Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada

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Abstract
Recent American debates about the relationship between the historic political compromises underlying constitutional provisions and their contemporary judicial application have been largely ignored in Canada. The Supreme Court of Canada has only twice referred to originalism—and never positively. But in two 2014 decisions about how central institutions of government—the Senate and the Supreme Court of Canada itself—might be changed, the Court relied on the underlying historic political compromises to interpret the Constitution, rejecting arguments from the text or democratic principle. In this article, I consider how Canadian courts have looked to history in the past and in the 2014 decisions, and I situate their approach within contemporary theories of originalism.

Keywords
Constitutional law; Constitutional history; Implied powers (Constitutional law); Canada. Supreme Court; Canada; United States

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Recent American debates about the relationship between the historic political compromises underlying constitutional provisions and their contemporary judicial application have been largely ignored in Canada. The Supreme Court of Canada has only twice referred to originalism—and never positively. But in two 2014 decisions about how central institutions of government—the Senate and the Supreme Court of Canada itself—might be changed, the Court relied on the underlying historic political compromises to interpret the Constitution, rejecting arguments from the text or democratic principle. In this article, I consider how Canadian courts have looked to history in the past and in the 2014 decisions, and I situate their approach within contemporary theories of originalism.
CANADA BORROWED FEDERALISM and later an entrenched and judicially enforceable bill of rights from its southern neighbour. From the beginning, American developments have had a profound impact in Canadian constitutional law, both as negative precedents to be avoided and as positive ones to be embraced. But the most fertile and contentious American constitutional debate of the last generation—the debate about originalism as a theory of constitutional interpretation—has been essentially ignored in Canada. The result is that a Canadian understanding of the relationship between the historical meaning of the terms of a constitution and its contemporary application remains trapped in antitheses dating from the early 1980s: The “framers’ intent” is contrasted with a “progressive” and “purposive” reading, and the assumption is made that readings that give much weight to history and political compromise will be weaker and more conservative than those that emphasize philosophical inquiry or proportionality analysis. This assumption is held both by those who think that

a more active and progressive Supreme Court of Canada (SCC) is good,\(^5\) and by those who consider it bad.\(^6\)

The 2014 SCC decisions in the *Supreme Court Act Reference*\(^7\) and the *Senate Reform Reference*\(^8\) should cause us to rethink these conventional oppositions and consider what the implications of the American originalism debate may be for Canadian constitutional jurisprudence. In both cases, the SCC relied heavily on history and the dynamics of political compromise in arriving at its conclusions. Both cases created robust constraints on the ability of the federal Parliament to unilaterally reform central institutions of government. Perhaps, given all the American ink spilled over the relationship between history and current constitutional adjudication in the debate over originalism, we should turn south for some reference points.

American constitutional commentary and jurisprudence are increasingly obsessed with arguments about the relationship between the historical meaning of the provisions of the US Constitution and its contemporary application. Should constitutional provisions be interpreted as their framers intended them? Should they be interpreted as their ratifiers would have understood them? Is there a distinction between the semantic meaning of constitutional provisions and their application in a particular case? What, specifically, does history tell us about the meanings of resonant but abstract phrases like “commerce among the several States,” “freedom of speech,” “cruel and unusual punishment,” or “due process of law”?

The academic literature on originalism is increasingly sophisticated. There are no longer just conservative “original-intent” originalists,\(^9\) but also public-meaning

\(^5\) David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 65 [Beatty, *Constitutional Law*] (“[R]ight from the beginning, the judges recognized that to keep the Charter relevant and responsive to the role that it was expected to play, they should flesh out its meaning with an eye to the future rather than glancing backward to the past”).


\(^7\) *Reference re Supreme Court Act, ss 5 and 6, 2014 SCC 21, [2014] 1 SCR 433 [Supreme Court Act Reference]*.

\(^8\) *Reference re Senate Reform, 2014 SCC 32, [2014] 1 SCR 704 [Senate Reform Reference]*.

originalists,10 semantic originalists,11 new originalists,12 original-methods originalists13 and progressive living originalists.14 This ferment has had little effect north of the 49th parallel. Only one SCC justice, Ian Binnie, has even attempted to grapple with the American originalism literature, and he rejected it.15 The conventional wisdom is that Canadian constitutional interpretation eschews a backward look at history in favour of a progressive and evolving approach that concerns itself solely with contemporary social needs.16 This, it is sometimes suggested, is what it means to say the Constitution is a “living tree.”17 But the two 2014 References should cause us to rethink the relevance of originalism to Canadian constitutional interpretation.

In the Supreme Court Act Reference, the Court considered two issues. First, did the statute constituting the SCC permit the appointment of a Federal Court justice to one of the seats reserved for Quebec? Second, could Parliament amend the statute to ‘clarify’ that this sort of appointment was permitted without triggering the requirement for a unanimous constitutional amendment under paragraph 41(d) of the Constitution Act, 1982?18 These issues, especially the second, brought the fundamental question of the constitutional status of the SCC—a question that had divided leading constitutional academics for many years—before the Court itself for the first time since 1982. A scant five weeks later, the Senate Reform Reference considered how a number of reforms to the Senate

15. Ian Binnie, “Constitutional Interpretation and Original Intent” (2004) 23 Sup Ct L Rev (2d) 345 at 373. He states that the “more nuanced” version of originalism advocated by Justice Scalia is “to be preferred” to the version he is rejecting. As will be described in Part II, below, Justice Scalia’s views would not be considered unusually nuanced among “new originalists” in the United States today. What Justice Binnie rejected, therefore, is not new originalism.
16. According to Peter Hogg, “Originalism has never enjoyed any significant support in Canada.” Peter W Hogg, Constitutional Law of Canada, 5th ed, loose-leaf (Toronto: Thomson Carswell, 2015-Rel 1), c 60.1(e) [Hogg, Constitutional Law, 5th].
might be accomplished, including introduction of fixed terms, consultations with
the populations of the provinces and territories before senators were appointed,
elimination of property qualifications for Senators, and outright abolition of the
upper house.19 The federal government argued Parliament could accomplish all
the reforms except abolition on its own.20 Once again, the Court confronted
fundamental questions raised by the 1982 constitutional instrument but left
dormant through the intervening generation.

What was at stake in both cases was whether the federal Parliament could
make significant changes to national institutions without seeking provincial
consent. The federal government advanced strong textual arguments that it could.
But the SCC drew on history to reject the federal claim as formalistic. The central
theme of the Court’s responses was the identification of historic compromises:
the framework of the Senate set in 1867 as part of the original Confederation
deal;21 the composition of the SCC set in 1875, as part of a broader compromise
between Quebec’s needs in relation to its distinct legal system and the needs of
the common law provinces;22 and the constitutional amending formula, which
was a major component of the patriation compromise made in November 1981
between the federal government and the provinces other than Quebec.23 As the
Court pointed out in the Supreme Court Act Reference, the amending formula
was the product of an earlier compromise in April 1981 among eight of the
provinces—the ‘Gang of Eight”—including Quebec.24

If, as I will argue, history was determinative in two of the most important
cases on the structural (as opposed to rights-guaranteeing) Constitution in a
generation, what lessons are there for the theory of constitutional interpretation?
Does this emphasis on the history of adoption mean we have to abandon
purposive and progressive interpretation? Or is history just one more factor
to be considered with the others? This article will consider how Canadian
constitutional jurisprudence has used the history of adoption in the past, how
that approach was disrupted by the collision of the 1982 Constitution with the
conservative “original intent” school of originalism of the same time period, and

19. Senate Reform Reference, supra note 8 at para 2.
20. Ibid at paras 51, 72, 85, 96.
23. Ibid at para 101; Senate Reform Reference, supra note 8 at paras 29–31.
how this collision may evolve into a constructive relationship between a Canadian jurisprudence facing new questions and a more sophisticated originalist theory.25


The judicial power in a constitutional case is to overturn political decisions based on the meaning of words. If a case is interesting and important enough to get to an appellate court, that meaning is unlikely to be obvious. It is difficult to defend the legitimacy of an undemocratic institution, the judiciary, overturning those of a more democratic one, the legislature, based only on will. This difficulty gives rise to a demand for politically neutral accounts of how a conscientious judge ought to go about turning the abstract and general words of a constitutional text into decisions in concrete cases.26 One of the most important issues is what weight, if any, the judge should give to the political reasons that underlay the text’s creation in the first place.

Canadian constitutional interpretation started off without much in the way of theoretical baggage. The BNA Act was a statute of the Parliament of the United Kingdom. Even though it represented the fruit of a complex process of negotiation between the constituent provinces with the occasional paternal push from the Colonial Office, which favoured Confederation but was unwilling to impose it,27 its application to the validity of Canadian legislation was for many decades treated “by the same methods of construction and exposition which


26. This is the “counter-majoritarian difficulty.” For its first naming, see Alexander M Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, 2d ed (New Haven: Yale University Press, 1986) at 16.

A guide to how the legal culture at the time of Confederation viewed the activities of statutory construction and exposition is the first edition of Maxwell’s *On the Interpretation of Statutes*, which appeared in 1875. Its opening words set out a deceptively straightforward mission for the judicial interpreter:

> Statute law is the will of the Legislature; and the object of all judicial interpretation of it is to determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it.  

At first glance, the “will of the Legislature” appears to be a historical fact of what the members of that legislature intended to do. On the most naïve approach, judges should decide cases just as those who voted for the law would have, and should use whatever evidence they can get about what that decision would have been. But Maxwell rejected that inference. Maxwell approved of Lord Westbury’s statement that he would, in his judicial role of interpreting the *Bankruptcy Act*, divest himself of any knowledge he had as the Attorney General who had introduced it in the Commons. What mattered was not the psychological intention of the legislators, but the intention “conveyed … by the language used.” The question for the judge was “not what the Legislature meant, but what its language means.” It did not—and could not—matter what the drafters of the statute thought it would in fact accomplish; what mattered was what the legislature willed to say, not what it willed to do.

But Maxwell did not reject history altogether as a guide for interpretation. Since “[l]anguage is rarely so free from ambiguity as to be incapable of being used in more than one sense,” history should be considered so as to put the judicial interpreter in the position of those whose words are being interpreted.
With older statutes, which might have been subject to general linguistic change, historical evidence of usage (contemporanea exposito) was relevant. While it did not matter what the parliamentarians intended, it did matter what their words meant at the time.\footnote{Clyde Navigation v Laird (1883), 8 AC 658 (HL) at 673, Lord Watson (“When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period”).}

The Judicial Committee of the Privy Council did not refer to legislative history to interpret the BNA Act, but it occasionally referred to the “common understanding” that prevailed at the time it was passed.\footnote{Lambe, supra note 28 at 582.} For example, in deciding what “direct taxation” in section 92(2) meant, the Judicial Committee considered what the distinction meant in the political economy generally accepted in 1867.\footnote{AG Quebec v Reed (1884), 10 AC 141 (PC) at 143 (“[T]hose words ['direct taxation'] must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the [BNA Act] was passed”).} Since the distinction was a technical one, the relevant linguistic community was political economists, and thus the Privy Council accepted John Stuart Mill’s 1848 definition of “direct tax.”\footnote{Ibid, citing John Stuart Mill, Principles of Political Economy with some of their Applications to Social Philosophy, 7th ed (London: Longmans, Green & Co, 1909), bk 5, ch 3 (“A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it”).} Interestingly, the Judicial Committee distanced itself from the scientific validity of the distinction between a direct and indirect tax: The “marginal revolution” in economics was making the distinction untenable, and the Judicial Committee seemed to have an inkling of the change but ignored it. What mattered was what the words meant at the time.\footnote{For a later example, see Reference whether “Indians” includes “Eskimo”, [1939] SCR 104 (considering evidence of usage of term “Indian” in pre-Confederation colonial discourse).}

Lord Sankey’s decision in Edwards introduced the metaphor of the “living tree” into Canadian jurisprudence.\footnote{Edwards, supra note 17 at 136, Sankey LC.} The Judicial Committee overruled the decision of the SCC that women could not be “qualified persons” to be summoned by the Governor General to the Senate under section 24 of the BNA Act because of the political disabilities of women that existed in 1867.\footnote{Constitution Act, 1867, supra note 1, s 24.} As Bradley Miller has argued, a careful reading of the Judicial Committee’s decision shows that it
is consistent with Maxwell’s approach to statutory interpretation: History is to be consulted for the meaning of words but not for the intentions of legislators.44

Constitutional consensus in Canada broke down in the 1930s when the federal government proved unable to take interventionist measures to combat the Depression as a result of the provincialist decisions of the Judicial Committee.45 In contrast, during the same decade in the United States, progressive and realist critics of traditional federalism triumphed in the New Deal-era Supreme Court.46 Canadian legal academics who identified with this social movement to limit laissez-faire capitalism and who believed only federal authority could effectively do so—W.P.M. Kennedy, Vincent MacDonald, and Frank Scott—turned to the historical record at the time of Confederation to critique the judicial interpretation of the Canadian Constitution.47 They contrasted the strong desire for a centralized federal union, expressed by Fathers of Confederation like Sir John A. Macdonald and George Brown, with what the Judicial Committee had

46. In 1913, Oliver Wendell Holmes said, “I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.” See Richard A Posner, ed, The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr (Chicago: The University of Chicago Press, 1992) at 147. In the New Deal Revolution, a majority of the US Supreme Court moved away from striking down federal legislation on the grounds it went beyond Congress’ enumerated powers. See NLRB v Jones & Laughlin Steel Corp, 301 US 1 at 38-39 (1937) [Jones] (upholding comprehensive federal labour legislation); Wickard v Filburn, 317 US 111 at 124 (1942) (upholding federal regulation of the production of feed crops for personal use based on the potential impact on interstate commerce). The legal realist/legal process school consensus against judicial review on federalism grounds was crystallized in Herbert Wechsler, “The Political Safeguards of Federalism: The Role of the States in Composition and Selection of the National Government” (1954) 54:4 Colum L Rev 543. After Jones, no US federal law was struck down for exceeding Congressional powers in Article 1 until United States v Lopez, 514 US 549 (1995).
During the postwar period, other critics emphasized the degree to which the Confederation pact was a compromise between the centralist views of the politicians of Canada West and the concern for provincial autonomy of George-Étienne Cartier and many of the participants from the maritime colonies. The recognition that both centralist and decentralist agendas went back all the way to the founding moment complicated a search for the intent of the Fathers of Confederation. But the common ground was that constitutional interpretation could not avoid a historical investigation of the political bargain underlying the text.

Future SCC Justices Bora Laskin and Louis-Philippe Pigeon played major roles in the academic debate of the postwar, pre-Charter period, but there were few references to history on the face of constitutional jurisprudence, even after appeals to the Judicial Committee were abolished. This looked like it might change in the 1970s. In Jones v Attorney General of New Brunswick et al, the Court briefly reviewed the history of legislative bilingualism in the pre-Confederation Province of Canada, and the content of the resolutions at the pre-Confederation Quebec and London conferences, when deciding that section 133 of the BNA Act was not intended to limit supplementary bilingualism legislation. In the Upper House Reference, the Court referred for the first time to the parliamentary debates preceding Confederation to come to the conclusion that the Senate was designed to provide regional representation in the central Parliament. Shortly afterward,

48. A number of historians of this and of the next generation also supported this centralist interpretation of Confederation. See e.g. Donald Creighton, The Road to Confederation: The Emergence of Canada, 1863–1867, revised ed (Toronto: Oxford University Press, 2012); Waite, Confederation, 3d ed, supra note 27; John T Saywell, The Lawmakers: Judicial Power and the Shaping of Canadian Federalism (Toronto: University of Toronto Press, 2002).

49. For a full discussion of this intellectual history, see Peter W Hogg & Wade K Wright, “Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism” (2005) 38:2 UBC L Rev 329. For the rise and fall (and perhaps subsequent rise) of the “compact theory” in Canadian jurisprudence, see Sébastien Grammond, “Compact is Back: The Supreme Court of Canada’s Revival of the Compact Theory of Confederation” (2016) 53:3 Osgoode Hall LJ [page 799].


52. Ibid at 194-95.

the SCC gradually abandoned any restriction on referring to parliamentary debates as a guide to ordinary legislative interpretation.54

But this was a false dawn—at least with respect to giving the history of the adoption of the constitutional text an important role in constitutional interpretation. In 1983, Chief Justice Laskin discounted the helpfulness of referring to the Confederation debates in reference to division of powers issues, stating, “There are, at best, general observations in the Confederation Debates respecting criminal law and procedure.”55 More significantly, when it came to interpreting the Charter, the SCC was highly skeptical of a historical-political analysis.

There were at least two reasons for this skepticism, both of which require consideration of the American context. The first was political-ideological. Under Earl Warren and for a few years after he left as Chief Justice, the US Supreme Court had engaged in a strikingly liberal and progressive constitutionalism. Early 1970s-era originalism—as championed by legal theorists like Raoul Berger and Robert Bork, and politicians like Edwin Meese and Ronald Reagan—was a conservative response to what that court had done. These critics argued that the progressive decisions of the era—ranging from school desegregation,56 electoral reapportionment,57 and a due process revolution in criminal procedure,58 to the striking down of abortion laws59 and capital punishment60—went beyond anything men like James Madison or Alexander Hamilton could possibly have had in mind when drafting the constitutional text. Since, as a matter of indisputable historical fact, these framers had no problem with school segregation, unequal electoral districts, police questioning without the benefit of Miranda warnings,


59. Roe v Wade, 410 US 113 (1973) [Roe].

60. Furman v Georgia, 408 US 238 (1972) [Furman]. The change in the ideological tide was made clear by the effective reversal of Furman in Gregg v Georgia, 428 US 153 (1976).
and bans on abortion or the noose, the Warren court was obviously acting illegitimately, if the intent of the framers was what mattered.

The Canadian advocates of the Charter were, however, clearly inspired by the Warren court, whose record contrasted so starkly with that of the SCC in interpreting the Canadian Bill of Rights. Thus, the idea of original intent could not have recommended itself to those who wanted to demonstrate that the Charter, unlike its predecessor, would have a significant impact on Canadian law. At the same time, original intent could not have been particularly appealing to Charter skeptics or social conservatives either, since the framers were contemporary liberal (and Liberal) politicians and bureaucrats. Argument from this quarter tended to emphasize democratic principles and institutional problems with the judiciary, not original intent.

Moreover, originalism appeared to most legal commentators to be easily discredited. Berger and Bork advocated an “expected application” version of originalism: The issue was how the framers would have decided the case if it had been decided at the time.

61. SC 1960, c 44 [Bill of Rights]. For the only pre-Charter case in which a statute was declared inoperative as a result of inconsistency with the Bill of Rights, see R v Drybones, [1970] SCR 282 (finding that an offence confined to “Indians” was contrary to equality under the law). For more representative cases, see Robertson and Ruotanni v The Queen, [1963] SCR 651 (upholding the Lord’s Day Act); The Queen v Appleby, [1972] SCR 303 (upholding “reverse onus” provisions); Attorney General of Canada v Lavell—Isaac v Belard, [1974] SCR 1349 (upholding facial sex discrimination in the Indian Act); Miller et al v The Queen, [1977] 2 SCR 680 (upholding the death penalty). For a contemporary account of how the Charter was structured to address perceived problems with the Bill of Rights, see Walter S Tarnopolsky, “The Constitution and Human Rights” in Keith Banting & Richard Simeon, eds, And No One Cheered: Federalism, Democracy & the Constitution Act (Toronto: Methuen, 1983) 261.

62. To be sure, critics of judicial review on both the political left and right uniformly criticized the expansive reading of section 7 in the Motor Vehicle Act Reference, infra note 73, as exceeding original intent. See e.g. Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Thompson Educational, 1989) at 152-53; Rainer Knopff & FL Morton, Charter Politics (Scarborough, Ont: Nelson Canada, 1992) at 130-31. But this was a relatively minor note in a critique that was primarily about how judicial review interferes with contemporary majority rule.

63. Like many ideological terms, “originalism” appears to have been coined by its opponents and only later adopted by its advocates. See Paul Brest, “The Misconceived Quest for the Original Understanding” (1980) 60:2 BUL Rev 204 at 204. Brest writes: “By ‘originalism’ I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.” See also Lawrence B Solum, “What is Originalism? The Evolution of Contemporary Originalist Theory” [Solum, “What is Originalism?”] in Huscroft & Miller, eds, supra note 44, 12 at 13 (stating that Brest coined the term “originalism”).

64. “Expected application,” as a term, is a bit of an anachronism in this context, since it was developed in Balkin, Living Originalism, supra note 14 at 7.
come before them. In an influential attack, Paul Brest demonstrated a number of
problems with originalism understood in this way:

1. The social-change objection. Technological and social change
implies that many contemporary controversies simply could not
have been anticipated by the authors of a constitution drafted
long ago: Since airplanes were invented in the twentieth century,
neither the US Constitution nor Canada’s Constitution Act, 1867
could have contemplated whether the federal government should
have jurisdiction over aeronautics, but a court can hardly avoid the
issue. More profoundly, mass social movements, such as the labour
movement or feminism, have deeply changed the social context in
which a constitution exists.

2. The dead-hand-of-the-past objection. The intentions of the framers
have no democratic legitimacy for future generations, especially
given the racial and gender exclusions of 1789 and 1867. Unlike
the social change argument, this applies whether or not the issue
is one the originators of a constitution would have foreseen: Even
if they did foresee it, what right do they have to dictate to future
generations? In the Canadian context, why should feminists of the
1920s be bound by how Victorians thought of female personhood?
Why should marginalized Canadians looking for help from the
Charter care about what ten bourgeois white men thought in 1982?

3. The no-corporate-intention objection. The framers themselves might
fundamentally disagree about how the constitution should be
applied: The generation that agreed to the American Bill of Rights
fundamentally disagreed about whether the Alien and Sedition Acts—
enacted by John Adams’ Federalists and vehemently opposed by
Jefferson and Madison’s Democratic Republicans—were consistent
with it. Canadians repeated this experience in the generation after
1982, as fundamental disagreements arose among the authors of the
Charter (to the extent it was possible to identify such individuals)
as to how constitutional cases should be resolved. If intentions are

65. The names of the four objections that follow are mine, but the first three are intended to
summarize Brest’s argument, while the point that originalism was not the original method
was first advanced in H Jefferson Powell, “The Original Understanding of Original Intent”

66. Supra note 1. Article I, section 8 authorizes Congress to “raise and support armies” and to
“provide and maintain a navy,” but of course does not refer to an air force.

discrete mental events, they require a single mind in which they can occur. Constitutions are not authored by a single mind.

4. The originalism-was-not-the-original-method objection. At least in the common law world, the framers themselves did not believe that the psychological states of mind of those enacting legal texts should be binding—as evidenced in the Anglo-Canadian context by the inadmissibility of parliamentary history as a guide to interpretation. As a result, critics of originalism could make the devastating point that the original intent was not necessarily to follow original intent.

In its first Charter case, the Court embraced the “living tree” metaphor, emphasized that the difficulty of amending a constitution left the “fine and constant adjustment” of constitutional provisions to the judiciary, and disregarded evidence of political statements by federal or provincial politicians on the interpretation of mobility rights. In the first case to strike down a statutory provision, the Court echoed some of Brest’s points, particularly the social-change and dead-hand-of-the past objections:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

The most dramatic early consequence of this approach was the decision of the Court to include substantive, not merely procedural, principles of

68. See e.g., Gosselin v The King (1903), 33 SCR 255 at 264; Attorney General of Canada v Reader’s Digest Association (Canada) Ltd, [1961] SCR 775 at 793.
70. Ibid at 366.
71. Ibid at 381-82.
72. Hunter, supra note 4 at 155.
fundamental justice within the guarantee of section 7 of the Charter. Before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, the two public servants most responsible for the federal proposed constitutional package, Barry Strayer (Assistant Deputy Minister for Public Law at the Department of Justice) and Roger Tassé (Deputy Minister), relying on jurisprudence under the Diefenbaker Bill of Rights, stated that “principles of fundamental justice” were limited to procedural fairness or natural justice, and did not allow for the review of the substantive content of legislation. Lower courts relied on these comments to conclude that section 7 entrenched procedural, but not substantive, justice. The SCC disagreed, invoking the no-corporate-intention, social-change and dead-hand-of-the-past objections. While the statements of the political actors were admissible, Justice Lamer for a unanimous Court considered that they were “unreliable” because statements of


74. See e.g. Duke v The Queen, [1972] SCR 917.


76. See e.g. Latham v Solicitor General of Canada, [1984] 2 FC 734, 39 CR (3d) 78; Re Mason and The Queen, [1983] OJ No 3174, 1 DLR (4th) 712 (Ont HC); R v Holman, [1982] BCJ No 962, 28 CR (3d) 378 (BC Prov Ct).

77. Motor Vehicle Act Reference, supra note 73 at 507, citing Joseph Elliot Magnet, “The Presumption of Constitutionality” (1980) 18:1 Osgoode Hall LJ 87 at 99 (“In the constitutional cases, the issue of intent concerns the legislature, an incorporeal body made up of hundreds of persons. It may be said that such a body, like a corporation, is a legal fiction and has no intention in the relevant sense. It would follow that legislative intent, in the constitutional setting, is a hollow concept”).

78. Motor Vehicle Act Reference, supra note 73 at 509 (“Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs”).

79. Ibid (“If the newly planted ‘living tree’ which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth”).

80. Ibid at 505-07.
individuals cannot determine the intent of the “multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter.” 81 Indeed, he said the “intention of the legislative bodies which adopted the Charter” is a matter “nearly impossible of proof.” 82

It is interesting to note that there was nothing particularly Canadian about the arguments Justice Lamer deployed; indeed, they essentially recapitulated the points made by Brest. But there is no doubt Justice Lamer’s statements in the Motor Vehicle Act Reference have become conventional wisdom, at least among those who generally support the practice of constitutional judicial review in Canada. 83

II. THE NEW ORIGINALISM IN THE UNITED STATES

The election of President Ronald Reagan brought the original intent school to a position of political power, but Brest’s criticisms were difficult to answer. The failure of Robert Bork’s nomination to the US Supreme Court in 1987 suggested that consistent originalism was also politically toxic in the United States. But, at least at the academic level, American originalism evolved, and responded to the objections. One development was to temper originalist fervour with a pragmatic acknowledgment that some non-originalist precedents must stand because societal reliance on them has grown too great. In Scalia’s words, “[A]lmost every originalist would adulterate it with the doctrine of stare decisis—so that Marbury v. Madison would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong.” 84 Even Richard Epstein—a proponent of reversing most post-1937 US constitutional jurisprudence—has argued that since any actual polity will evolve in ways that are in practice irreversible, just as property law must accept that trespasses carried on long enough create prescriptive easements, there is inevitably both an original and “prescriptive” constitution. 85 A Canadian example of a textual provision that

81. Ibid at 508.
82. Ibid at 508-09. It is not clear what Justice Lamer’s reference to “legislative bodies” refers to. While the new Constitution derived from a joint resolution of the Senate and House of Commons, it was fictional a Schedule to an Act of the Parliament of the United Kingdom and really the product of executive deal making. But this strengthens the point. If the issue was an ‘intention’ as a mental act, then in the context of the Constitution Act, 1982, it was not even determinate whose mental act that might be.
83. Binnie, supra note 15; Hogg, Constitutional Law, 5th, supra note 16, c 60.1(e).
is unlikely ever to be revived because of a combination of disuse and reliance on that disuse would be section 56 of the Constitution Act, 1867, which requires federal statutes to be sent to a British cabinet minister and permits the British cabinet to disallow the statute. 86

Acknowledging that stare decisis must sometimes override original intent was simply adding water to originalist wine. The next step was to change originalism’s flavour, rather than just dilute it. The second generation of originalists decided that what mattered at the origin point was not intent—focusing on what could be imputed to the mentality of the drafters—but understanding—focusing on the way that the language would be understood broadly within the linguistic community at the time of adoption. 87 The terms “meaning” and “intention” both contain ambiguity between their semantic and pragmatic senses. Semantic meaning or intention refers to what the speaker meant or intended to say, whereas pragmatic meaning or intention refers to what the speaker meant or intended to accomplish. In an exchange with Antonin Scalia, a Reagan-appointee to the US Supreme Court and self-proclaimed originalist, Ronald Dworkin gave the example of a boss who instructs a subordinate to hire “the most qualified candidate,” assuming it will be the boss’s son. 88 If the subordinate thought another candidate was better qualified, he or she would be following the pragmatic meaning (and perhaps avoiding unemployment) by hiring the son, but would violate the semantic meaning of the command. Both Dworkin and Scalia 89 agreed that it was the semantic intention that judges should pay attention to, and that semantic intention did not depend on internal mental acts, but on the common understanding of the relevant linguistic community of what proposition words uttered in that context would state. Whatever “original meaning” might be, it should not be located psychologically in the heads of the framers, but socially in the relevant linguistic community at the time the text was adopted.

This development responded to the no-corporate-intention objection: If meaning is not psychological, it no longer matters that corporate bodies do not have psychological intentions. It also responded to the objection that originalism did not reflect historic methods of interpretation. As I explained

89. Antonin Scalia, “Response” in ibid, 129 at 144. Scalia writes: “I agree with the distinction that Professor Dworkin draws … between what he calls ‘semantic intention’ and the concrete expectations of lawgivers. It is indeed the former rather than the latter that I follow.”
in Part I, above, Maxwell showed that the common law tradition of statutory interpretation refused to consider evidence of the psychology of the enactors of legislation, which is why it did not use legislative history. But it was open to evidence of linguistic change, as with the doctrine of *contemporanea exposito*, because it considered changes in the meaning given by the relevant linguistic community to be important. Although there were some old-time originalists who resisted the externalization of original meaning, it had a powerful ally in Scalia, who was just as committed to eliminating reliance on legislative history in the interpretation of statutes as he was to constitutional originalism.

The next move was to distinguish between the semantic meaning of a more-or-less vague legal norm and its application to a concrete legal dispute. Here the “new originalists” developed a new vocabulary. Lawyers typically use the term “interpretation” to mean both the activity of determining what words in a legal text mean in the abstract sense and how that abstract meaning applies to a particular case or controversy. New originalists distinguished these two activities, referring only to the former as “interpretation” and the latter as “construction.” This enabled them to accept—indeed, insist—that the courts play a creative role when applying vague constitutional commandments, and that they are not bound to do so as the founding generation would have. The founding generation governs whether a text encodes a rule, standard, or principle and, if so, what rule, standard, or principle. But the work of determining what might be the implications of a standard or principle for the validity of a law depends on social facts and normative values that must be left to succeeding generations to determine themselves.

The new originalist distinction between interpretation and construction mirrors the distinction made in the philosophy of language, since the time of

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92. Solum calls this the “legal content.” See *ibid*.
93. For Maxwell’s definition, see Maxwell, *Interpretation*, 2d, *supra* note 30 at 1. He writes: “[T]he object of all judicial interpretation … is to determine [a] what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining [b] whether the particular case or state of facts presented to the interpreter falls within it.”
Gottlob Frege, between the sense of a linguistic unit and its reference,95 or, in most recent iterations, between its intension and its extension.96 I will use the latter terminology here. The extension is easier to understand: It is the set of all objects in the world that are in fact described by the unit. A has the same extension as B if it is the case that x is a member of the set of entities described by A if and only if x is a member of the set of entities described by B. For example, the extension of "Bora Laskin" and "the Chief Justice of Canada in 1980" consist of one entity—the now-deceased individual human being to whom both descriptions apply.

Intension is a more difficult concept: It is an object of a propositional attitude (like belief or desire). A encodes the same intension as B if it is the case that P believes (or desires, etc.) something about A if and only if P believes the same thing about B. I may not be familiar with who was the Chief Justice of Canada in 1980. But I may know that the Chief Justice gives royal assent to federal bills when the Governor General is unavailable. I would therefore believe that, in 1980, the Chief Justice of Canada gave royal assent to federal bills when the Governor General was unavailable, but I would not believe that Bora Laskin did so. Therefore, the intension of "Bora Laskin" and "Chief Justice of Canada in 1980" are not the same.

If a word or phrase is ambiguous, then there are a discrete number of possible intensions, and context has to make it clear which one is meant.97 A trite example is "bank," which can refer either to the side of a river or to a financial institution that accepts deposits. The word “bank” is ambiguous between these two intensions. But if a word or phrase is vague, then it has a single intension with a fuzzy or debatable extension. The hackneyed example of a vague predicate is “bald”: While Patrick Stewart clearly is bald, reasonable people might disagree about William Shatner.98

A disagreement about the application of a textual command to a particular situation can turn either on ambiguity or vagueness. Suppose a teacher instructs

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96. David J Chalmers, “On Sense and Intension” (2002) 36:S16 (supp) Noûs 135. “Intension” should not be confused with “intention.” In making a statement, the utterer may have intentions both with respect to the sense/intension of her utterance and its reference/extension. The distinction is developed in the text.
two students to “choose the lightest feather.” The first child might think they should pick the feather with the least mass, while the second child thinks they should pick the palest feather. In that case, they have a disagreement about how to resolve ambiguity—an interpretative disagreement, in the narrower sense of interpretation favoured by new originalists. But if both children think they should pick the palest feather, but are unable to agree about which one that is, then they have a disagreement about how to resolve vagueness—for new originalists, a disagreement of construction. The second type of disagreement is not really a disagreement about the meaning of the teacher’s words, but about the hue of two feathers. While the accurate resolution of the disagreement of interpretation turns on psychological or linguistic facts about the teacher, the disagreement of construction can only be resolved by looking at external facts about the world. These need not be simply empirical facts. If the teacher told the students to “share your toys fairly,” it is easy to imagine the students having a disagreement about how to apply this command. But the disagreement is not really about the meaning of language or the psychological intentions of the teacher. It is about what division of toys is fair. In this case, construction requires the children to look at normative or moral facts.

In the drafting of legal texts, ambiguity is usually unintentional (and often easy to disambiguate with context), while vagueness may be strategic. A vague term may have been decided upon precisely because the parties do not agree about, or cannot foresee, the cases to which it will be applied. When a party agrees to a vague term, the party is consenting to giving the interpreter or applier a degree of discretion, either because the party thinks the interpreter or applier will be better placed to make the decision or as the price of the deal. This phenomenon is familiar for all kinds of legal texts, including commercial or labour contracts. In the context of broad constitutional provisions, it can normally be inferred that this discretion will be governed by social facts and prudential and moral beliefs of the body empowered to apply the provision.

Dworkin divided legal norms into three categories: rules, such as a speed limit, which can be applied to a set of facts by simple deductive reasoning without reference to their underlying purpose; standards, such as the reasonable person standard in negligence, which calls for an act of normative judgment; and principles, such as freedom of speech, which must be balanced against other

principles to derive a legal answer. Using this typology of legal norms, the intension of a legal text is the type of norm (e.g., the rule, standard, or principle) that the text of the contract, statute, or constitution encodes, while the extension is the set of actual cases in which the provision mattered to the result. By their nature, standards and principles are vaguer than rules. If the text encodes, as a matter of interpretation, a standard or principle, then it invites prudential and moral disagreement when applied. If Robert Alexy is correct that “the nature of principles implies the principle of proportionality,” then constitutional provisions that encode principles necessarily invite proportionality analysis as part of construction, with all that that entails.

While there are subtle differences among theorists, the new originalist contribution is that it is the intension that is fixed at the time of enactment and remains unchanged until the legal text is properly amended. The new originalist, like the old originalist, sees the fixing of this intension as a historical event. Historical facts going to this meaning are therefore the authoritative source for arguments about the intension of the constitutional provision. This view should be distinguished from the use of pre- and post-adoption history by common law constitutionalists to provide insight about a dynamic tradition of meaning unfolding before and after adoption. So far as the intension of the text goes, pre- and post-adoption historical facts are relevant only to the extent they

101. These distinctions were first set out in Ronald Dworkin, Taking Rights Seriously (Cambridge, Mass: Harvard University Press, 1977), chs 2-3. This particular typology has been criticized for mixing up the issue of defeasibility with the issue of the extent to which a judgment call is left with the interpreter/applier. See Larry Alexander, “Legal Objectivity and the Illusion of Legal Principles” in Matthias Klatt, ed, Institutionalized Reason: The Jurisprudence of Robert Alexy (Oxford: Oxford University Press, 2012) 115.


105. For an example of the indiscriminate use of pre- and post-enactment usage, see Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12 at paras 24-36, [2016] SCJ No 12 [Daniels]. The emphasis on post-1867 usage in Daniels is somewhat surprising because it cuts against the Court’s decision: Colonial discourse was more likely to distinguish between “Indians” and “Métis” after 1867 than before.
shed evidentiary light on the ultimately important factual question of what the
text meant when it was adopted.

The extension, on the other hand, depends on descriptive and prescriptive
propositions. Since these may change either in reality or in perception,
construction can quite properly change as well. For a practice of interpretation
to be originalist in any sense, the extension as revealed in the decisional law
must, to some degree, be constrained by the intension as encoded at the original
moment of text formation or adoption. But new originalists have no a priori
commitment to the determinateness of that constraint. Once we recognize the
possibility of deliberate vagueness, the constraint might be extremely loose.
Philosophical and policy arguments may be relevant at this stage, as may the
broader conception of “history” of an unfolding tradition.

So while the intension of “cruel and unusual punishment” in the Eighth
Amendment (or in section 12 of the Charter) must, for new originalists, remain
the same from the time of adoption to the time of adjudication (perhaps,
as a punishment inconsistent with “civilized standards”), twenty-first century
Americans need not accept the factual, prudential, and moral assumptions that
led their eighteenth-century counterparts to overwhelmingly conclude that
hanging is consistent with the guarantee against such punishments. That is
because the intension of that constitutional provision is a principle or perhaps a
standard—not a rule—and the application of a principle or standard can change
without a change in the principle or standard itself.

The distinction between interpretation and construction allowed the new
originalists to avoid the social-change objection: If changes in technology and
society are relevant to the application of the legal norm, then they must be taken
into account. As Justice Scalia put it, “A 19th-century statute criminalizing the

106. Solum refers to this as the “constraint principle.” See Lawrence B Solum, The Constraint
Principle: Original Meaning and Constitutional Practice [forthcoming].
107. For the purpose of this article, I will generally refer to the use of “history” as being about
the time of adoption. I am thankful to an anonymous reviewer for pointing out that
there is another use of “history” whose relevance a new originalist would limit to the
construction stage.
110. Constitution Act, 1867, supra note 1, s 8.
theft of goods is not ambiguous in its application to the theft of microwave
owns.”112 New originalism does not altogether eliminate the dead-hand-of-the-
past objection, however, since the present generation is still bound to use the
standard, principle, or rule established by the founding generation. But at least
the force of the objection is reduced since, in most cases, the semantic meaning
gives the present generation much to do. In any event, the dead-hand-of-the-past
objection can be levied at any written constitution that confines the discretion
of current majorities: If what matters most is flexibility, the Constitution of the
United Kingdom, with its paramount principle of Parliamentary sovereignty,
delivers in spades. The constitutional question is not usually whether there will
be flexibility for future generations, but rather who will exercise it. Courts should
exercise flexibility within the sphere the constitution gives them, but surely
everyone should be uneasy with the idea that there is no constraint on the courts
deciding what that sphere is. New originalism acknowledges the legitimacy of
judicial flexibility when the historically enacted text is irreducibly vague—as,
of course, it usually is.

What, then, are the arguments for the new originalist approach? Old-style
originalists relied heavily on democratic arguments about the need to constrain
judicial discretion and respect legislative choice, but these arguments are not as
available to new originalists since it is perfectly possible that the intension of
a constitutional provision is to create judicial discretion and narrow legislative
choice. But new originalists are able to rely on a very powerful argument from the
fundamental features of constitutional norms: that they are supreme and that they
are entrenched. If constitutional texts are supreme, then they are supreme over
even their most authoritative interpreters, namely the final court of appeal.113 But
this requires that there be some external reference point as to what the text means
other than what the judges say it means. New originalism provides that reference
point without making it implausibly determinate. Moreover, entrenchment
implies that constitutions can only be changed through the use of the prescribed
amending procedures. Since the amending procedures do not provide for change
by judicial fiat, entrenchment implies that there must be something that judges
cannot change by their own legitimate activity, even if the constitution gives
them some legitimate activity in which to be engaged (called, by new originalists,

473 (stating that the rule of law requires that the judicial branch be constrained by law).
The fixation thesis means that this something can be specified, at least in principle, without reference to subsequent judicial activity.\textsuperscript{114} Although the logical implications of supremacy and entrenchment are the fundamental point, new originalism can also embrace other normative arguments. If even the sense of a constitution is whatever the courts say it is, a person seeking to criticize jurisprudence from the outside is just making a conceptual error. To say that the SCC inaccurately stated constitutional law would be like saying a statute of the UK Parliament is not the law in Britain: It would not make sense within the system.\textsuperscript{115} However, external intellectual or popular criticism has in fact played an important role in constitutional development, as demonstrated by the impact that Kennedy, MacDonald, and Scott had on federalism jurisprudence. They did not simply argue that the Judicial Committee’s decisions were unwise; they also argued that they were contrary to the true meaning of the Constitution. This latter criticism requires an external standard of meaning, which both new and old originalism can deliver but an unconstrained living constitution cannot.

Another normative argument depends on the legitimacy of the political moment in which the text was created. If constitutional provisions were adopted at periods of high political mobilization and approved by a broader set of actors than a single national majority, then that broader-than-usual consent is normatively relevant to the authority of that constitution. It would seem to follow that the scope of that broader consent should constrain the interpretation of the text that results. The force of this argument depends on the process by which the constitutional text came to be enacted. It is always a fiction to say a constitution represents the factual consent of “the people,” since individuals who did not agree to it were still bound to it at the moment of enactment, and subsequent generations did not agree to it at all. But the normative force of consent is not necessarily absent when it is imperfect. First, there is a strong argument that provisions adopted by supermajorities or representatives of divergent interests will have epistemic advantages over laws passed through ordinary majoritarian processes. Norms that are the product of a broad consensus after intense deliberation are, as a probabilistic matter, likely to be better grounded epistemically than narrowly majoritarian decisions occurring in the context of ordinary politics. This implies that the courts should try to give effect to the provision as that regionally diverse supermajority understood it, if not give it the

\textsuperscript{114} This argument is made most rigorously in Jeffrey Goldsworthy, “The Case for Originalism” in Huscroft & Miller, supra note 44 at 42.

\textsuperscript{115} In both cases, a critic could dispute the prudence or morality of the SCC decision or statute. But it would be an error to say it did not accurately reflect the positive law.
effects the supermajority expected.\textsuperscript{116} Second, if there are normatively important
divergences of interest within the constituted community, an agreement between
representatives of those interests will have to protect those interests to some
extent. While that bargain might be renegotiated in a similar process, if the
mutual agreement was necessarily for legitimacy in the first place, the bargain
can no more be legitimately rewritten by a simple majority vote of the highest
court of appeal than of the central legislature.

While old originalism, at least in the American context, had politically and
jurisprudentially conservative implications, the same is not necessarily the case
for new originalism. For the most important (and vaguest) provisions, results
in particular cases depend more on background presumptions and factual and
normative assumptions about the world than on the unchanging historical sense
of the textual provisions. Keith Whittington favours judicial restraint; Randy
Barnett is a libertarian in favour of a highly activist court; Jack Balkin is a
progressive liberal.\textsuperscript{117} All three are new originalists.\textsuperscript{118}

In its early formulation, originalism was clearly a purely normative theory:
Berger and Bork certainly did not think they were describing the behaviour of
the US Supreme Court. They were objecting to it. Most new originalists continue
to see themselves as primarily normative in orientation to judicial practice. But
some new originalists go beyond arguing that the courts \textit{should} decide in an
originalist manner, and have argued that they already \textit{do}.\textsuperscript{119} It is no doubt true
that liberal justices in the United States are now capable of speaking in new
originalist tones. For example, in her confirmation hearing, Justice Elena Kagan,
a reliably progressive vote in disputed constitutional cases, succinctly stated the
new originalist position and gave her approval: “Sometimes [the framers] laid
down very specific rules. Sometimes they laid down specific principles. Either
way, we do what they said. In that sense, we are all originalists.”\textsuperscript{120} There have

\textsuperscript{116} See John O McGinnis & Michael B Rappaport, \textit{Originalism and the Good Constitution}
brand of originalism they call “original methods originalism” and which they distinguish
from new originalism. However, the argument that a supermajority has epistemic advantages
over normal majorities is a general normative argument for originalism.

\textsuperscript{117} Balkin, \textit{Living Originalism}, supra note 14.

\textsuperscript{118} Whittington, “The New Originalism,” \textit{supra} note 12; Barnett, \textit{supra} note 94; Balkin, \textit{Living
Originalism}, \textit{supra} note 14.


\textsuperscript{120} Jason Reed, “Kagan Confirmation Hearings: Day Two” \textit{The Wall Street Journal} (29
June 2010), online: <http://www.wsj.com/articles/SB10001424052748704103904575
336790488403182>.
been originalist defences of all the major progressive decisions that got Bork and Berger exercised in the first place.121

Skeptics may wonder whether new originalists have transformed an interesting perspective on judicial practice into a purely semantic relabeling of it. There is no such thing as a free lunch, and it may be objected that what new originalism gains in plausibility it loses in usefulness. Once the new originalist moves have been accepted, it is not clear what difference they make. If the original meaning of the text is abstract, then it is possible to mount a new originalist defence of almost any result. New originalism in effect licences all of Phillip Bobbitt’s modalities of constitutional interpretation—the historical, textual, structural, doctrinal, ethical, and prudential122—so long as the last four are referred to as modalities of construction.

One difference with Bobbitt’s unrestricted pluralism is that new originalism holds that the analysis of the modalities must occur in a sequence: It is the intension of the text, in its historical context, that gives rise to the legal content. So interpreted, the legal content may licence ethical and prudential—what the Canadian jurisprudence would call “purposive”123—inquiries. These inquiries, in the context of adversarial litigation, will lead to a line of precedents, which should, to the extent possible, fit together (Bobbitt’s “doctrinal” modality124). So, new originalism still insists that the text and history must come first, if not in order of importance, at least in order of consideration—at least to the extent the constitutional decision can honestly be said to be pursuant to the constitutional text.

It will still be objected that in many cases, none of this will constrain judicial discretion all that much. But this problem is not unique to originalism: Any jurisprudential theory faces a trade-off between descriptive plausibility and normative bite. If a theory is presented as a way of explaining how the results of the judicial system are actually reached (even if the judges themselves are unaware that they are following the theory), then (1) the theory must be indeterminate enough to explain any actual result, and (2) the theorist cannot complain that a judge has failed to follow the theory. One cannot consistently use the same theory to explain and critique judicial decisions. Simply explaining may be fine

121. For some examples, see Michael W McConnell, “Originalism and the Desegregation Decisions” (1995) 81:4 Va L Rev 947 (arguing that Brown was consistent with original meaning); Jack Balkin, “Abortion and Original Meaning” (2007) 24:2 Const Commentary 291 (arguing that Roe was consistent with original meaning).
123. Hunter, supra note 4 at 156.
124. Supra note 122 at 13.
for a purely social scientific enterprise, but obviously does not work if the theorist has an ambition to influence the results the judicial system reaches. On the other hand, a highly prescriptive normative theory runs the risk of being too doctrinaire for actual practice. Advocates must of course adopt any plausible argument that looks helpful to their client’s cause, whether it fits with a theoretical perspective or not. Judges also tend to argue that their resolution of a case is supported by all possible considerations. As a result, legal practice is likely to be more eclectic than the theoretically minded would like, and however much American law has moved in the direction of paying greater attention to the historical meaning of the US Constitution’s terms, it is in no danger of becoming purist. As Scalia himself said, “I am a textualist, I am an originalist. I am not a nut.”\textsuperscript{125} Of course, by not being a “nut,” Scalia opened himself up to the charge of motivated reasoning. For his critics, Scalia’s originalism and textualism were abandoned for congenial conservative results.\textsuperscript{126}

Both at the “high” level of theory and in judicial and legal practice, Americans broadly associated with new originalism are continuing to debate how determinate their method really is. These debates are both philosophical and historical. But it seems that the basic insight—that the level of determinateness is itself a question constitution makers have a choice about—is unlikely to be lost.

III. CAN ORIGINALISM COME TO CANADA? HAS IT?

The new originalists’ most general normative arguments apply just as well to Canada as to the United States—indeed, they may apply better. Like the Constitution of the United States, Canada’s Constitution is explicitly supreme and entrenched. There is an amending formula that sets out how the Constitution can be changed: In no case is it either sufficient or necessary to obtain a majority of the final court of appeal. This implies that there must be something the final court of appeal cannot change. Indeed, section 52(3) of the Constitution Act, 1982 spells this out: “Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.”\textsuperscript{127} Judges who do not recognize a historically-fixed constraint of some


\textsuperscript{127} Constitution Act, 1982, supra note 2, s 52(3) [emphasis added].
kind are, on Goldsworthy’s difficult-to-answer argument, flaunting the very text that empowers them.

The supermajoritarian argument has peculiarly Canadian resonances as well. The decisions of a supermajority command special respect both because they presumably correspond to the interests of a wider group of people and represent the epistemic advantages of diversity and greater deliberation. The constitutional settlements of both 1867 and 1982 were the products of moments of great mobilization and debate, and of compromise across regional and ideological lines. The narrative of “compact” has long had resonance in Canada. The 1982 Constitution emerged as it did precisely because the SCC insisted that there was a constitutional convention requiring that major changes obtain “substantial provincial … consent,” and the Trudeau government postponed its attempt to bring its amendment package out unilaterally to see if such consent could be obtained. This conventional requirement of provincial consent suggests that what the provinces consented to matters for interpretative purposes—with the recognition that by accepting vague rights guarantees, they must have consented to substantial judicial freedom in application and construction. In addition to the provinces, the consent of aboriginal and women’s groups was demonstrably important to the 1982 Constitutional settlement.

To be sure, as in the United States, there are problems with an idealized account of the constitutional text as the product of unproblematic consent. Confederation, like the US Constitution, was the product of a debate limited to white men within the framework of an explicitly imperialist order. But where the 1789 constitutional settlement was a compromise within a single ethnic group divided primarily by the institution of slavery, the 1867 compromise at least involved compromise across ethnic and religious lines. The 1982 compromise is, of course, controversial to this day because it was rejected by the Quebec National Assembly—a defect in legitimacy that subsequent rounds of constitutional reform were unable to correct. But questions about original legitimacy exist for the United States as well: The original Constitution was a pact with slaveholders, while the Reconstruction Amendments were imposed through military force. Notwithstanding its defects, the Canadian constitutional

128. Goldsworthy, supra note 114.
129. Grammond, supra note 49.
130. Re: Resolution to amend the Constitution, [1981] 1 SCR 753 at 784, [1981] SCJ No 58 [Patriation Reference]. See also Re: Objection by Quebec to a Resolution to amend the Constitution, [1982] 2 SCR 793, [1982] SCJ No 101 [Quebec Veto Reference cited to SCR]. In that case, the Court stated that the conventional requirement of substantial provincial consent did not go so far as to require the consent of the province of Quebec (ibid at 806).
adoption processes were still special ones, resulting in the adoption of a complex amending formula setting out exactly what consent of what legislative bodies would be required to amend it further. To the extent the new originalism is a “living originalism,” it would seem to escape the traditional Canadian critiques, which, as we have seen, essentially recapitulated the points made by Brest and others in the American context.

How does new originalism fare as a descriptive theory of how Canadian courts act? There are relatively few examples of descriptive new originalist scholarship in Canada, although in one of the few Canadian examples of this genre, Justice Bertha Wilson, the most progressive of interpreters of the Charter during the Court’s most ‘heroic’ phase, has been described as an originalist—which at least suggests a descriptive originalism could be developed for any of the other SCC justices in the Charter era. As we have seen, the reception of old originalism by 1980s-era Canadian courts was hostile. However, the claim that the SCC absolutely rejects an originalist approach is overstated, both by impatient originalists and by strong supporters of progressive interpretation. It is more accurate to consider the Court’s approach to history as pluralistic. Even Chief Justice Dickson stated that “the Charter was not enacted in a vacuum” and should be “placed in its proper linguistic, philosophic and historic contexts.” The living tree metaphor means only that the past “plays a critical but non-exclusive role” in determining the content of even the rights-guaranteeing provisions of the Constitution. The contours of section 96 of the Constitution Act, 1867 depend on a historical assessment of practices of the superior courts in the confederating provinces in 1867 that new originalists would reject as pedantic. Some of the provisions of the Constitution explicitly refer to the legal situation at the time the


According to *Sobeys Stores*, a court trying to determine whether a law falls afoul of section 96 of the Constitution Act, 1867 is to compare the jurisdiction given to a statutory tribunal with the jurisdictions exercised by superior, district, or county courts in the four confederating provinces in 1867. If these differed, the court is to look at whether the jurisdiction was exercised in three or more of those provinces. If the jurisdiction was exercised in only two provinces, practice in England in 1867 is used as a tie-breaker. This is obviously originalism at a highly concrete level.
provision was enacted.\textsuperscript{136} In 2003, the Court stated it was “not free to invent new obligations foreign to the original purpose of the provision at issue,” an original purpose that must be determined from “historical context.”\textsuperscript{137}

In the context of official language, denominational, and treaty rights, reference to what was agreed at the time the rights were created seems inevitable, and the courts have returned repeatedly to the history of adoption for interpretative guidance. Unfortunately, this has sometimes been accompanied by the inference that these rights, because they are historically grounded, are less important—an implication that has led the judicial champions of these rights to defensiveness. In the 1986 language rights trilogy,\textsuperscript{138} Justice Beetz distinguished “universal” legal rights that are “seminal in nature because they are rooted in principle” from language rights “based on political compromise.”\textsuperscript{139} The result for Justice Beetz was that “political compromise” rights should be approached with greater restraint than the “universal” rights.\textsuperscript{140} In rejecting the legacy of the trilogy,\textsuperscript{141} Justice Bastarache—a champion of language rights both before and after appointment to the Court—pointed out that constitutional language rights are not unique in resulting from political compromise.\textsuperscript{142} This could have led to a recognition that the framework of political compromise is relevant to the interpretation of those “universal” rights as well, but instead Justice Bastarache

\begin{footnotes}
\item[136] See e.g., Constitution Act, 1867, supra note 1, s 18 (stating that the privileges of the Senate and House of Commons are not to exceed those of the UK House of Commons “at the passing of such Act”); ibid, s 93(2) (stating that denominational rights at the time of union are preserved and that those of separate schools in Ontario extended to dissentient schools in Quebec). Section 93(2) was repealed by SI/97-141, (1997) C Gaz II, 308 (Constitutional Amendment, 1997 (Québec)).
\item[138] Société des Acadiens du Nouveau-Brunswick v Assn of Parents for Fairness in Education, Grand Falls District 50 Branch, [1986] 1 SCR 549, [1986] SCJ No 26 (holding that the right to plead in an official language under section 19(2) of the Charter does not imply a right to be understood) [Société des Acadiens cited to SCR]; MacDonald v City of Montreal, [1986] 1 SCR 460, [1986] SCJ No 28 (holding that there is no right to receive a process issued from a court in one’s own language under section 133 of the Constitution Act, 1867); Bilodeau v Manitoba (Attorney General), [1986] 1 SCR 449, [1986] SCJ No 27 (holding that there is no right to receive a process issued from a court in one’s own language under section 23 of the Manitoba Act, 1870, 33 Vict, c 3 (Canada)).
\item[139] Société des Acadiens, supra note 138 at 577-78.
\item[140] Ibid at 578.
\item[142] Beaulac, supra note 141 at 790.
\end{footnotes}
insisted that “the existence of a political compromise is without consequence with regard to the scope of language rights.”

More recent language rights cases show that the proponents of wide readings of language rights can ground their arguments in history. In *Caron*, three justices would have overruled one of Justice Beetz’s language rights decisions holding that there are no French language rights in Alberta or Saskatchewan, primarily based on the argument that it misread the history of the constitutional enactments. The majority upheld the earlier decision holding that there was no constitutional requirement that laws in Alberta be written in French. But they did so with far more attention to the original understanding of the text than Justice Beetz had shown.

Even in relation to the so-called “universal rights” in the *Charter*, the Court has looked at the political compromise implied by the creation of rights review, with a limitation clause and override, in defending its role making controversial decisions. This is the sort of argument of which new originalists would approve. Moreover, the most methodologically sophisticated division of powers case in the twenty-first century, the *Employment Insurance Act Reference*, is consistent with new, but not with old, originalism. That case involved the interpretation of section 91(2A) of the *Constitution Act, 1867* (“Unemployment insurance”) and whether it authorized Parliament to enact an income replacement scheme for work lost as a result of pregnancy, adoption, or care of a new born. Justice Deschamps rejected an “original intent” approach to the heads of power enumerated in sections 91 and 92 of the *Constitution Act, 1867*, but at the

143. *Ibid* at 791. In my view, Justice Bastarache is required to return to the history of political compromise to justify some propositions about language rights that are important to him, including the irrelevance of cost and administrative inconvenience outside section 23 and the priority of the official languages over other minority languages—but full justification of this assertion is outside the scope of this article.


146. *Ibid*.

147. *Vriend v Alberta*, [1998] 1 SCR 493 at 563, [1998] SCJ No 29 ("We should recall that it was the deliberate choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts and to command them under s. 52 to declare unconstitutional legislation invalid").


149. *Supra* note 1, s 91(2A).

same time insisted that the courts must “refer to the framers’ description of the power in order to identify its essential components.”

Section 91(2A) was added by the Constitution Act, 1940 in direct response to the Reference re: Employment and Social Insurance Act (Can), in which the Judicial Committee struck down Prime Minister Bennett’s attempt to respond to the Great Depression by setting up a federal unemployment insurance scheme. When legislation was enacted under section 91(2A), it not only did not include maternity or parental benefits, but excluded women for two years after they were married. Obviously, it would be unacceptable to restrict Parliament’s authority under section 91(2A) to a statute that, in every detail, matched this original application—and, unsurprisingly, Justice Deschamps rejected this idea of originalism. She did not, however, ignore history, referring to federal-provincial negotiations on the scope of the power. Instead, she treated it at a higher level of abstraction, defining unemployment insurance as a “public insurance program based on the concept of social risk … the purpose of which is to preserve workers’ economic security and ensure their reentry into the labour market … by paying temporary income replacement benefits … in the event of an interruption of employment.” This more abstract definition was justified with reference to a 1937 letter from Prime Minister Mackenzie King to the Premier of Quebec. She then applied this relatively abstract definition to legislation for pregnancy, parental, and adoption benefits, finding that it was met. Justice Deschamps’ approach is consistent with the new originalist distinction between interpretation and construction, as well as its use of a relatively abstract conception of historical meaning.

Any claims of descriptive originalism must be modest. The Court has never expressly embraced originalism, although it also rarely says anything negative. The Court has not tried to theorize what the “critical but non-exclusive” role of the history of the text should be, nor has it tried to engage with the developments

151. Ibid at para 10.
152. For the original legislation, see British North America Act, 1940, 3-4 Geo VI, c 36 (UK) [Constitution Act, 1940].
155. Ibid at para 48.
156. Ibid at para 41.
158. Saskatchewan Electoral Boundaries Reference, supra note 134 at 180.
in originalist theory in the United States—even in cases such as the Employment Insurance Reference, where this theory might have proven useful. For the work of adjudicating rights and most division of powers disputes, this has perhaps not proven necessary. But 2014 was to show that too little theory and too little history have their costs when it comes to structural provisions—like those of the amending formula—that cannot escape their origins. In describing the two 2014 References in detail, I hope to show not only that the Court found it necessary to go to originalist ideas to make sense of what it was being asked to decide, but also that it could have negotiated these issues better if it had engaged with the more sophisticated versions of originalism developing south of the 49th parallel.

IV. THE 2014 REFERENCES

A. THE SUPREME COURT ACT REFERENCE

The Supreme Court Act Reference arose as a result of Prime Minister Harper’s decision to appoint Justice Marc Nadon of the Federal Court of Appeal to replace Justice Morris Fish on the SCC. The Supreme Court Act states that a minimum of three SCC Justices “shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province,” or, in French, “Au moins trois des juges sont choisis parmi les juges de la Cour d’appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.”159 Justice Fish was one of the three. While Justice Nadon had been a member of the Barreau du Québec for nineteen years as a practicing lawyer, this ended with his appointment as a Federal Court judge in 1993.160 Since he was clearly not a judge of the Court of Appeal or of the Superior Court of Quebec, the validity of his appointment turned on whether a nominee for one of the Quebec seats on the Court must be “among the advocates of the Province” at the time of appointment or if it is sufficient that the nominee was among those advocates at some earlier date.

Justice Nadon was sworn in as a Justice of the SCC on 7 October 2013. Toronto lawyer Rocco Galati filed a challenge to the appointment in the Federal Court the same day. As a result of the challenge, Justice Nadon declined to sit on any cases.161 The federal government reacted on 21 October. First, it included

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159. Supreme Court Act, RSC 1985, c S-26, s 6 [Supreme Court Act].
161. Supreme Court Act Reference, supra note 7 at paras 9-10.
in its omnibus Bill C-4 two clauses that purported to give “greater certainty” to sections 5 and 6 of the *Supreme Court Act*.\(^{162}\) The more important of the two clauses was clause 472, which added a new section 6.1: “For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, *at any time*, they were an advocate of at least 10 years standing at the bar of that Province.”\(^{163}\) If valid, the new section 6.1 would have resolved the matter in favour of Justice Nadon.

The federal government simultaneously referred to the SCC the following questions:

1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the Supreme Court Act?

2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic action Plan 2013 Act, No. 2*?\(^{164}\)

The first question seems, at first glance (although not necessarily on deeper analysis), to be a simple question of statutory interpretation. Whether a condition in a statute requires that a person have the status at the time the provision is to operate or at any time is typical of the issues that arise when lawyers argue about how statutes should be applied—and that modern drafters try to address explicitly for that reason. At least if the *Supreme Court Act* were treated as an ordinary statute, this issue would be nothing special from a jurisprudential point of view—despite the obvious importance to the operations of the Court and to the Harper government.

The second question, in contrast, raised a fundamental question about the constitutional status of the SCC. Since there is no doubt that any power to

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163. *Ibid*, cl 472. Bill C-4 received royal assent after the questions in the reference were set but before argument or judgment.

164. *Supreme Court Act Reference, supra note 7 at para 7.*
legislate with respect to the SCC lies with the federal Parliament, a negative answer to the second question would necessarily imply that there are some aspects of the law governing the SCC about which no ordinary legislation is permissible, and so are constitutionally entrenched. This issue had engendered intense academic debate, arising out of the anomaly in the Constitution Act, 1982 in which changes to the SCC are clearly provided for in the amending formula, but the establishment, composition, and jurisdiction of the Court are set out in an ordinary federal statute.

In contrast to article 3 of the US Constitution (“The judicial power of the United States, shall be vested in one Supreme Court...”), the Constitution Act, 1867 did not specifically entrench a final court of appeal. Instead, it gave the federal Parliament the authority to “from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada.” The federal Parliament exercised this authority in 1875 by enacting the Supreme Court Act, but the SCC remained a mere intermediate appellate court until appeals to the Judicial Committee of the Privy Council were abolished in 1949. From that point on, the SCC became the authoritative final interpreter of the Constitution and therefore had the final say on the line between federal and provincial legislative jurisdiction. Its legitimacy in this role was in obvious tension with its apparent status as a creature of the federal Parliament. Unsuccessful attempts at constitutional reform, both before and after the 1981–1982 settlement, included provisions entrenching the SCC. Part IV of the 1971 Victoria Charter would have entrenched the SCC (with articles 24 and 25 reproducing sections 5 and 6 of the Supreme Court Act), while avoiding the textual ambiguity that gave rise to the dispute about Justice Nadon’s

165. Reference re: The Manitoba Mechanics’ and Wage Earners’ Lien Act, [1908] AC 504, [1908] JCJ No 3 (PC) (holding that provincial legislatures have no power to limit the jurisdiction of the SCC); Reference as to the Legislative Competence of the Parliament of Canada to Enact Bill No 9, Entitled “An Act to Amend the Supreme Court Act”, [1940] SCR 49; Ontario (Attorney General) v Canada (Attorney General), [1947] AC 127 at 153, [1947] 1 DLR 801 (PC) [Ontario v Canada].
166. Warren J Newman, “The Constitutional Status of the Supreme Court of Canada” (2009) 47 Sup Ct L Rev (2d) 429 (describing the debate as it had developed in the years before the Court’s eventual decision).
167. Supra note 1, art III, § 1.
168. Constitution Act, 1867, supra note 1, s 101.
169. Act to amend the Supreme Court Act, SC 1949, c 37 (2d Sess), s 3.
appointment.  The Meech Lake and Charlottetown constitutional Accords of 1987 and 1992, respectively, included similar language entrenching the Court.

However, the Constitution Act, 1982—the only successful attempt to fundamentally reform the Canadian Constitution—was developed without a clear consensus about what to do with the Court. The SCC is not mentioned in the text outside the amending formula of Part V. The Supreme Court Act is not among the “Acts and orders” included within the “Constitution of Canada” by paragraph 52(2)(b). On the other hand, the amending procedures gave rise to a powerful inference that the SCC could not be altered except in accordance with its terms. Paragraph 41(d) provides that an amendment to the Constitution in relation to “the composition of the Supreme Court of Canada” must have unanimous consent of all the provincial legislative assemblies, as well as the Senate and House of Commons. Moreover, paragraph 42(1)(d) states that all other amendments in relation to the SCC must be made in accordance with the general amending formula, requiring resolutions of at least two-thirds of the provincial legislative assemblies representing a majority of the population of Canada, in addition to the houses of the federal Parliament.

Some commentators, most notably Peter Hogg, concluded that since the written “Constitution of Canada,” as described in the Schedule, did no more than give the federal Parliament the power to constitute, maintain, and organize the Court, there was no legal limit on its power to change the SCC, without a constitutional amendment, as it saw fit—even to the point of abolishing it outright (although, of course, this would be politically untenable). Patrick Monahan, in contrast, argued that since Hogg’s interpretation would render paragraphs 41(d) and 42(1)(d) essentially meaningless, the fundamental features

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172. Constitution Act, 1982, supra note 2, s 52(2)(b), Schedule.

173. Ibid, s 41(d).

174. Ibid, s 42(1)(d).

and “key characteristics” of the Court—including the one-third representation of the province of Quebec among its members—must be beyond unilateral federal competence to alter.\textsuperscript{176} Subsection 52(2) uses the word “includes” rather than “means,”\textsuperscript{177} and therefore the written texts in the Schedule do not necessarily exhaust the scope of the “Constitution of Canada.”\textsuperscript{178}

If the answer to the second question in the \textit{Supreme Court Act Reference} implied that the rules of appointment to the Court were, in some fashion, constitutionally entrenched, then this might affect the approach to the first question as well. That is, the \textit{Supreme Court Act} would no longer be an ordinary federal statute, but rather would embody some constitutionally entrenched features of the Court as well as some non-essential and therefore unconstitutional-ized ones. Since constitutional interpretation is usually thought to operate under different principles than ordinary statutory interpretation, the interpretation of section 6 of the \textit{Supreme Court Act} could be different depending on whether it was regarded as manifesting a constitutionalized feature of the Court.\textsuperscript{179}

In its factum, the federal government tried to avoid explicitly taking Hogg’s position that there were absolutely no constitutional limits to what the federal Parliament could unilaterally change about the Court, pointing out that the “reference is not about the constitutional status of the Court or its fundamental features, including the number of judges of the Court who, by tradition or statute must be drawn from Quebec.”\textsuperscript{180} Still, the logic of the federal argument was Hogg’s. The federal government emphasized that the plenary power of Parliament under section 101 of the \textit{Constitution Act, 1867} had “never been limited, either through judicial interpretation or by constitutional amendment.”\textsuperscript{181} The amending formula did not itself bring about change to the substantive Constitution.\textsuperscript{182} It therefore followed that Parliament could make any changes to the \textit{Supreme Court Act} it wished, and only a constitutional amendment—which would

\begin{itemize}
  \item \textsuperscript{177} Constitution Act, 1982, supra note 2, s 52(2).
  \item \textsuperscript{178} New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 319 at 378, [1993] SCJ No 2; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference Re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, [1997] 3 SCR 3 at para 92, [1997] SCJ No 75.
  \item \textsuperscript{179} Supreme Court Act Reference, supra note 7 at para 19.
  \item \textsuperscript{180} Reference re Supreme Court Act, ss 5 and 6, 2014 SCC 21, [2014] 1 SCR 433 (Factum of the Appellant Attorney General of Canada at para 75), online: <http://www.scc-csc.ca/WebDocuments-DocumentsWeb/35586/FM020_Appellant_Attorney-General-of-Canada.pdf>.
  \item \textsuperscript{181} Ibid at para 78.
  \item \textsuperscript{182} Ibid at paras 85-86.
\end{itemize}
have to be unanimous if it purported to limit Parliament’s ability to change the composition of the Court—could impose any limits on what Parliament could do: “Thus, until [a condition limiting appointment] is made a part of the Constitution, paragraphs 41(d) and 42(1)(d) do not operate to limit Parliament’s ability to legislate pursuant to section 101 of the 1867 Act.”

A majority of the SCC characterized the federal government’s account of paragraphs 41(d) and 42(1)(d) of the Constitution Act, 1982 as the “empty vessels” theory of those provisions, and—not surprisingly in light of this characterization—rejected it. In the Court’s view, as in Monahan’s, paragraph 41(d) implied that the existing practices regarding the composition of the Court—at least with respect to the presence of a minimum of three justices from Quebec—must be constitutionalized and could only be changed by unanimous consent, while paragraph 42(1)(d) implied that the other “essential features” of the SCC found in the Supreme Court Act (or perhaps elsewhere) could only be changed by ordinary constitutional amendment.

In coming to this conclusion, the Court repeatedly relied on what the “framers” had “intended.” The majority’s reasoning on this point discussed the historical context from the time of Confederation to the final patriation deal. The Court noted that the first Macdonald government tried to introduce an SCC under the power in section 101 of the then-British North America Act on two occasions without any guarantee of members from Quebec, and was unsuccessful both times in light of opposition from Quebec MPs. The successful 1875 bill, introduced under the Mackenzie government, included a requirement that two out of five justices be from Quebec to ensure competence in the distinctive civil law system of the province. The majority drew the inference that this was a necessary component of the political compromise that led to the establishment of the Court.

The majority then discussed how the Court’s role grew in constitutional importance. First, the Privy Council became a critical player in the balance

183. Ibid at para 86.
184. Supreme Court Act Reference, supra note 7 at para 97.
185. Ibid at para 98.
186. Ibid at para 93.
187. Ibid at para 94.
188. Ibid at para 98.
189. Ibid at para 99. In this crucial paragraph, the Court used “intended” twice and “agreed” once.
190. Ibid at para 79.
191. Ibid at paras 20-21.
192. Ibid at para 48.
between the federal and provincial governments as judicial review displaced reservation-and-disallowance as the vehicle for deciding conflicts between the federal and provincial governments.\textsuperscript{193} A system of constitutional supremacy necessarily requires a final, authoritative decision-making body on interpretative issues, and vests that body with substantial power. The abolition of appeals to the Privy Council passed this role on to the SCC. The majority seemed to opine that this history itself, in effect, constitutionalized the Court, in light of the importance of the Court to the constitutional order after 1949.\textsuperscript{194} This argument is not entirely persuasive, however. It is certainly true that a system of constitutional review demands a final authoritative interpretative body if interpretative disputes are not to go on forever. But it does not require any particular such body, and certainly a final interpretative tribunal could survive whether only current or both current and former Quebec advocates could be appointed to the Quebec positions. At most, this structural argument supports the proposition that Parliament cannot abolish the Court or remove its status as a general court of appeal.\textsuperscript{195} The Privy Council, in upholding abolition of appeals to itself, held that Parliament’s power to amend the \textit{Supreme Court Act} under section 101 was “unqualified and absolute,”\textsuperscript{196} and no subsequent case suggested otherwise.

The majority had more persuasive reasoning once it turned to the history of the patriation deal. The Court noted that the amending formula that came out of the 4–5 November 1981 agreement (which excluded Quebec) was itself derived from an earlier April 1981 compromise between the Gang of Eight.\textsuperscript{197} In particular, both paragraphs 41(\(d\)) and 42(1)(\(d\)) derive directly from the April 1981 Accord.\textsuperscript{198} The November 1981 deal—which, with the exception of the subsequent addition of what became sections 28 and 35, became the basis of the \textit{Constitution Act, 1982}—involved the federal government accepting the April Accord amending formula, with a narrower right of compensation for a provincial government that opted out of a constitutional amendment, in exchange for

\begin{footnotes}
\item[193] \textit{Ibid} at para 82.
\item[194] \textit{Ibid} at paras 83-85.
\item[195] For this argument, see Newman, \textit{supra} note 166.
\item[196] \textit{Ontario v Canada}, \textit{supra} note 165 at 153.
\item[197] \textit{Supreme Court Act Reference}, \textit{supra} note 7 at para 92.
\item[198] \textit{Ibid} at paras 92-94.
\end{footnotes}
the English-speaking dissenting provinces agreeing to the Charter including a notwithstanding clause.199

The dissenting provinces were unable to agree to changes in how the Court would be appointed or operate,200 but they did agree on how change would take place.201 Of course, what constitutes a “change” depends on how the status quo is characterized. As the federal government argued, one possible interpretation of the status quo was that the federal Parliament could unilaterally make any changes to the SCC that it saw fit. Another interpretation, though, was that the status quo was a Court essentially as it was at the beginning of the 1980s. There was thus an ambiguity in the interpretation of “an amendment in relation to the composition of the Supreme Court of Canada.”202

A majority of the Court persuasively reasoned that the provinces—particularly Quebec—could not possibly have had the federal meaning of “amendment” in mind when they agreed to the April Accord. The Court surmised that the requirement of unanimity for changes to the composition of the Court was a necessary concession to Quebec as part of the April Accord, in light of the importance of the representation of civil law-practicing justices to Quebec throughout the history of the country.203 The majority reasoned:

[The federal approach] would mean that Parliament could unilaterally and fundamentally change the Court, including Quebec’s historically guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces.203

As a reconstruction of the political actors’ positions, the majority’s reasons on this point must be correct. Indeed, as the Court noted, the explanatory note to clause 9(d) of the April Accord made this point clear: “This clause [i.e., what later became paragraph 41(d)] would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench.

200. Ibid at 94-97 (explaining how agreement on the Court was elusive at the Continuing Committee of Ministers on the Constitution meeting in August 1980, and how the matter was not returned to, except in context of the amending formula).
202. Supreme Court Act Reference, supra note 7 at paras 92-93.
203. Ibid at para 99.
of Quebec and are, therefore, trained in the civil law.”

The acceptance of the amending formula, including paragraphs 41(d) and 42(1)(d), was a demand of the dissenting provinces and (ultimately) a concession by the Trudeau government in the course of an adversarial and often-acrimonious bargaining process. It would be inconsistent with this historical context to read these provisions as permanently entrenching (and in the case of the composition of the Court, super-entrenching) a unilateral power of the federal Parliament to do whatever it wanted.

The federal government had the better of the textual argument. By definition, amending procedures do not change substantive constitutional provisions (unless they are used, of course). Despite the use of the word “includes” in paragraph 52(2) of the Constitution Act, 1982, it is surely desirable to have a finite list of the specific provisions of the Constitution of Canada that are entrenched and made supreme, and the Schedule fulfills that function. While it is arguably reasonable for the Court to ‘discover’ the broad “principles that animate” the Constitution without specific reference in the text, it would create an unacceptable degree of uncertainty if rules—especially those as technical as whether membership in a provincial bar is required at the time of appointment—were to be part of the “Constitution of Canada” despite their non-inclusion in the written instruments making up that constitution. The Court’s structural arguments do not really assist either. The need for a stable final court of appeal in a system of constitutional judicial review cannot resolve whether one level of government could change details about membership in provincial bars at time of appointment. Different systems of judicial review could easily disagree on this point. If there is a structural problem with the appointment process, it is not that the Prime Minister can nominate former members of the Quebec bar, but that the Prime Minister has the unilateral power of appointment at all. This was the structural problem that the Victoria Charter, Meech Lake, and Charlottetown all tried to address. The Court’s decision on the second question can only be defended as an historical—and therefore, originalist—one.

By the same token, the SCC’s approach to the question of whether Parliament could ‘clarify’ the group of potential appointees also only makes sense.

204. Ibid at para 92. See also “Premiers’ Conference, Ottawa, Ontario, April 16, 1981” in Bayešky, supra note 170, vol 2, 804 at 810.
206. Supra note 2, s 52(2).
on originalist grounds. There were several arguments, but the only persuasive one was a historical analysis of the origins of the Supreme Court Act. In light of the conclusion that the requirements of section 6 were constitutionalized, the Court determined that it should be read using constitutional, as opposed to statutory, principles of interpretation. It then gave four reasons why section 6 excludes former advocates, none of which impressed dissenting Justice Moldaver. The first reason was the “plain meaning” of section 6, which amounts, as plain meaning arguments generally do, to judicial intuition. The second was that the more restrictive interpretation of section 6 gave effect to the “is or has been” and “actuels ou anciens” language of section 5. Like most arguments that appeal to negative inferences, this one cuts both ways, in that the distinction drawn between sections 5 and 6 undermines the rationale for excluding former advocates of Quebec from appointment: If former members of the Manitoba bar are presumed to know enough common law to be potential SCC justices, why would former members of the Quebec bar be thought to not know enough civil law? The fourth argument—that appointing former members of the Quebec bar would conflict with a long-disused provision relating to the appointment of federal court judges as ad hoc judges of the SCC, according to which superior and appellate judges of the Quebec courts would have to be appointed instead in the event of an appeal from Quebec—was, by the majority’s admission, “not conclusive.” Interestingly, in discussing this reason for its decision, the majority went so far as to refer to the fact that the assistant judge of the Exchequer Court at the time the provision was written was, like Justice Nadon, from Quebec.

For the purposes of this article, the third reason given by the majority for its decision on the first question in the Supreme Court Act Reference was the most important: that permitting the appointment of former members of the Quebec bar might undermine the purpose of the Quebec quota of ensuring knowledge of Quebec’s distinctive legal system. In fleshing out this purpose, the Court referred extensively to the parliamentary history of the original Supreme Court Act to establish the importance of this requirement for the general acceptance of a final court of appeal in Canada.

208. Supreme Court Act Reference, supra note 7 at para 19.
209. Ibid at para 39.
210. Ibid at para 41.
211. Ibid at para 67.
212. Ibid at para 68.
213. Ibid at paras 49, 56.
Part of what characterizes that history is the importance of Quebec’s distinctive civil law system to the historical relationship between the founding peoples. Article 8 of the Quebec Act, 1774 had guaranteed that “in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of Canada, as the Rule for the Decision of the same.”214 In 1866, just prior to Confederation, the Province of Canada had enacted the Civil Code of Lower Canada215 under the auspices of George-Étienne Cartier, the leading Father of Confederation from Quebec, and, as the Court noted, an opponent of a domestic general court of appeal.216 Preserving its distinctive civil legal system was an essential interest of Quebec in Confederation. The SCC noted in the Supreme Court Act Reference that the Macdonald government twice tried to introduce a general court of appeal without fixed seats from Quebec, and both attempts died on the order paper.217 The majority cited both the concerns of Henri-Thomas Taschereau, the Member of Parliament for Montmagny—that a general court of appeal for Canada would be dominated by common-law lawyers218—and the response, which suggested introducing a minimum number of Quebec judges.219

The majority had more difficulty directly connecting this history to the distinction between a former and current member of the Quebec bar.220 Part of the problem was the lack of a theory of the relevance of history. On a new originalist approach, such a theory would require showing that the parliamentary debates of the time shed light on the general public meaning of “from among” or “parmi,” and no such linkage was attempted.221 The Court paid a great deal of attention to the bargaining structure of the exchanges between the Macdonald and Mackenzie governments and Quebec MPs,222 and this may provide clues to the tacit theory of originalism it applied. But while the opinion gave great weight to history, it failed to explore how that weight should bear on today’s dispute.

Framing the adoption of section 6 as part of a bargain did, however, have a significant consequence in the rhetorical force of the opinion: It gave normative

214. 14 Geo III, c 83, s 8 (UK).
215. An Act respecting the Civil Code of Lower Canada, LC 1865, c 41. The Civil Code was proclaimed into force 1 August 1866.
216. Supreme Court Act Reference, supra note 7 at para 77.
217. Ibid at para 79.
218. Ibid at para 50.
219. Ibid at paras 53-55.
220. As noted by Justice Moldaver in dissent, “To suggest that Quebec wanted to render ineligible former advocates of at least 10 years standing at the Quebec bar is to rewrite history. There is nothing in the historical debates that suggests any such thing.” Ibid at para 147.
221. See Supreme Court Act, supra note 159, s 6.
222. Supreme Court Act Reference, supra note 7 at paras 77-80.
significance to what would otherwise be a purely technical exercise of statutory construction. *Expressio unius est exclusio alterius* has no great resonance, but Canadians value compromise—particularly linguistic and regional compromise. By giving normative weight to the 1875 legislative deal and to the April Accord of 1981, the SCC subtly included Quebec as a party to the constitutional order established in 1982, despite the province’s dramatic dissent in November 1981. Jurisprudentially, the *Supreme Court Act Reference* revealed both that the Court is open to historical approaches to interpretation, and that such approaches can form the basis of a more, rather than less, activist approach to enforcing constitutional provisions.223

B. THE SENATE REFORM REFERENCE

The *Senate Reform Reference* decision was released just over one month after the decision in the *Supreme Court Act Reference*. Once again, the SCC was asked to determine the kinds of changes the federal Parliament could make to a national institution without provincial consent, and once again the Court turned to an analysis of the political compromises of the past for answers. In the *Senate Reform Reference*, the federal government asked the Court to explain what amending procedure, if any, would be necessary to accomplish proposed changes to the Senate.224 Senators are currently “summoned” by the Governor General on the advice of the sitting Prime Minister.225 The text of the Constitution provides no process for election. Senators may serve until they reach the age of 75.226 They must also meet property requirements.227

The first question in the reference asked how section 29 of the *Constitution Act, 1867*—which provides that Senate appointments continue until the Senator reaches the age of 75—could be amended to allow for fixed terms.228 The federal

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223. It might be objected that the 2014 References cannot be labelled “activist” because they involved struggles between governments, rather than involving limits imposed on government at the behest of a private individual or organization, as in a typical Charter or Aboriginal rights case. There is no universally accepted meaning of “judicial activism,” of course, but I would argue the 2014 References fit almost any definition. They seriously constrained the options of the federal government, without (in either case) enabling the provincial governments to do things on their own initiative. The *Supreme Court Act Reference* was precipitated by Rocco Galati as a private citizen, although his position was supported by the Attorney General of Quebec. See *ibid*.


228. *Senate Reform Reference*, supra note 8 at para 5.
government argued that since any such change would not alter “the powers of the Senate and the method of selecting Senators” (which requires use of the general amending procedure under paragraph 42(1)(b) of the Constitution Act, 1982), it was within the exclusive authority of Parliament under section 44. The second and third questions asked whether Parliament could enact legislation for consultative elections in relation to the Senate, either on its own or by creating a framework for enactment by provincial and territorial legislatures. Since the proposed legislation would leave unchanged the provisions of the Constitution Act, 1867 relating to the summoning of Senators, the federal government argued that no constitutional amendment was required at all. The fourth question asked whether Parliament could alter the property qualifications of Senators under section 44. The fifth question asked whether abolition of the Senate would require unanimous consent or could be accomplished through the general amending formula. This was a difficult issue because of an ambiguity in section 41, which provides for matters that can only be amended with unanimous consent. While this section does not explicitly refer to the Senate, it refers in paragraph (d) to any amendments to the amending formula itself, and the amending formula includes references to the Senate as an actor, albeit not a necessary actor, in the amending procedures.

The Senate Reform Reference could not help but be argued and decided in the shadow of the pre-patriation Upper House Reference, which considered Bill C-60, a proposal of the Trudeau government to make changes to the Canadian Constitution under what was then subsection 91(1) of the BNA Act. Subsection 91(1) gave Parliament authority to make laws in relation to “the amendment from time to time of the Constitution of Canada...”. Part IV of Bill C-60 would have replaced the Senate with a “House of the Federation” with half its members.

229. Constitution Act, 1982, supra note 2, s 42(1)(b).
230. Senate Reform Reference, supra note 8 at para 51.
231. Ibid at para 5.
232. Ibid at para 66.
233. Ibid at para 5.
234. Ibid.
235. Constitution Act, 1982, supra note 2, s 41.
236. Ibid, s 41(e).
237. supra note 53.
238. Constitutional Amendment Act, 1978 [Bill C-60]. For the first reading version, see Bayefsky, supra note 170, vol 1 at 344-413. The nature and powers of the House of the Federation were set out in clauses 62-70 of Bill C-60.
239. This section was amended by British North America (No 2) Act, 1949, 13 Geo VI, c 81 (UK). It was repealed by the Constitution Act, 1982, supra note 2, Schedule, Item 1.
selected by the House of Commons and half by the provincial legislatures. Bill C-60 would also have changed the powers of the new Upper House. In the Upper House Reference, the SCC set out the principle that, despite the apparently broad wording of subsection 91(1), Parliament could not, on its own, change the “fundamental features” or “essential characteristics” of the Senate. In those days, before a domestic amending formula, such changes could only be accomplished by an Act of the Parliament of the United Kingdom—which, the SCC was to inform Canadians a year and a half later, required “a substantial degree of provincial consent” as a matter of constitutional convention, albeit not as a matter of constitutional law.

The Upper House Reference set the baseline from which the provinces and federal government negotiated patriation in the following two years. During the patriation process, Senate reform proved too difficult, and the provisions of the 1867 Constitution regarding the Senate were left unaltered. But, as in the case of the SCC, the amending formula provided some specific rules for changing the Constitution with respect to the Senate. Like the rest of the amending formula, these provisions derived from those in the April Accord, which were accepted by the Federal government (and its allied provinces of Ontario and New Brunswick) in November 1981.

Section 44 of the Constitution Act, 1982—which replaced subsection 92(1) as it was between 1949 and 1982—says, “Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.” Strictly speaking, section 41 says nothing about the Senate, although paragraph (b) guarantees that the right of provinces to representation in the House of Commons at least equal to their representation in the Senate can only be changed by unanimous consent. Paragraph 42(b) provides that the general amending formula applies to amendments to the “Constitution of Canada” in relation to “the powers of the Senate and the method of selecting Senators.” As a matter of purely textual inference, therefore, it would seem that the Parliament of Canada

240. See supra note 238, s 67 (allowing the House of Commons to refer bills directly to the Governor General after refusal by the Upper House); ibid, s 68 (allowing the House of Commons, with a two-thirds majority, to dispense with Upper House consideration).
241. Supra note 53 at 78.
242. Patriation Reference, supra note 130 at 808.
243. Romanow, Whyte & Leeson, supra note 199 at 208.
244. Supra note 2, s 44.
245. Ibid, s 41(b).
246. Ibid, s 42(b).
could change any provision of the Constitution in relation to the Senate that was not in relation to its powers or the method of selecting Senators. And, if the Constitution were purely textual, Parliament could make any changes that did not require changing the constitutional text through ordinary legislation.

But this interpretation would imply that the Constitution Act, 1982 had altered the principles of the Upper House Reference, since it would appear to allow unilateral changes to the fundamental features and essential characteristics of the Senate—so long as they did not explicitly change the text of the Constitution in relation to its powers or methods of selection. Most of the provinces and territories argued that this approach could not be correct, but that the “fundamental features and essential characteristics” principle continued to operate or at least informed the interpretation of sections 42 and 44. On this provincialist view, section 44 was subject to the same limits as the pre-patriation section 91(1), which was, according to the Upper House Reference, limited to “housekeeping” matters.247


248. Supra note 53 at 65. Jean Chrétien, as Minister of Justice during the patriation process, gave evidence to the Special Joint Committee that the federal version of what became section 44 was narrower than section 91(1). See Canada, Parliament, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, iss 4 (Hull, Que: Supply and Services Canada, 1980) at 4:112-13.


250. Ibid at para 79.

251. Secession Reference, supra note 207.

252. Ibid at para 49.


254. Ibid at para 27.

255. Ibid at paras 29-30.

256. Ibid at para 31.

257. Ibid at paras 46-47.

258. Ibid at para 48.} It argued that since the April Accord was a provincial proposal—accepted as a concession by the federal government in November—it could not have been intended to loosen the constraints on the unilateral power of amendment on the part of Parliament the provinces had established in the \textit{Upper House Reference}.\footnote{Ibid at para 79.

250. Ibid at para 79.

251. Secession Reference, supra note 207.

252. Ibid at para 49.


254. Ibid at para 27.

255. Ibid at paras 29-30.

256. Ibid at para 31.

257. Ibid at paras 46-47.

258. Ibid at para 48.} The federal government made arguments both from the principle of democracy—asserted in the \textit{Secession Reference}\footnote{Ibid at para 49.

251. Secession Reference, supra note 207.

252. Ibid at para 27.


254. Ibid at para 27.

255. Ibid at paras 29-30.

256. Ibid at para 31.

257. Ibid at paras 46-47.

258. Ibid at para 48.} and with which the existing Senate is difficult to square—and from the text.

The Court began its analysis with a strong claim that the Constitution was not limited to its text. It included not only the foundational principles of federalism, democracy, the protection of minorities, constitutionalism, and the rule of law—as announced in the \textit{Secession Reference}—but also the “internal architecture” or “basic constitutional structure” assumed by the text.\footnote{Senate Reform Reference, supra note 207 at para 26.

Ibid at para 27.

255. Ibid at paras 29-30.

256. Ibid at para 31.

257. Ibid at paras 46-47.

258. Ibid at para 48.} The corollary is that it is not always necessary to change the text to amend the Constitution and therefore to trigger the amending formula.\footnote{Senate Reform Reference, supra note 207 at para 26.

Ibid at para 27.

255. Ibid at paras 29-30.

256. Ibid at para 31.

257. Ibid at paras 46-47.

258. Ibid at para 48.}

The Court then turned to history. It noted the development of a pre-patriation practice, and then a convention, of “a substantial degree of provincial consent” for changes that directly affected federal-provincial relations.\footnote{Senate Reform Reference, supra note 207 at para 26.

Ibid at para 27.

255. Ibid at paras 29-30.

256. Ibid at para 31.

257. Ibid at paras 46-47.

258. Ibid at para 48.} It was this practice that the April Accord and later Part V were designed to codify, in a manner that, unlike the rejected federal proposal, respected the juridical equality of the provinces.\footnote{Senate Reform Reference, supra note 207 at para 26.

Ibid at para 27.

255. Ibid at paras 29-30.

256. Ibid at para 31.

257. Ibid at paras 46-47.

258. Ibid at para 48.} This historical background informed the Court’s critical conclusion that section 44 was intended to fulfill the same basic function as the pre-patriation subsection 92(1) discussed in the \textit{Upper House Reference}.\footnote{Senate Reform Reference, supra note 207 at para 26.

Ibid at para 27.

255. Ibid at paras 29-30.

256. Ibid at para 31.

257. Ibid at paras 46-47.

258. Ibid at para 48.} As with subsection 92(1), section 44 does not allow alteration in “the fundamental nature and role of the institutions provided for in the Constitution.”\footnote{Senate Reform Reference, supra note 207 at para 26.

Ibid at para 27.

255. Ibid at paras 29-30.

256. Ibid at para 31.

257. Ibid at paras 46-47.

258. Ibid at para 48.} From an ahistorical textual point of view, this does not make much sense, since section 44 on its own terms seems to incorporate any change to the Senate not expressly referred to in section...
41 or 42. But it makes sense from a historical perspective. The final form of Part V derived largely from a provincialist proposal; the provincialists had won a victory in the *Upper House Reference* and they were not likely to give it away for nothing. If the dissenting provinces were trying to codify their victory in the *Upper House Reference* with what became Part V, then Parliament could do no more by itself in 2014 than it could before in 1979. The basic compromise of 1867, as elucidated in 1979, remains until at least two-thirds of the provinces with a majority of the population agree otherwise.

The Court in the *Senate Reform Reference* returned to the well of the Confederation debates to draw out further historical aspects from 1867. Macdonald had noted that an elected upper house would likely come into greater conflict with an elected lower house. Thus, the lack of democratic legitimacy of the Senate was itself part of its design. This conclusion doomed the consultative elections. Senatorial tenure was also found to be part of the institution's design and therefore a “fundamental feature” that could not be modified under section 44—even though Parliament had modified tenure in 1965 by imposing an age limit of 75 years.

Jurisprudently, the *Senate Reform Reference* relies heavily on two of Bobbitt’s modalities—structure and history—at the expense of text. The Court was not interested in the federal government’s arguments from the principle of democracy (in Bobbitt’s terms, an “ethical” argument), and instead regarded an attempt to make the Senate more democratic as precisely the kind of alteration that would rewrite the historic bargain. Indeed, despite the Court’s rhetorical emphasis on it, structure does not do much work, except on the final question of abolition. As the Australian example shows, a federal parliamentary democracy can function with an elected upper house, and there is no reason to think it could not function with an upper house with term limits. The real issue is not that these arrangements could not work with the structure of the Constitution, but that they were not the arrangements reached by the political actors behind Confederation.

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261. *British North America Act, 1965*, 14 Eliz II, c 4, pt 1 (Canada), s 1. See also *Upper House Reference, supra* note 53 at 65. The Court stated that this was an acceptable “housekeeping” amendment.
263. *Senate Reform Reference, supra* note 8 at paras 60-62.
264. *An Act to constitute the Commonwealth of Australia 1900* (Cth), c 12, ss 7-9 (providing for an elected Senate).
In the *Senate Reform Reference*, the Ancient Constitution won out not only over
the Philosopher’s Constitution, but also over the Political Scientist’s.

Unfortunately, unlike in the case of the *Supreme Court Act Reference*, the
Court’s historical analysis of the patriation process is skimpy—and in at least
one case, factually mistaken. The Court claims, “Abolition of the Senate was not
on the minds of the framers of the *Constitution Act, 1982.*”265 In fact, according
to Roy Romanow, John Whyte, and Howard Leeson—key players in both the
April Accord and the November 1981 deal—the New Democratic Party (NDP),
at both provincial and federal levels, “had consistently urged [the Senate’s] total
abolition.”266 This was significant both because the federal NDP was a close
constitutional ally of the Trudeau government and because of the pivotal role
of the NDP government in Saskatchewan—as a swing player between the federal
government and its allies on the one hand and the more rejectionist provinces
on the other.267 Clearly, the Saskatchewan government, if not the federal NDP,
were among the “framers of the *Constitution Act, 1982.*” It was because Allan
Blakeney, Saskatchewan’s premier, believed that the federal government had made
unacceptable promises to the Senate that Saskatchewan sided with the Gang of
Eight in the first place, despite Trudeau telling Blakeney, “[W]e will fight the
Senate together.”268 The Liberal Party of Quebec (PLQ) also proposed abolition
of the Senate in its “beige paper” released during the 1980 referendum campaign.269
To be sure, the PLQ and NDP were only two political players in 1981–1982;
the PLQ ultimately sided with Quebec’s Parti Québécois government to oppose
the patriation package, and abolition was always unlikely.270 But it was hardly
ture, as the SCC claimed, that the possibility of abolition was not on the framers’
minds. This mistake does not seem to have been determinative of the result,
but it shows the importance of a full historical record—which, in turn, suggests
that the Court should be clear with potential litigants about what history is and
is not relevant.

266. Romanow, Whyte & Leeson, *supra* note 199 at 127.
267. *Ibid* at 117 (describing Saskatchewan as the leader of the “moderate group”).
268. *Ibid* at 128.
269. The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation*
(Montreal: Quebec Liberal Party, 1980) at 47 (“Because this institution no longer seems
to us to be adapted to the needs of a modern federal system, we propose that the Senate
be abolished and that henceforth the federal Parliament be made up of only one body, the
House of Commons”). Justice LeBel, one of the eight justices signing on to the Court’s
opinion in the *Senate Reform Reference*, was co-author with André Tremblay of the first draft
of this report. See *ibid* at 6.
The deficiencies of the SCC’s historical account do not undermine the basic point that its decision makes sense—and only makes sense—as a vindication of the actual political compromise that led to the amending formula. Fixation of meaning by past political events is, by definition, originalism. But as with the Supreme Court Act Reference, there is no theorization of why the historic compromise is more important than arguments from text or democratic principle, or where the limits are. References to American debates could have helped because they could explain that historical fixation of intension comes first in analysis without necessarily being most important in determining the result.

V. CONCLUSION

The best arguments for the results in both 2014 References were historical ones, situating the texts of the 1867 Constitution, the Supreme Court Act, and the 1982 amending formula in the political context at the times of their adoption. But this did not make the results deferential or conservative. Indeed, the result in both cases was a vigorous assertion of constitutional limits on the legislative powers of the federal Parliament. What implications do these cases have for Canadian constitutional methodology in general, and descriptive or normative originalism in particular?

The Court’s own methodological reflections on what it was doing are terse. In both cases, it claimed it was engaging in “broad and purposive” interpretation, informed by understanding the “linguistic, philosophic and historical context” of the Constitution. Both decisions referred specifically to Edwards, although the Court did not explicitly use the “living tree” metaphor. It would be claiming too much to say that the SCC’s focus on the history of enactment in these two References vindicates the descriptive-originalist claim that SCC judges have been new originalists all along without knowing it. It is possible to interpret the SCC’s use of history in purely pluralist terms. Despite some academic comments by originalists and anti-originalists alike, the Court has never eschewed Bobbitt’s historical modality altogether, as the references to it by Chief Justice Dickson attest. Even in the Motor Vehicle Act Reference, Justice Lamer allowed historical

271. Supreme Court Act Reference, supra note 7 at para 19; Senate Reform Reference, supra note 8 at para 25. The phrase “linguistic, philosophic and historical context” comes from Chief Justice Dickson’s decision in Big M, supra note 133 at 344. This varies slightly from his formulation of “historical, political or philosophic context” in Hunter, supra note 4 at 155.

272. Supra note 17.
evidence to be submitted, although he gave it little weight. Arguably, the 2014 References just continued this tradition, which could be characterized as pluralist, pragmatic, or opportunist, depending on the evaluation of the observer.

Courts in general, and Canadian courts in particular, are more comfortable with a pluralist or pragmatic approach to methodology than anything more rigorous. This is particularly true to the extent that a particular methodology appears over-determinative and politically controversial. The problem with leaving it there, though, is that a purely pluralist account cannot shed light on when history should be used. If all that can be said is that there are a number of relevant factors of which history is one, then it becomes impossible to state what the law is when those factors are in conflict. While we should avoid a quixotic quest for a rigidly determinative method, lawyers, governments, and lower courts need to know at least the framework for analysis. This is particularly important for the amending formula, since it would be unfortunate if the already complicated constitutional negotiations always required SCC references to determine how change could be accomplished.

The new originalist literature provides a framework that can allow us to do more than simply assert that history is one factor that goes into the constitutional mixing bowl, without purporting to provide an implausibly strict constraint. Interpretation—a fundamentally historical-linguistic activity—comes before construction, an activity of making factual, moral, and prudential judgments constrained by precedent and the contours of adversarial litigation. This sequence, unlike unconstrained pluralism, provides an analytic framework for addressing the relationship between constitutional text and past political compromises—one consistent with the approach of the Court in the 2014 References. At the same time, new originalism avoids constraining the development of case law with the concrete expectations of the framers about how cases should be decided. For the important constitutional provisions, it is principles, not rules, that are fixed.

To be sure, recent American scholarship on originalism can provide at most a general framework in which Canadian jurisprudential issues might be resolved. American originalists agree that, at some level of abstraction, the meaning of the US Constitution and its amendments was fixed at the time they were adopted, and that this meaning provides some constraint on what a court may legitimately decide under those provisions. But there is no consensus on how that meaning might be determined in practice, how constraining it is, or what should be done when the original meaning fails to provide sufficient guidance.

273. Supra note 73 at 505-09.
American imports have long inspired Canadian anxiety. This was manifestly the case with the old originalism that grew out of the battles over the legacy of the Warren Court in the 1980s. But as our constitutional jurisprudence matures—especially to the extent it focuses on structural features—we need sophisticated tools for navigating the relationship between the historical-political context in which the provisions of the Constitution arose and their application to contemporary controversies. Once we get past the anxiety, we may see that one reason for considering a sophisticated originalism is precisely that it Canadianizes our Constitution by rooting it in our own history.

The project of a native Canadian originalism is obviously beyond the scope of a single article. A reader who accepts the philosophical arguments of new originalism—that the meaning of unamended but amendable legal texts must be fixed but not determinative—and that these arguments shed light on how the SCC could have resolved the issues in the 2014 References will inevitably have further questions. The most passionate parts of the American discourse relate to the Bill of Rights and the Fourteenth Amendment. What are the implications of new originalism for rights claims in Canada? To the extent that contemporary forms of originalism disclaim determinateness, how useful are they? Is there anything specific to the Canadian constitutional tradition that shines light on intra-originalist debates? How can the sometimes abstruse philosophical distinctions between meaning and reference (let alone extension and intension) be translated into terminology Canadian lawyers can use? What lessons does the historical record of our major constitutional moments actually have for us now? Assuming that originalist arguments in some cases do point in a specific direction, when would that be a normatively sound reason for departing from established precedent? To state these questions is to state that there is a research program ahead for Canadian new originalists. It is in the nature of such programs that they cannot establish their payoff ahead of time. The project has just begun.

For now, I hope only to have shown that there is reason to think that it is worth pursuing a more philosophically informed approach to our legal history and a more historically informed approach to our constitutional jurisprudence. Our central institutions, particularly the Senate, are controversial. But they are ours because

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274. See Beatty, Constitutional Law, supra note 5; Binnie, supra note 15; Hogg, Constitutional Law, 5th, supra note 15; Motor Vehicle Act Reference, supra note 73.
275. Kerri Froc has initiated the project of bringing a new-originalist perspective to bear in relation to section 15 and the typically-ignored-but-historically-important section 28 of the Charter. See Froc, supra note 25.
they derive from the "thousand acts of accommodation"\(^{276}\) that allowed a nation of religious, linguistic, regional, and juristic diversity to coexist within a single (if complicated) legal order. Philosophy can help us think through the importance of the political compromises at the time of adoption to current disputes about the application of text. But only that history itself can explain why our institutions are ours. Arguments from universal normative principles will never resolve institutional details, which must be a product of contingency and compromise. While there is much scholarly work on Canadian constitutional history and on current doctrinal issues, we have yet to develop a systematic way of relating them to each other. But as an SCC justice remarked in 1926, if the Canadian Constitution is a living tree, political compromise between Canada’s parts is its “native soil.”\(^{277}\) It is time for Canadian constitutional theorists to get their hands dirty.

\(^{276}\) Secession Reference, supra note 207 at para 96 (quoting the oral submissions of the Attorney General of Saskatchewan).