Constitutional

in the *Representation Act, 1985*²⁹ and the *Fair Representation Act*,³⁰ and to constitute Nunavut as a territory.³¹

The Court's generous interpretation of "provincial interests" appears to leave little room for unilateral federal action. The Court explicitly adopted a "stakeholder" understanding of provincial interests.³² It views the provinces as stakeholders in the federal institutions that they rely upon for representation in Ottawa, including their "constitutional design".³³

The treatment of term limits in the *Senate Reference* demonstrates just how readily the Court was prepared to deem provincial interests to be engaged. The Court rejected terms imposed by Parliament as undue restrictions on the Senate's function as the body of "sober second thought".³⁴ That term limits would seriously alter the Senate has been critiqued, especially as Senators do not on average serve lengthy terms.³⁵ The implication is that the institution would not be transformed by term limits, unless exceedingly short. Yet the Court still found that provincial interests would be engaged for shifting a long-standing feature of the Senate.³⁶ The *Senate Reference* considers the provinces to have a stake in preserving the significant institutional elements of the status quo agreed to in 1867 and continuing to today, such as term limits, though it viewed property qualifications as too remote from the core provincial interests.

The interpretation of the *Senate Reference* as adopting a generous view of provincial interests is buttressed by the reasoning in the *Reference re Supreme Court Act, ss. 5 and 6*.³⁷ The *Supreme Court Reference* contained a similar move to the *Senate Reference*, though

Amendment Under Sections 44 and 45 of the *Constitution Act, 1982*" (2003) 22 S.C.L.R. 423, at 429 [hereinafter "Newman, 'Defining the 'Constitution'"]].

²⁹ S.C. 1986, c. 8.

³⁰ S.C. 2011, c. 26.

³¹ Newman, "Defining the 'Constitution'", *supra*, note 28.

³² The Court uses this term on three occasions: *Senate Reference*, *supra*, note 4, at paras. 48, 77 and 82.

³³ See *id.*, at para. 77 ("stakeholders in our constitutional design") and similar language in para. 82. Dennis Pilon argues that electoral reform does not engage provincial interests: "You Can't Hide Behind the Constitution to Spare Us Electoral Reform", *National Post* (February 1, 2016) [hereinafter "Pilon"]. His argument does not take into account the "stakeholder" understanding of provincial interests used by the Court.

³⁴ *Senate Reference*, *id.*, at para. 79.

³⁵ Peter W. Hogg, "Senate Reform and the Constitution" (2015) 68 S.C.L.R. 591, at 600-602 [hereinafter "Hogg, 'Senate Reform'"]; Macfarlane, *supra*, note 10, at 894-98. The *Senate Reference* considered term limits of 9, 12 and 15 years.

³⁶ *Senate Reference*, *supra*, note 4, at para. 82.

³⁷ [2014] S.C.J. No. 21, [2014] 1 S.C.R. 433 (S.C.C.) [hereinafter "*Supreme Court Reference*"].

anchored in the constitutional text related to the judiciary. Only with provincial consent can Parliament alter the “essential features” of the Court, even though most are not listed in Part V.³⁸

The central benefit of the Court’s approach in the two cases is that it sets a clear line preventing illegitimate amendments³⁹ by the federal government to the underlying constitutional order, or basic structure.⁴⁰ The Court has set itself up as the guardian of constitutional amendment,⁴¹ with the task of scrutinizing the details of reforms to central institutions. The Court’s method protects the foundational institutions of the federal state, even if the constitutional text does not explicitly do so. The trade-off in this approach, however, is a reduction of flexibility. No matter how badly needed, reform of the defining features of central institutions may be stymied, because their long-standing presence has imbued them with enhanced constitutional status.⁴²

III. THE IMPLICATIONS FOR REFORM OF FEDERAL INSTITUTIONS

The *Senate Reference* generated considerable uncertainty regarding both what is captured by the formal rules on amendment in Part V and, if they are engaged, when provincial consent will be required. The vagueness of the phrase “constitutional architecture”, the malleability of the term “fundamental nature and role”, and the potentially vast reach of “provincial interests” all contribute to destabilizing the constitutional ground.

It is an open question how influential the reasoning in the *Senate Reference* will be in changes to other central institutions. It is possible to read the emphasis on provincial consent in the *Senate Reference* narrowly as pertaining only to the Senate and not to the other legislative chamber, the House of Commons. Such a reading, however, is undermined by the placement of both the Senate and the House within the same provision related to amendment, namely section 44. The adoption of a

³⁸ *Id.*, at para. 74.

³⁹ See Richard Albert, “Constitutional Amendment by Stealth” (2015) 60:4 McGill L.J. 673, who warns of illegitimate amendments.

⁴⁰ See Joel I. Colon-Rios & Allan C. Hutchinson, “Constitutionalizing the Senate: A Modest Democratic Proposal” (2015) 60:4 McGill L.J. 599 and Kate Glover, “Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*” (2014) 67 S.C.L.R. (2d) 221.

⁴¹ Dawood, *supra*, note 10, points out this enhanced role at 750.

⁴² Hogg, “Senate Reform”, *supra*, note 35, at 604.

similar test in the *Supreme Court Reference* also indicates that to read the *Senate Reference* narrowly as applying only to the Senate is to ignore larger trends at play in the Court's jurisprudence. At this stage, we have no conclusive answers on the reach of the *Senate Reference*.

We can establish some parameters, however, for constitutional amendment with regard to federal institutions. Applying the reasoning of the *Senate Reference*, some matters are covered by Part V and require provincial consent to alter. In this category we can place the existence of the central institutions of the federal government as well as their fundamental or essential features. The Senate and Supreme Court are protected from abolition without unanimous consent and changes to their core features require provincial agreement. If the Supreme Court and the Senate are part of the constitutional architecture, then we can reasonably conclude the House is as well.

We can also glean a category of matters where Parliament clearly has unilateral authority to act, either because they are excluded from Part V or, if within the formal rules, can be achieved through section 44 for not engaging provincial interests. Insignificant features of a central institution can be changed by Parliament alone, either as non-constitutional matters or as falling under section 44. The Senate property qualifications are the clear example here, as amendable by section 44. Though often significant, the internal workings of Parliament protected by privilege would presumably be excluded from the formal rules on amendment.⁴³

Between these two islands of relative clarity, however, there is a vast zone of uncertainty. The grey zone includes institutions not in existence in 1867 or 1982, but which have arguably evolved to play fundamental roles. Adam Dodek points out the full range of institutions not traditionally considered as having constitutional status, but which may now fall under Part V and require provincial consent to alter.⁴⁴ It is worth considering, he writes,⁴⁵ whether on the Court's view of section 44 Officers of Parliament⁴⁶ such as the Chief Electoral Officer⁴⁷ or Auditor

⁴³ See *Canada (House of Commons) v. Vaid*, [2005] S.C.J. No. 28, [2005] 1 S.C.R. 667 (S.C.C.) (on Parliamentary privilege).

⁴⁴ Dodek, "Uncovering the Wall", *supra*, note 10.

⁴⁵ *Id.*, at 11.

⁴⁶ On Officers, see Jeffrey Graham Bell, "Agents of Parliament: A New Branch of Government?" (2006) 29:1 Can. Parl. Rev. 13.

⁴⁷ On the constitutional role of election commissions, see Michael Pal, "Electoral Management Bodies as a Fourth Branch of Government" Rev. Con. Studies (forthcoming 2016) and Bruce Ackerman, "The New Separation of Powers" (2000) 113(3) Harv. L. Rev. 633, at 691.

General may be outside of the scope of the unilateral federal authority. The evolution of the Supreme Court to ever-greater levels of importance dictated its constitutional status in the *Supreme Court Reference*. Similar logic could entrench the Chief Electoral Officer or other Officers beyond Parliament's control.

Also within the grey zone are constitutional conventions that affect the important features of core institutions. Conventions are parts of the Constitution and may define essential components of our system of government, but they can be altered by the practice of political actors and are not legally enforceable by the courts.⁴⁸ Imagine, however, a government that sought to dramatically alter the convention of responsible government by moving to direct election of the Prime Minister by voters. The Court's reasoning in the *Senate Reference* would potentially engage Part V for such a change, even if there was no amendment to the text, because it could be said to alter fundamental features of the House and executive as well as the constitutional architecture.

I turn now to applying the approach in the *Senate Reference* to electoral reform. I conclude that on the reasoning in the *Senate Reference*, most important reforms of the FPTP electoral system should be placed squarely within the grey zone as well, until we have further elucidation from the Court on the reach of its doctrinal innovations.

IV. DOES CHANGING THE ELECTORAL SYSTEM REQUIRE A FORMAL AMENDMENT?

1. First Past the Post

The *Senate Reference* compels us to ask if the electoral system is part of the constitutional architecture, if changing it would alter the fundamental nature and role of the House, and whether provincial interests are engaged by reform. There are two⁴⁹ main possible visions of

⁴⁸ *Reference re Resolution to Amend the Constitution*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753 (S.C.C.); Andrew Heard, *Canadian Constitutional Conventions*, 2d ed. (Toronto: Oxford University Press, 2014).

⁴⁹ The third possibility is that it is a non-constitutional matter. For reasons of space and because it is the least plausible option, I do not engage with this issue.

the constitutional status of electoral reform: (a) it is an unwritten convention that can be altered by Parliament alone without engaging the amending formula at all, with the exception of the rules guaranteeing a minimum number of seats to the provinces; or (b) it is subject to the rules on formal amendment in Part V.

The electoral system as inherited from the United Kingdom could be viewed as a constitutional convention.⁵⁰ FPTP is not explicitly mentioned anywhere in the Constitution. FPTP is not spelled out in the constitutional documents, but is a long-standing practice that provides meaning to the text and fills in gaps between provisions. It has many of the classic features of a convention.

Any federal reform would have to respect clear constitutional rules from the text guaranteeing the proportionate representation of the provinces⁵¹ and a minimum number of seats.⁵² As long as these are respected, a new electoral system could be implemented through federal legislation if the view of FPTP as a convention prevails. To adhere to these rules, Parliament could simply keep the number of seats assigned to each province the same, and make sure that any MPs elected from a list to ensure proportional representation would be tied to a particular province. Parliament would have a nearly free hand to design a new electoral system.⁵³

The method of constitutional interpretation adopted by the Court in the *Senate Reference*, however, directs us away from focusing on whether FPTP is a convention for the purposes of assessing whether a formal amendment is required. Instead we must consider whether it is part of the constitutional architecture. Given FPTP's importance, the

⁵⁰ There may be separate issues as to whether a particular aspect of an electoral system is compliant with s. 2(b) and/or s. 3 of the Charter.

⁵¹ Section 52, *Constitution Act, 1867*. *Campbell v. Canada (Attorney General)*, [1988] B.C.J. No. 442, 49 D.L.R. (4th) 321 (B.C.C.A.) gave Parliament leeway to define "proportionate".

⁵² There are two minimum guarantees: The "Senate floor" and the "grandfather clause". Both are incorporated into the "representation formula" in s. 51 of the *Constitution Act, 1867*. The Senate floor is subject to amendment only through unanimous consent: s. 41(b), *Constitution Act, 1982*.

⁵³ Some legislative provisions indirectly imposing FPTP may need amendment to implement a new electoral system. Section 313(1) of the *Canada Elections Act*, S.C. 2000, c. 9 declares "the candidate who obtained the largest number of votes" to be the winner in a riding. Section 68(1) bars parties from nominating more than one candidate per riding. Various other provisions rest on the use of ridings. The *Parliament of Canada Act*, R.S.C. 1985, c. P-1, s. 21 prevents candidates from running in more than one riding.

Court's approach seriously raises the possibility that the electoral system is subject to the rules on formal amendment in Part V of the *Constitution Act, 1982*.

2. The Constitutional Architecture

The most direct judicial pronouncements from which we can attempt to glean the constitutional status of the electoral system come from *Figueroa v. Canada (Attorney General)*.⁵⁴ *Figueroa* struck down restrictions placed on small political parties under the right to vote. One possible implication after *Figueroa* was that FPTP was vulnerable to a section 3 challenge, since it consistently favours large political parties.⁵⁵ The majority, however, did not expressly consider the constitutional status of the electoral system.

Justice LeBel's concurrence did address FPTP and emphatically endorsed the electoral system as having deep constitutional significance. His concurrence planted a marker that the reasoning in *Figueroa* should not be used to invalidate FPTP in future constitutional litigation.⁵⁶ He wrote that while the Charter does not mandate a particular electoral system, FPTP has constitutional significance. He stated that "our [FPTP] electoral system is one of Canada's core political institutions".⁵⁷ The concurrence reads like an ode to the virtues of FPTP.⁵⁸

Justice LeBel was careful to include caveats. He wrote that Parliament has wide leeway to design the electoral system and that the Constitution does not dictate which one.⁵⁹ Yet these comments must be viewed in context. He was addressing only whether section 3 of the Charter required FPTP or a more proportional alternative. His concurrence is largely *obiter* as it has little direct connection to the provisions at issue in *Figueroa*. He appears to have been attempting to foreclose the Charter as an avenue by which to force a change in electoral system.

⁵⁴ [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912 (S.C.C.) [hereinafter "*Figueroa*"] (Justice LeBel was joined by Gonthier J. and Deschamps J.).

⁵⁵ *Daoust v. Quebec (Chief Electoral Officer)*, [2011] Q.J. No. 12526, [2011] R.J.Q. 1687 (Q.C.C.A.). The constitutionality of FPTP was upheld.

⁵⁶ See Michael Pal, "The Promise and Limits of Citizens' Assemblies: Deliberation, Institutions, and the Law of Democracy" (2012) 38:1 Queen's L.J. 259, at 285-88 [hereinafter "Pal, 'Citizen's Assemblies'"] for a discussion of the implications.

⁵⁷ *Figueroa*, *supra*, note 54, at para. 157.

⁵⁸ Pal, "Citizen's Assemblies", *supra*, note 56, at 284-88.

⁵⁹ *Figueroa*, *supra*, note 54, at paras. 158, 161.

The debate between the majority and concurring opinions in *Figuroa* suggests that the constitutional value of FPTP remains unresolved. The emphasis on FPTP as a “core political institution” in the concurrence, however, has some resonance with the use of the term “constitutional architecture” in the *Senate Reference*. The implication is that a change to the electoral system could be held to alter the constitutional architecture and, therefore, trigger Part V, particularly given the long-standing and uninterrupted use of FPTP federally.

3. The Fundamental Nature and Role of the House

We must also examine whether the “fundamental nature and role” of the House would change. A move to MMP or PR would not seem to affect its fundamental *role*. The House would remain the confidence chamber, the location from which money bills could be introduced,⁶⁰ and the locus of responsible government. More proportional systems might bring about changes, however, that could be seen as shifting its fundamental *nature* and therefore as having constitutional significance, including: (1) a move away from exclusive use of single-member geographic districts; (2) alterations in the pattern of government formation; and (3) redesign of the party system.

(a) *Single-Member, Geographic Districts*

Single-member geographic districts are central to FPTP. Other systems may use districts, but usually in combination with MPs elected from lists, as in MMP, or in large multi-member districts, as with the single transferable vote (“STV”). A legislative body composed entirely of representatives with a direct electoral link to a particular geographic community distinguishes FPTP from list-PR and MMP, and its use of single-member districts from STV and some versions of MMP.

The courts have emphasized the centrality of geographic ridings to the right to vote. In *Opitz v. Wrzesnewskyj*,⁶¹ the Court understood it as “the right to vote in a specific electoral district”.⁶² In *Henry v. Canada*

⁶⁰ *Constitution Act, 1867*, at s. 53.

⁶¹ [2012] S.C.J. No. 55, [2012] 3 S.C.R. 76 (S.C.C.) [hereinafter “*Opitz*”].

⁶² *Id.*, at para. 29.

(*Attorney General*),⁶³ the British Columbia Superior Court stated that: "... Canadian citizens do not have the right to vote at large or to vote anywhere in the country; rather, they have the right to vote in a specific electoral district, choosing among various candidates who wish to be the Member of Parliament for that district".⁶⁴ The courts have seemed to give constitutional significance to the practice of electing MPs from geographic ridings.

This emphasis on ridings is echoed in the constitutional provisions shaping the initial exercise of democracy immediately after 1867. While none of the provisions directly bar the use of non-geographic districts, they rely on the particular features of FPTP for their full meaning. The *Constitution Act, 1867* refers to the number of ridings per province (section 37), set out transitional provisions on district boundaries (section 40), and prepared contingencies if "Seats [are] vacated" (section 41). Section 40 established the number of ridings to which Ontario, Quebec, Nova Scotia and New Brunswick were each entitled.⁶⁵ For Ontario, New Brunswick and Nova Scotia, it explicitly endorsed geographic districts, with each riding tied to a local sub-division such as a county. Section 40 also instituted the rule that each district shall be "entitled to return One Member". Building on section 40, the First and Second Schedules set out the names and in some cases the geographic locations of the electoral districts for Ontario and Quebec. As a transitional provision, section 40 is now considered "spent".⁶⁶ It is relevant, however, as a signal of the assumption of single-member geographic districts in 1867.

⁶³ [2010] B.C.J. No. 798, 7 B.C.L.R. (5th) 70, at para. 139 (B.C.S.C.).

⁶⁴ *Id.*, at para. 139, cited with approval by the Supreme Court in *Opitz, supra*, note 61, at para. 29.

⁶⁵ Thanks to B. Thomas Hall for drawing my attention to this point. Nova Scotia was permitted in s. 40 two representatives for the County of Halifax, which is a rare exception to the use of single member districts in Canada. That the United Kingdom historically used multi-member districts might factor into an assessment of the constitutionality of STV, which is characterized by several representatives from a riding.

⁶⁶ The annotated version of s. 40 reads: "Spent. Elections are now provided for by the *Canada Elections Act* ... qualifications and disqualifications of members by the *Parliament of Canada Act* ... The right of citizens to vote and hold office is provided for in section 3 of the *Constitution Act, 1982* (citations omitted)." Pilon, *supra*, note 33 relies on ss. 40-41 to argue that Parliament has unilateral constitutional authority. This downplays the transitional and now spent nature of ss. 40-41. He also relies on examples of the House debating electoral reform in the 1920s and 1930s. His emphasis on these past political practices ignores the transformative shift in both Parliamentary authority and constitutional amendment rules imposed in 1982.

Electing MPs from lists, rather than constituencies, could be seen to undermine the assumption that all representatives would come from ridings. Take MMP systems, which involve both ridings and lists. MMP is often said to change the behaviour of representatives and the functioning of legislative bodies through the creation of “two classes” of MPs.⁶⁷ There is a robust debate in countries with MMP, such as Germany, New Zealand, Scotland and Wales, whether MPs elected from party lists provide the same degree of service to their constituents⁶⁸ or operate with the same priorities⁶⁹ as those from districts. Much turns on the details. Lists can be “closed” (set by the party), or “open” (influenced by voters), or “dual” (where candidates stand both in ridings and on a list).⁷⁰ Overall, however, there is relatively strong evidence that MMP is different from FPTP in terms of how MPs act and how the legislative body operates.⁷¹ The functioning of the House would potentially be reworked in significant ways by a move to MMP.

(b) Majority Government

Patterns of government formation under MMP or PR might also reshape the nature of the House. Proportional systems increase the likelihood of minority and coalition governments.⁷² By contrast, FPTP tends to generate majority government. In preventing false majorities, PR would entail transformative change.⁷³

⁶⁷ Leigh J. Ward, ““Second-Class MPs”? New Zealand’s Adaptation to Mixed-Member Parliamentary Representation” (1998) 49:2 *Political Science* 125; Thomas Carl Lundberg, “Tensions Between Constituency and Regional Members of the Scottish Parliament Under Mixed-Member Proportional Representation: A Failure of the New Politics” (2014) 67 *Parl. Affairs* 351; Thomas Carl Lundberg, “Second Class Representatives? Mixed-Member Proportional Representation in Britain” (2006) 59:1 *Parl. Affairs* 60.

⁶⁸ Werner J. Patzelt, “The Constituency Roles of MPs at the Federal and *Länder* Levels in Germany” (2007) 17:1 *Regional and Federal Studies* 47.

⁶⁹ Martin Battle, “Second-Class Representatives or Work Horses? Committee Assignments and Electoral Incentives in the Scottish Parliament” (2011) 64:3 *Parl. Affairs* 494.

⁷⁰ Dual lists, as in Germany, might decrease the tendency to have two classes of MPs: Louis Massicotte, “Towards a Mixed-Member Proportional System for Québec?” (2007) 43:4 *Representation* 251.

⁷¹ *Id.* This evidence appears less strong for the German case, but more compelling for Scotland, Wales and New Zealand.

⁷² Minority government happens under FPTP, but it remains less likely than in other systems. Justice LeBel recognized this in *Figueroa*, *supra*, note 54, at para. 155, citing Heather MacIvor, “A Brief Introduction to Electoral Reform” in Henry Milner, ed., *Making Every Vote Count: Reassessing Canada’s Electoral System* (Peterborough: Broadview Press, 1999), at 29.

⁷³ Matthew Soberg Shugart, “Inherent and Contingent Factors in Reform Initiation in Plurality Systems” in André Blais, ed., “*To Keep or to Change First Past the Post? The Politics of Electoral Reform*” (Oxford: Oxford University Press, 2008).

There may be constitutional significance to FPTP's reliable, even if not uniform, production of majority governments. Justice LeBel's concurrence in *Figueroa* is again relevant. An electoral system that produces majority governments is not an accident of history, in his account, but reflects a conscious preference for a particular kind of democratic politics. He ties the prevailing pattern of government formation to the broader constitutional order: "Majority government is connected to the Canadian tradition of responsible government because a single party under a single identifiable leader is accountable for government policy."⁷⁴ The "value of political aggregation", which defines FPTP and its tendency toward majority government in his view, "runs through certain fundamental Canadian political institutions".⁷⁵ In the *Figueroa* concurrence, three members of the Court imbued the prevalence of majority government with constitutional significance.

(c) *Fragmentation in the Party System*

MMP or PR would also result in changes to the party system. While multiple parties have been and continue to be represented in Parliament, FPTP rewards large brokerage parties that appeal across groups of voters. FPTP usually results in two parties alternating political power, such as the Liberals and Conservatives.⁷⁶ Proportional systems are, in contrast, characterized by multiple parties competing for power, coming in and out of coalitions with one another, and typically appealing to a more discrete set of voters than in the brokerage model.

As with government formation, LeBel J. in *Figueroa* considered the party system to reflect deep-seated constitutional values. He tied the presence of brokerage parties, especially their ability to accommodate competing interests and to appeal to wide swathes of the population, as reflecting a deliberate choice in constitutional design. He held that:

On the spectrum of democratic political systems, from those that represent citizens in a more diverse and fragmented way to those where only a small number of mainstream parties has any significant presence

⁷⁴ *Figueroa*, *supra*, note 54, at para. 155.

⁷⁵ *Id.*, at para. 159.

⁷⁶ This is "Duverger's Law". See Kenneth Benoit, "Duverger's Law and the Study of Electoral Systems" (2006) 4:1 *French Politics* 69 for an overview of the now massive literature. See Patrick Dunleavy & Rekha Diwakar, "Analyzing Multiparty Competition in Plurality Rule Elections" (2013) 19:6 *Party Politics* 855 for a critique.

in the political arena, the Canadian system is towards the latter end of the range. This has not come about by accident, but in part as a result of the deliberate design of our electoral infrastructure to confer advantages on mainstream political movements that are denied to parties on the political periphery.⁷⁷

I do not intend to say that LeBel J. was right to sing the virtues of FPTP with regard to government formation or the party system. The *Figueroa* concurrence signals, however, that some of the very aspects of FPTP that reformers critique could conceivably be viewed in a very different light by the Court, especially in the context of amendment.

4. Conclusion

We do not know the specific federal reform proposal and ambiguity remains as to the boundaries of the constitutional architecture and the fundamental nature tests. The electoral system itself, its exclusive use of geographic districts, the specific results that it reliably generates such as majority government, or the patterns of party competition that it encourages may all have constitutional significance. None of these features of Canadian democracy are specifically required by the constitutional text, yet all could potentially be interpreted as affecting the fundamental nature of the House.

V. WHICH AMENDING PROCEDURE APPLIES?

If electoral reform is judged to change the constitutional architecture or the fundamental nature of the House, then the rules on amendment in Part V apply. The options within Part V are unilateral amendment by Parliament pursuant to section 44, provincial agreement on the 7/50 formula as required by section 38 as the default rule, or even unanimous consent under section 41. The prospects for electoral reform vary dramatically depending on whether Parliament can act alone.⁷⁸ The key consideration here, on the terms of debate established by the *Senate Reference*, is whether provincial interests on the stakeholder definition are engaged.

⁷⁷ *Figueroa*, *supra*, note 54, at para. 153.

⁷⁸ There is no practical difference if 7/50 or unanimity is imposed. Either rule likely sets an unattainable standard. I do not consider unanimity for reasons of space.

1. Provincial Interests and the Scope of Section 44: The Relevance of Seat Redistribution

A constitutional challenge to a new electoral system would oblige the Court to address the significance of the main prior use of section 44, which has been for amending the formula assigning seats in the House to each province. One could view the application of section 44 over seat redistribution in 1985 and 2011 as a clear signal of federal authority to unilaterally remake the House. Adopting PR would be a larger modification than seat redistribution, but the difference may only be in degree rather than kind, as both relate to representation.

Reliance on unilateral authority over redistribution as the hook to catch electoral reform within section 44, however, faces several problems. First, the *Senate Reference* may simply have changed the game by interpreting section 44 as embodying less substance than previously assumed. I have argued elsewhere that the *Senate Reference* unfortunately raises doubts as to the constitutionality of even unilateral federal control over the redistribution of seats.⁷⁹ Requiring provincial consent to update the distribution of seats would be disastrous,⁸⁰ yet is now a real possibility.

The only solid judicial endorsement of section 44 for seat redistribution comes from the British Columbia Court of Appeal (B.C.C.A.) in *Campbell v. Canada (Attorney General)*.⁸¹ *Campbell* involved a constitutional challenge to the 1985 federal legislation apportioning seats in the House for not garnering provincial consent. The B.C.C.A. upheld the legislation as validly enacted through section 44. It held that as long as the proportionate representation of the provinces (section 52 of the *Constitution Act, 1867*) remains undisturbed, Parliament has the authority to redistribute seats.

The interpretation of section 44 in the *Senate Reference* appears to be directly at odds with *Campbell*. The B.C.C.A. understood section 44 not as an exception, but as the default procedure for seat redistribution even if there was an obvious impact on provincial representation in Ottawa. *Campbell* assumes section 44 to be subject only to the express textual limitation in section 52. The *Senate Reference* by contrast rejects any

⁷⁹ On s. 44 in relation to seat redistribution, see Michael Pal, "Fair Representation in the House of Commons?" (2015) J.P.P.L. 35, at 43-49 [hereinafter "Pal, 'Fair Representation'"].

⁸⁰ *Id.*, at 47-48.

⁸¹ *Supra*, note 51.

notion of section 44 as the default with regard to the Senate or, by extension, the House. Even if Parliamentary amendment of the representation formula seemed on solid constitutional ground in the past, that may no longer be the case.

Second, the redistribution of seats pursuant to section 44 has always been contested, with heated federal-provincial conflicts whenever the representation formula has been revised.⁸² The formula was modified wholesale on four occasions (1946, 1974, 1985 and 2011), with smaller variances at other junctures (1915 and 1951). Provinces standing to lose seats or influence have fought back by seeking amendments to the formula.⁸³ The constitutional rules setting a minimum floor on the representation of each province reflect the history of extensive negotiations.⁸⁴ The most recent battle was around the *Fair Representation Act*, which added 30 seats to the House in 2011. It brought the infamous claim from a federal Minister that the Premier of Ontario was “the small man of Confederation” for objecting to his province’s allocation.⁸⁵ The specter of a constitutional challenge to Parliament’s authority provided impetus for the federal government to augment Ontario’s seat total.⁸⁶

Provincial representation in the House has also been a repeated point of concern in mega-constitutional negotiations. The 1982 reforms made the Senate floor rule subject to the unanimous consent requirement as one of the items of greatest importance to the provinces. Provincial representation in the House had a key place in the Charlottetown Accord.⁸⁷ The Accord would have redistributed seats immediately, but also explicitly provided for further inter-governmental negotiations, not

⁸² Peter Oliver describes one such conflict in “Canada, Quebec, and Constitutional Amendment” (1999) 49 U.T.L.J. 519, at 533-34.

⁸³ John Courtney, *Commissioned Ridings: Designing Canada’s Electoral Districts* (Montreal: McGill-Queen’s University Press, 2001), at 155-56 [hereinafter “Courtney, ‘Commissioned Ridings’”]; Elections Canada, ‘History of the Right to Vote’, *supra*, note 2; Norman Ward, “The Basis of Representation in the House of Commons” (1949) 15:4 C.J.E.P.S. 477, at 477.

⁸⁴ Courtney, “Commissioned Ridings”, *id.*, at 249.

⁸⁵ Keith Leslie, “Van Loan Belittles McGuinty in MP Dispute”, *The Toronto Star*, November 20, 2007.

⁸⁶ Brian Laghi, “Ontario Mulls Legal Action, Sources Say”, *The Globe and Mail* (May 24, 2007).

⁸⁷ See Pal, “Fair Representation”, *supra*, note 79, at 40; Gerald A. Beaudoin, “The Charlottetown Accord and Central Institutions” in Kenneth McRoberts & Patrick J. Monahan, eds., *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993), at 34; and Ronald L. Watts, “The Reform of Federal Institutions” in McRoberts & Monahan.

unilateral federal action, on setting a “permanent formula” for allocating provincial representation.⁸⁸

Representation in the House has traditionally also been one of Quebec’s key concerns. The various formulas over the years have often taken Quebec’s allotment of seats as the starting point in recognition of this interest.⁸⁹ A long-standing demand from Quebec has been a seat complement of 25 per cent of the House, regardless of the province’s population,⁹⁰ which was also in the Accord.

None of this history conclusively establishes the boundaries of section 44. The *Senate Reference*, however, encourages an investigation into what aspects of federal institutions the provinces may have a stake in preserving. It is therefore notable that the various actors have frequently understood redistribution of seats as engaging provincial concerns and that unilateral federal authority has been regularly contested. Parliament’s previous authority over seat redistribution is not a definitive response to concerns about the constitutionality of unilateral federal electoral reform.

2. Provincial Interests and Minimum Representation

In addition to ambiguity surrounding the boundaries of section 44, electoral reform may tread on provincial interests because of its impact on current constitutional provisions on representation. The representation formula itself, the Senate floor rule and the grandfather clause establish a floor for provincial representation. These guarantees potentially have a broader meaning than simply creating a minimum number of MPs for each province.

Take the Senate floor rule. It provides Prince Edward Island with four MPs in perpetuity. Under MMP, two of these MPs could be elected from constituencies and two from a list. If the list is a closed one, which the national parties control, the influence of Islanders might wane. If list MPs are less accountable to or less interested in serving their constituents, which we have evidence about from other democracies, then the Senate floor would not provide the same guarantee of local representation under MMP as it would under FPTP. An open list system would address some of these concerns.

⁸⁸ *Id.*

⁸⁹ Courtney, “Commissioned Ridings”, *supra*, note 83, at 23-27.

⁹⁰ Russell, *supra*, note 8, at 226; Jeremy Webber, *Reimagining Canada* (Montreal: McGill-Queen’s University Press, 1994), at 174-75.

A province's number of MPs is also directly related to its representation in Cabinet.⁹¹ If list MPs are seen as less legitimate in the popular mind, then they may not be appointed to Cabinet in the same frequency as their constituency-based colleagues. Modifying the meaning of the seat guarantees could be said to involve provincial interests because of the impact on local control or cabinet representation.

While FPTP is not set out in the constitutional text, the minimum guarantees of representation arguably assume its presence, and electoral reform could therefore be said to trammel on the protections they were intended to provide to the provinces. This analysis implies that even if the number of seats per province is kept constant in the move from FPTP to a more proportional system, provincial interests may still be affected under the stakeholder definition adopted by the Court.

3. Is There a Way Forward? The Ranked Ballot

Parliament is in a peculiar kind of trap. A transformative reform proposal is likely to please reformers and would meet the platform commitment. The more ambitious the proposal, however, the greater is the resulting constitutional jeopardy. Adopting MMP or PR would force a head-on constitutional confrontation between the Court's emphasis on the provincial stake in federal institutions and the legitimate desire for reform.

Of the plausible options, the ranked ballot⁹² stands as the most likely to be within Parliament's unilateral authority,⁹³ if adopted to complement FPTP rather than as part of a more wholesale change to STV. The constitutionality of unilateral federal imposition of a ranked ballot turns on what scope section 44 possesses, in its attenuated form post-*Senate Reference*. The ranked ballot is less likely to be seen as a change to the constitutional architecture or as affecting the fundamental nature of the House, because it is not as transformative a reform as PR.

⁹¹ John Courtney, *Elections* (Vancouver: UBC Press, 2005), at 53 and Courtney, "Commissioned Ridings", *supra*, note 83, at 33.

⁹² It is also known as Instant Run-Off Voting ("IRV"), the preferential ballot, or the alternative vote.

⁹³ Some Western provinces used ranked ballots for provincial elections, but the practice ended in the 1950s. Municipalities in Ontario can opt to use a ranked ballot system: *Municipal Elections Modernization Act, 2016*, S.O. 2016, c. 15, s. 30.

A ranked ballot allows voters to list in their desired order the candidates on offer. The one with the least support is eliminated and her supporters' second choice preferences are counted, and so on, until one individual receives more than 50 per cent support. At the level of the voter, a ranked ballot changes how ballots are tallied to facilitate the expression of multiple preferences. It may also decrease strategic voting, or at least make it more nuanced, as a voter can rank their preferred but likely to lose candidate first, and a candidate more likely to be elected second.

At the level of parties, a ranked ballot would likely spur changes, but short of those that would accompany PR. A ranked ballot is not a proportional system and there would be no direct translation between votes for a party and its seats. Parties may have less incentive to engage in negative advertising, if they must rely on the second choice preferences of the supporters of their opponents, as they may fear turning off individuals who might otherwise rank them highly.⁹⁴ A ranked ballot is sometimes said to favour centrist parties that are the second preference of many voters.⁹⁵ The evidence does not suggest, however, that a ranked ballot would herald the same transformative changes as MMP or PR.

A ranked ballot would preserve the elements of FPTP that may be part of the constitutional order under the approach set out in the *Senate Reference*. Single-member, geographic ridings would remain in place. There is no evidence that ranked ballot systems would facilitate minority government or a more fragmented party system. It would not create "two classes" of MPs or shift the meaning of the guarantees of representation of the provinces. Critics of the ranked ballot highlight its failure to achieve proportionality as a fatal flaw. Perhaps ironically, it is the limited nature of the reform that may ensure the constitutionality of the ranked ballot.

VI. CONCLUSION

In an ideal world, federal adoption of MMP, PR, STV, or the ranked ballot would fall within the constitutional authority of Parliament

⁹⁴ Robert Richie, "Instant Runoff Voting: What Mexico (and Others) Could Learn" (2004) 3(3) *Election Law Journal* 501, at 507; but see also Michael Lewyn, "Two Cheers for Instant Run-Off Voting" (2012) 6 *Phoenix L. Rev.* 117, at 127-30 which frames this claim as less certain.

⁹⁵ See Éric Grenier, who calculated that the Liberal Party would have won even more seats under a ranked ballot in 2015: "Change to Preferential Ballot Would Benefit Liberals", CBC.ca, November 26, 2015, online: <<http://www.cbc.ca/news/politics/grenier-preferential-ballot-1.3332566>>.

pursuant to its power in section 44 of the *Constitution Act, 1982*. The Supreme Court's interpretive method in the *Senate Reference*, in combination with the contested prior uses of section 44 and previous judicial pronouncements on the electoral system, however, collectively suggest that reform exists in a constitutional grey zone. If the federal proposal involves PR or even MMP, then there is significant constitutional jeopardy at play. The ranked ballot is on more stable constitutional ground. The *Senate Reference* has created significant uncertainty for the reform of federal institutions. Further guidance from the Supreme Court will likely be necessary to un-muddy the waters.