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# The Meta-Constitution: Amendment, Recognition, and the Continuing Puzzle of Supreme Law in Canada.\*

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## 1. Introduction

It is a truism that there is more to constitutional law than the written text. Yet it is not always clear how the unwritten and written parts of a constitution interact and this can be particularly confusing when the written text entrenches the constitution. By entrench, I mean that there is a higher procedural threshold of amendment for the constitution than for an ordinary statute. Typically, constitutional texts emerge against the background of an unwritten tradition, as is the case with many Commonwealth nations. These nations inherited the Westminster system but several also have a constitutional text claiming some degree of entrenchment.<sup>1</sup> Yet, where the constitution is entrenched, its wording could unwittingly entrench matters that were previously part of the unwritten constitution. For example, the entrenchment of a particular text clearly includes the rules of the text itself but it might also include informal rules which relate to the same subject matter as the rules in the text. In other words, it is possible for the entrenchment of a particular *text* to also entrench other rules surrounding particular *subject matters* thus making constitutional change significantly more challenging than the constitutional framers intended.

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<sup>1</sup> For example, the Constitutions of Australia, Canada, and India, impose a higher threshold on constitutional amendments in their respective countries, Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vic, c 12, s 128; Constitution of India, art 368; Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11, Part V [Constitution Act, 1982].

Given the scope of constitutional law in a Westminster-style system and the recent push for a new constitutional settlement in the United Kingdom, which may involve a written constitution,<sup>2</sup> it is worth paying attention to how the written texts could interact with the unwritten portions of the constitution.

In order to explore these issues I rely on the example of Canada and on the concept of the meta-constitution. The meta-constitution is simply that part or parts of a written constitution which is self-referential.<sup>3</sup> The meta-constitution should not be confused with the meta-textual rules which courts use to interpret written constitutions; the meta-constitution is part of the constitutional text and it tells readers *what* makes up the constitution and *how* the constitution can be altered.<sup>4</sup> For many written constitutions the meta-constitution is simple because the constitution is usually a single document which can only be amended by one or two procedures.<sup>5</sup> Canada's meta-constitution, much like its Constitution, is far from simple and this is why Canada is a good case study of the role and importance of the meta-constitution.

Canada's Constitution is not contained within a single document; in fact, the Constitution of Canada has long been understood to encompass more than simply the written texts.<sup>6</sup> At best, what Canada has is a partially written constitution,<sup>7</sup> though it is not always entirely clear how the

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<sup>2</sup> Political and Constitutional Reform Committee, *The future of devolution after the Scottish referendum* (HC2008-09, 700) 6, available online : <http://www.publications.parliament.uk/pa/cm201415/cmselect/compolcon/700/700.pdf>

<sup>3</sup> I do not rule out the possibility that a meta-constitution could exist in states with unwritten constitutions but for ease of analysis I focus only on written constitutions here.

<sup>4</sup> I say altered here as, in Canada, the meaning of amend has not always been clear.

<sup>5</sup> For a comparison of methods of constitutional amendment and their difficulty, see e.g. Donald S Lutz, *Principles of Constitutional Design* (CUP 2006) 171-182. See also Richard Albert, 'The Difficulty of Constitutional Amendment in Canada' (2015) 53:1 *Alberta Law Review* 85, 89-96.

<sup>6</sup> See WPM Kennedy, *The Constitution of Canada, 1534-1937: An Introduction to its Development, Law and Custom* (2nd edn, OUP 1938) 378.

<sup>7</sup> This may well be the case in other countries as well, see e.g. Benjamin L Berger, 'White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text' (2008) 3:1 *Journal of Comparative Law* 249, 250-252.

unwritten and written parts interact; in fact, it is not even clear how the two main texts of the constitution are to be reconciled. Of course, the interaction between the two parts is then further complicated by the fact that it is hard to figure out what combination of written instruments and unwritten practices make up the Constitution of Canada. The two main texts of the constitution are not particularly helpful, and gesture to both a list of constitutional instruments,<sup>8</sup> and a list of constitutional features.<sup>9</sup> In addition to this confusion over what exactly the Constitution of Canada is, Part V of the Constitution Act, 1982 offers multiple amending formulae, and figuring out which formula is applicable is not always straightforward.<sup>10</sup> As such, in the Canadian context, there is room for dispute over the meta-constitution and this affords an opportunity to see how questions about the scope and flexibility of a constitution play out in court.

In 2014, the Supreme Court of Canada issued its decisions in two high-profile reference questions dealing with the finer points of the Canadian Constitution. The first of these 2014 questions was about the eligibility of Marc Nadon for one of the vacant Quebec seats on the Supreme Court of Canada;<sup>11</sup> while the second was about the potential for Senate reform.<sup>12</sup> At issue in both of these questions was how the Constitution of Canada could be amended. Although reference questions are not legally binding, given that they are a species of advisory opinion, they have always been followed.<sup>13</sup> The federal government lost the argument in both

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<sup>8</sup> Constitution Act, 1982, (n 1), s52(2)(b).

<sup>9</sup> *ibid*, ss 41, 42.

<sup>10</sup> Robert E Hawkins, 'Constitutional Workarounds: Senate Reform and Other Examples' (2011) 89 Canadian Bar Review 513, 514.

<sup>11</sup> *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 (Supreme Court of Canada (SCC)) [*Supreme Court Reference*].

<sup>12</sup> *Reference re Senate Reform*, 2014 SCC 32 [*Senate Reference*]. The Quebec government posed its own reference question on the matter, *Reference re Bill C-7 Concerning the Reform of the Senate*, 2013 QCCA 1807 (Quebec Court of Appeal)

<sup>13</sup> Supreme Court Act, RSC 1985, c S-26, s 53 [Supreme Court Act]. See also, John McEvoy, 'Separation of Powers and the Reference Power: Is There a Right to Refuse' (1988) 10 Supreme Court Law Review 429.

decisions, and, as a result, both have begun to attract ample scholarly attention, though they are rarely, as yet, examined together.<sup>14</sup>

In this paper I want to focus on what these decisions have to say about constitutional amendment and recognition in Canada. By constitutional recognition, I simply mean how to figure out what is and is not part of the Constitution of Canada. As will become clear, there is a persistent recognition issue with the Constitution of Canada, which comes to the fore in debates about how to amend it. In Canada, the uncertainty surrounding the meta-constitution gives the Supreme Court a wide degree of latitude to determine what is and is not part of the constitution and, by extension, what is and is not constitutional.<sup>15</sup> As I argue in this paper, in the *Supreme Court Reference* and the *Senate Reference*, the Supreme Court uses the meta-constitution to identify constitutional *topics* rather than discrete constitutional rules. The idea of constitutional topics is perhaps the next logical step in Canadian constitutional theory, building as it does on the previous jurisprudence of constitutional conventions and constitutional principles. Yet it is

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<sup>14</sup> For some early commentary see Ian Peach, 'Reference re Supreme Court Act, ss 5 and 6 – Expanding the Constitution of Canada' (2014) 23:3 Constitutional Forum constitutionnel 1; Adam M Dodek, 'Uncovering the Wall Surrounding the Castle of the Constitution: Judicial Interpretation of Part V of the *Constitution Act, 1982*' (2105) Ottawa Faculty of Law Working Paper 13/2015, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2577818](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577818)> accessed 25 April 2016; Kate Glover, 'Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*' (2014) 67 Supreme Court Law Review (2d) 221 [Glover, 'Structure, Substance']; Hugo Cyr, 'The Bungling of Justice Nadon's Appointment to the Supreme Court of Canada' (2014) 67 Supreme Court Law Review (2d) 73; Emmett Macfarlane, 'Unsteady Architecture: Ambiguity, the *Senate Reference*, and the Future of Constitutional Amendment in Canada' (2015) 60:4 McGill Law Journal 883; Adam Dodek, 'The Politics of the *Senate Reform Reference*: Fidelity, Frustration, and Federal Unilateralism' (2015) 60:4 McGill Law Journal 623 [Dodek, 'Politics']; Kate Glover, 'The Supreme Court in a Pluralistic World: Four Readings of a Reference' (2015) 60:4 McGill Law Journal 839 [Glover, 'Four Readings']; Yasmin Dawood, 'The *Senate Reference*: Constitutional Change and Democracy' (2015) 60:4 McGill Law Journal 737; Noura Karazivan, 'De la structure constitutionnelle dans le *Renvoi relative au Sénat*: vers une gestalt constitutionnelle' (2015) 60:4 McGill Law Journal 793; Catherine Mathieu and Patrick Taillon, 'Le fédéralisme comme principe matricial dans l'interprétation de la procédure de modification constitutionnelle' (2016) 60:4 McGill Law Journal 763. See also David Schneiderman, *Red, White, and Kind of Blue: The Conservatives and the Americanization of Canadian Constitutional Culture* (University of Toronto Press 2015) 176-289.

<sup>15</sup> The term constitutional can have a dual meaning in that it can refer to things which are allowed under the constitution – is a law constitutional, for example – but it can also refer to things which are *part* of the constitution. Throughout the paper I try to, as far as possible, use it to mean the former but the context will make it clear when I am using it in the latter sense. Both meanings can occur simultaneously.

also clear that the Supreme Court of Canada's analysis, while being rooted in the constitutional texts, also implicitly invokes the original meaning of "the constitution" as being 'the whole of the body politic, including values, norms, behaviours, and institutions.'<sup>16</sup> As such, the Supreme Court of Canada's jurisprudence on what the Constitution of Canada is has expanded the scope of the constitution and thus what can be considered supreme law in Canada. It also suggests that the boundaries of the constitution are questions of political and historical fact to be found by the courts, rather than questions of law. Thus Canada is an example of the ways in which courts can guard the constitution from the vagaries of politics in ways which are not always explicit in the constitutional text(s).

I begin with a primarily theoretical discussion of the meta-constitution's role in written constitutions as well as its importance for legal certainty. In order to explain the meta-constitution's importance, I rely on key insights from legal and political theory. It should be noted that my argument here is limited to constitutional democracies, particularly those with a written or partially written constitution, rather than authoritarian regimes. Then I examine the Canada's meta-constitution with particular reference to the jurisprudence about constitutional amendment. This third section is subdivided to explore the pre-1982 case law, the changes brought by the Constitution Act, 1982, and the two 2014 reference questions. As will become clear, section 52 offers a tripartite definition which must be read with other parts of the constitutional texts, including Part V, in order to be understood. Yet the *Constitution Act, 1982* was not so much a "new" Constitution as a continuation of what had preceded it,<sup>17</sup> including the

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<sup>16</sup> Berger (n 7) 250

<sup>17</sup> Alan C Cairns, 'The Politics of Constitutional Conservatism' in Douglas E Williams (ed) *Constitution, Government & Society in Canada: Selected Essays by Alan C Cairns* (McClelland & Stewart 1988) 195 [Cairns, 'Politics'].

jurisprudence on what the Constitution of Canada might mean or include. The *Senate Reference* and *Supreme Court Reference* are but the latest in this definitional jurisprudence and they highlight what happens when the meta-constitution is unclear. Part four offers a brief discussion of some potential future developments and broader implications, and part five concludes.

## 2. The Meta-Constitution: The Lynchpin of the Law

In both a theoretical and practical sense a constitution is where the legal and political collide. Not surprisingly, constitutions attract ample academic attention because of their legal and political importance. Yet of all the aspects of a constitution, the meta-constitution is relatively under-examined. In the Canadian context, for example, scholars have commented on the amending formula and on the question of what other statutes (or parts of statutes) can be considered to be constitutional<sup>18</sup> but rarely have they analyzed these two features together or the ways in which they might undermine each other.<sup>19</sup> This failure seems all the more striking given the importance analytical legal theory places on identifying *what* counts as law. Analytical legal theory's concern with what law is implicitly, and sometimes explicitly, invokes the idea of legal certainty. As I show in this section, the meta-constitution is crucial for legal certainty but, in turn, legal certainty is important for more political questions such as legitimate authority and the separation of powers.

Written constitutions are, at their heart, a political agreement in a legal form; an understanding of how the people it represents are to live together and govern their affairs. In setting out how the country is to be governed, constitutions offer both a framework and a boundary for law and politics. Laws which do not meet the stated criteria fail to be valid laws.

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<sup>18</sup> Warren J Newman, 'Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada' (2007) 37 *Supreme Court Law Review* (2d) 383; 'Defining the "Constitution of Canada" Since 1982: The Scope of the Legislative Powers of Constitutional Amendment Under Sections 44 and 45 of the Constitution Act, 1982' (2003) 22 *Supreme Court Law Review* (2d) 423; Stephen A Scott, 'Pussycat, Pussycat or Patriation and the New Constitutional Amendment Process' (1982) 20:2 *University of Western Ontario Law Review* 247 [Scott, 'Pussycat, Pussycat?']; 'The Canadian Constitutional Amendment Process' (1982) 45 *Law and Contemporary Problems* 249. With respect to the question of which statutes are in the constitution, see Peter W Hogg, *Constitutional Law of Canada* (Carswell 2009) 80-104; Patrick J Monahan and Byron Shaw, *Constitutional Law* (4th ed, Irwin Law 2013) 191-193.

<sup>19</sup> See e.g. the discussion of how section 44 has the potential to undermine certainty, below at fn 161-166. See also, Newman, 'Defining the "Constitutions of Canada"' (n 18) 432. Lutz did not examine Canada's Constitution in his study of constitutional design because he could not determine 'what has constitutional status', Lutz (n 5) 179 fn 16.

Granted, it is accepted that constitutions will tend towards generalities rather than detailed specifics. If the written constitution is to be durable, it must leave room for interpretation and certainty will accrue overtime as the amount of constitutional jurisprudence increases.

Yet the interpretation of written constitutions aims to explain what the constitution *means*, rather than what it *is*. In practice these two roles are often blurred, after all meaning and being are closely related. Nonetheless, the role of courts is mainly to interpret rather than identify supreme law and for the courts to do this it is important to know *what* the constitution actually is and *how*, if at all, it may be changed. These questions are important in a legal sense because constitutions tell us which laws are actually laws. Yet constitutions must also tell us whether new or altered constitutional rules are valid, as these changes will result in new criteria for the validity of laws.

Among legal theorists there is longstanding disagreement over how to identify what counts as law. The positivist stance is that the question of identifying law is a purely factual one and they rely on a “rule of recognition” to assess whether or not something is law. At its simplest, the positivist stance is that so long as a law is enacted in accordance with the relevant legal system’s meta-rule, then it is a valid law.<sup>20</sup> Such a stance does not seek to interrogate the content of the law, nor does it seek to examine the legitimacy of the law-making power. It does, however, implicitly reference the importance of legal certainty. Positivists might argue that identifying what law is and is not is important for the purposes of analysis and does not need to invoke anything outside of the law such as legitimacy or morality; yet it is not clear that legal certainty is a value external to the law. Other theorists, typically influenced by Lon Fuller, argue

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<sup>20</sup> HLA Hart, *The Concept of Law* (Clarendon Press 1994) 94-95.

that the law has certain internal rules, such as stability, certainty, and non-contradiction,<sup>21</sup> which work to keep the law coherent as a specifically *legal* system.<sup>22</sup> Fuller's "internal morality" of the law offers space for the content of laws to be assessed as the law must form a system which is generally coherent.

Both the positivist and Fullerian approaches to legal certainty are compatible with how constitutions tell us what counts as law; however, in order for a law to be constitutional the *content* of the law as well as its manner of enactment must comply with the constitution. Consequently, in a practical sense, if we are to apply the insights of legal theory to constitutional democracies, we must be able to identify what the constitution actually is so that we can assess whether or not laws purporting to be passed under it are actually valid.

The meta-constitutional rules which tell us what the constitution is could be described as the constitution's rule of recognition, in that they tell us how to identify what is and is not included. Positivist theory does not explain *why* it is important to know what the law is outside of being able to identify the law. Perhaps identifying the law is important in and of itself, but in a Fullerian sense, the identifying role of the meta-constitution provides the stability, clarity, and publicity which are essential components of any legal system.<sup>23</sup> These components were important for Fuller because he was concerned with how legal systems can promote human agency.<sup>24</sup> This concern is largely irrelevant to positivists but it seems particularly appropriate for the evaluation of constitutional democracies.<sup>25</sup> To the extent that democratic constitutions

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<sup>21</sup> Lon L Fuller, *The Inner Morality of Law* (Yale University Press 1969), ch 2.

<sup>22</sup> Dan Priel, 'Lon Fuller's Political Jurisprudence of Freedom' (2014) 10:1 *Jerusalem Review of Legal Studies* 18, 27-28.

<sup>23</sup> Fuller, (n 21) 97.

<sup>24</sup> Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing 2012) 2.

<sup>25</sup> By which I mean those democratic countries which have adopted a written constitution as their supreme law.

purport to delineate the rights of an individual vis-à-vis the state, they necessarily speak to agency in a number of ways. First, they allow citizens to plan their lives by delineating what rights they have and what laws are supreme. Secondly, through the meta-constitution, they give citizens or their representatives the chance to change what the constitution is through peaceful means.

The ability to change the constitution is important in a political sense because of how it speaks to consent. The idea of governance by consent may have come under recent scrutiny,<sup>26</sup> yet there is no doubt that it remains an important legitimating force for democratic states. The ability of citizens to change the rules by which they are governed lends support to the idea that consent underpins the political system. This understanding of consent is, of course, more about the broader public than the individual, because even a person who does not consent to such changes will be bound by them; there is no way to opt out of the state.<sup>27</sup> The important points of agreement may not be on what the law actually means but on where to find it and how to change it. That is, consent might be more about the process than the result and, if so, this further reinforces the need for clarity with respect to how the governing rules are changed

The ability to change the constitution is important for another reason relating to legitimate authority. Questions of legitimacy and the links between political and legal theory are often downplayed,<sup>28</sup> but in the context of constitutional theorizing they are unavoidable. As a source of legitimate authority constitutions tend to be a mix of legal-rational and traditional

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<sup>26</sup> See e.g., Jeremy Webber and Colin Macleod (eds) *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press 2010).

<sup>27</sup> See e.g. Christine M Korsgaard, 'Taking the Law into Our Own Hands: Kant on the Right to Revolution' in Andrew Reath, Barbara Herman and Christine M Korsgaard (eds) *Reclaiming the History of Ethics: Essays for John Rawls* (CUP 1997) 297.

<sup>28</sup> For a critique of this tendency see, e.g. Dan Priel, 'The Place of Legitimacy in Legal Theory' (2011) 57:1 McGill Law Journal 1.

authority.<sup>29</sup> The former is obvious in that legal-rational authority is the form of authority most often linked with modern democratic societies. The link between traditional authority and written constitutions is perhaps less obvious; but written constitutions, particularly entrenched constitutions, will accrue such authority over time. In addition, such constitutions may also make reference to earlier practices and customs, or be incomprehensible without knowing the historical contexts.<sup>30</sup> Therefore, there is always the risk that a constitution could become too rigid.

Constitutional amending formula(e) offer one way to ensure that constitutions can evolve with the society they represent. Yet such amending formulae must strike a balance between flexibility and stability. Stability has long been recognized as an important legal value; in fact laws which are constantly in flux are of questionable value and may not even be considered valid law.<sup>31</sup> Stability is also important in a political sense because a state in constant constitutional flux suggests a divided populace, which does not and cannot agree on how to live together. Yet, stability tacitly invokes traditional authority through its promise to protect some features from change. In other words, legal-rational authority can have some traditional aspects to it as well.

The meta-constitution's role in ensuring the stability and flexibility of a constitution is primarily in delineating what the constitution actually is and having a workable, internally coherent way (or ways) to amend the constitution. Without such clarity it will be challenging to figure out what counts as supreme law and thus needs to follow the procedures set out in the amending formula. In turn, a lack of clarity complicates constitutional flexibility because it would not be obvious if such flexibility was precluded by an alternative piece of legislation. For

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<sup>29</sup> Here I am referring to Max Weber's tripartite classification of legitimate authority, see Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978) 215.

<sup>30</sup> Berger, (n 7) 250-251.

<sup>31</sup> Fuller, (n 21) ch 2.

example, if there was a statute which the constitution has explicitly entrenched as part of the constitution, an ordinary statute could not change it. Yet if the constitution has only implicitly entrenched a statute or, parts of a statute, this could lead to confusion over how such a statute could be amended.<sup>32</sup> The meta-constitution may well be more detailed than other constitutional features such as basic rights and division of powers but it does not have to be so.<sup>33</sup>

Where the problems start is when the meta-constitution is unclear. A flawed meta-constitution will not necessarily doom the written constitution as a whole but it does have the potential to undermine what the constitution purports to be. Most, if not all, written constitutions function as the supreme law of the land, with the courts functioning as interpreters of this law. If a country's meta-constitution is imprecise or leaves too much room for interpretation, sooner or later the courts will struggle to identify *what* the constitution is which makes it much more challenging to assess whether a proposed law is constitutional or not. To some extent, any litigation over the meta-constitution threatens to force courts out of their role as interpreters, because stating what the meta-constitution *means* has implications for what the constitution *is*. In this way, the meta-constitution can undermine the separation of powers,<sup>34</sup> or at least grant the courts the power to expand the scope of the constitution. Fortunately meta-constitutions are for the most part uncontroversial but as I now move on to show, Canada's meta-constitution contains contestable criteria instead of clear rules. In turn, this leaves it to the courts to interpret and explain which constitutional amendment process certain proposed changes must follow.

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<sup>32</sup> As was the case with the *Supreme Court Act* in the *Supreme Court Reference*, further discussed below, fn 9 to 122.

<sup>33</sup> See e.g. Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vic, c 12, s 128. For a non-Commonwealth example see, Constitution of Ireland, art 46.

<sup>34</sup> I leave aside any questions of whether written constitutions might, in general, grant courts more powers than they had before. But on this point see, e.g. John Finnis, 'Patriation and Patrimony: The Path to the *Charter*' (2015) 28:1 Canadian Journal of Law and Jurisprudence 51, 75 fn71.

### **3. The Jurisprudence on Canada's Meta-Constitution: Substance over Form**

Canada's constitutional development is well-worn but a brief overview is helpful to survey the history of the recognition question. For ease of analysis, this section is divided into three sections: the first covers the pre-patriation Constitution of Canada and the two reference cases which helped prompt the *Constitution Act, 1982*; the second covers the meta-constitution as amended by the *Constitution Act, 1982*, and the subsequent jurisprudence on what the 'Constitution of Canada' is; while the third focuses on the two constitutional reference cases decided in early 2014. Despite this divide, there are two questions running through each of the sub-sections: which parts of the Constitution of Canada are not enforceable by the courts and has the scope of the enforceable Constitution changed? Both questions speak to issues with Canada's meta-constitution.

#### A. Canada's meta-constitution before 1982

The roots of Canada's Constitution are intertwined with those of the modern British Constitution, a fact which should come as no surprise given that Canada used to be a British colony (or, more accurately, the original constituent provinces used to be British colonies as did many of the provinces which later joined Confederation).<sup>35</sup> Britain's Constitution is, famously, unwritten, or mostly unwritten.<sup>36</sup> The British Constitution is made up of principles and conventions which have evolved over centuries and, while there are rules for identifying conventions and principles, the enforcement of conventions is mostly political rather than legal. In other words, a political

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<sup>35</sup> Kennedy, (n 6) 378.

<sup>36</sup> An argument could be made that, for example, the Act of Union 1707 is part of Britain's written constitution. See also, Linda Colley, 'Empires of Writing: Britain, America, and Constitutions, 1776-1848' (2014) 32:2 Law and History Review 237.

actor who violates a convention will likely lose political capital rather than face censure in the courts. At times the British Constitution seems to function as more of a gentlemen's agreement than anything else, which is to say there is a rather large amount of trust and expectation that the executive, legislature, and judiciary will behave in a certain way and few ways to really enforce those expectations. With this background in mind the reference in the preamble to the Constitution Act, 1867 of a 'Constitution similar in Principle to that of the United Kingdom'<sup>37</sup> expands Canada's Constitution beyond the textual provisions and invokes the various norms and values implicit in the British Constitution. As the original Act was renamed (and amended) in 1982, I use its pre-1982 name, the British North America Act, in this section for clarity.

The British North America Act was an ordinary Act of the British Parliament even though that Act had constitutional status within Canada. The meta-constitutional aspects of the British North America Act left much to be desired. Initially, the Act contained no way for Canada to amend it without going through the British Parliament in London. The federal Parliament could, of course, supplement the British North America Act with ordinary, domestic statutes, such as the Supreme Court Act. From 1949 onwards, there was also some scope for domestic constitutional amendment but this scope was limited.<sup>38</sup> Similarly, the recognition aspects of the British North America Act were (and remain) far from clear but, based on jurisprudence, the preamble to the Act functioned and continues to function, as a way of delineating what the Constitution was and is.<sup>39</sup> Initially, however, the preamble invoked the unenforceable, political constitution rather than any enforceable constitutional rules.

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<sup>37</sup> Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, preamble, reprinted in RSC 1985, Appendix II, No 5.

<sup>38</sup> British North America (No. 2) Act, 1949, 13 Geo. VI, c. 81 (UK). Other amendments had to go through Westminster.

<sup>39</sup> For pre-1982 discussions see *Reference re Authority of Parliament in Relation to the Upper House* (1979), [1980] 1 SCR 54, 69 [*Upper House Reference*]; For post-1982 discussions see *New Brunswick Broadcasting Co v Nova*

As a result of the British North America Act, the Canadian Constitution has always been more legal than Britain's. Consequently, the courts have always had the power to rule Canadian legislation *ultra vires* and to judge certain political actions against the yardstick(s) provided in the text of the constitution. Though there were perhaps some novel aspects to Canadian constitutional interpretation, the jurisprudence built on the longstanding traditions of statute interpretation and common-law reasoning.<sup>40</sup> In a way, the British North America Act appears as a work in progress. After all, the text of the preamble states that it is "expedient" to provide for "Legislative Authority ... and the Nature of Executive Government" in the Dominion. This suggests a sense of urgency and the idea that some of the details would be filled in later as, in fact, some were. Arguably, the change in 1949 which allowed some domestic amendment to the text of the British North America Act was among the most important, being the first step in the patriation process.

By the 1960s it had become clear that Canada needed something of a constitutional overhaul.<sup>41</sup> A key sticking point was the difficulty in getting all of the provinces and the federal government to agree to one package.<sup>42</sup> Matters came to a head when the government of Pierre Trudeau attempted to force the issue: first, by attempting to unilaterally reform the Senate; and second, by attempting to unilaterally patriate the Constitution. The actions of the Trudeau

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*Scotia (Speaker of the Assembly)*, [1993] 1 SCR 319, 374-75 (McLachlin J, as she then was), 100 DLR (4th) 212 [*NB Broadcasting* ]; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 68-69 [*Provincial Court Judges*].

<sup>40</sup> It is beyond the scope of this particular paper to analyse Canada's entire history of constitutional interpretation. For some discussions see Kennedy, (n 6); Hogg, (n 18); Monahan & Shaw, (n 18)

<sup>41</sup> For more on this time period see e.g. Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press 1992); Roy Romanow, John Whyte and Howard Leeson, *Canada...Notwithstanding: The Making of the Constitution, 1976-1982* (Carswell 1984).

<sup>42</sup> For a good discussion of the politics behind the constitutional negotiations see, Cairns, 'Politics of Constitutional Conservatism', (n 17) See also, Alan C Cairns, 'The Canadian Constitutional Experiment' in Williams (n 17), 229 [Cairns, 'Canadian Constitutional Experiment'].

government led to two Supreme Court reference decisions in quick succession, both of which explored what exactly was meant by the ‘Constitution of Canada.’<sup>43</sup>

The first reference case, the *Upper House Reference*, saw the Court discuss the limits of the section 91(1) amending power, as introduced in 1949. At issue was whether the federal parliament could abolish or reform the Senate and if so, to what extent could it be reformed. The Court held that section 91(1) only allowed the federal parliament to amend the British North America Act with respect to matters that only concerned the federal government; they could not unilaterally alter the shape of those institutions which the British North America Act set up to provide a balance between the federal government and the provinces.<sup>44</sup> In this case, to bolster their answer about the limits of the federal amending power, the Court examined the original intent of the Fathers of Confederation and found that the Senate was an essential feature of the original federal bargain.

The Court also spent some time puzzling over what section 91(1) meant by ‘the Constitution of Canada.’ The British North America Act did not define the phrase and it did not appear elsewhere in the Act. The federal government tried to argue that this was a wide-ranging amending power but the Court observed that ‘s.91 (1) does not give power to amend the [British North America] Act ... [i]nstead, the phrase “Constitution of Canada” is used.’<sup>45</sup> Then the Court further limited the definition of ‘Constitution of Canada’ to meaning ‘the constitution of the federal government’<sup>46</sup> because whenever the Act spoke of “Canada” it did so to differentiate the

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<sup>43</sup> These were not the first cases to discuss what was meant by “Constitution of Canada” but the question had a particular kind of urgency in these two cases, which was arguably lacking in the previous cases. For earlier discussions see e.g. *Jones v New Brunswick (AG)*, [1975] 2 SCR 182, 196 (Supreme Court of Canada) [*Jones*].

<sup>44</sup> *Upper House Reference*, (n 39) 69-70.

<sup>45</sup> *ibid* 69.

<sup>46</sup> *ibid* 70. This definition differed from one the Court had earlier given to it, see *Jones*, (n 43) 196

federal from the provincial.<sup>47</sup> The fact that section 91(1) was added in 1949, over eighty years after the British North America Act came into force, might explain why it is the only place to refer to the ‘Constitution of Canada.’

A little under two years after the *Upper House Reference*, the *Patriation Reference* saw a majority of the Court find that, while there was no legal impediment to the federal government’s power to request an amendment to the constitution without the consent of the provinces, such a move would breach a convention requiring a ‘substantial measure’ of provincial consent.<sup>48</sup> The *Patriation Reference* again saw the Court discuss what the Constitution of Canada was. Chief Justice Laskin, in dissent to the second question about whether or not there was a constitutional convention requiring provincial consent, noted that the Canadian Constitution was ‘only in part written’ and took the form of ‘statutes and common law rules which declare the law and have the force of law, and ... customs, usages and conventions .... which, while not having the force of law .... form a vital part of the constitution.’<sup>49</sup> Laskin CJC’s comments arguably opened the door for domestic Canadian statutes, including those of the provinces, to be considered part of the constitution. In a similar vein, the majority noted that a ‘substantial part of the rules of the Canadian constitution are written. They are contained not in a single document called a constitution but in a great variety of statutes some of which have been enacted by the Parliament at Westminster ... or by the provincial legislatures.’<sup>50</sup> The majority agreed that conventions formed part of the constitution and that they could not be enforced by the courts.<sup>51</sup> With respect

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<sup>47</sup> *Upper House Reference*, (n 39) 70.

<sup>48</sup> *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 905 (Supreme Court of Canada) [*Patriation Reference*]. With respect to the question of there being a legal impediment, the Court split seven judges to two; while the convention question saw the Court split six to three in favour of there being such a convention.

<sup>49</sup> *ibid* 852-53.

<sup>50</sup> *ibid* 876.

<sup>51</sup> *ibid* 880-881.

to the conventions included in the constitution, some originated in Canada, while others were incorporated via the British North America Act's preamble. In other words, the majority was trying to draw a line between the political parts of the constitution and the legal parts;<sup>52</sup> the effect of such a distinction being that the courts were only bound to uphold the latter.

The definition of the Constitution of Canada appears to differ between the *Upper House Reference* and the *Patriation Reference*. The former's definition relied on a narrow textual reading of section 91(1), while the latter took a broader approach to the meaning of the term "constitution." Yet the broader definition of the Constitution of Canada is implicit in the *Upper House Reference*. The Court's interpretive footwork in the *Upper House Reference* worked to limit the federal parliament's power to amend the broader constitution and relied on statutory interpretation as well as an examination of what the federal amending power had previously been used for. The Court's line drawing between "Constitution of Canada" and the British North America Act reflects both the actual text of Canada's Constitution and its unwritten commitments. What the *Patriation Reference* did was make the broader scope of the Constitution of Canada clearer.

As a result of the *Patriation Reference* there was a meeting of the Prime Minister and all the provincial Premiers in November 1981. This meeting resulted in the document that would become the Constitution Act, 1982 as well as substantial changes to the text of the British North America Act. The Constitution Act, 1982 completed the process set in motion in 1949 and provided the much-needed amending formulae which would allow Canada to amend its own Constitution without needing any help from the United Kingdom.

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<sup>52</sup> *ibid* 880-884.



## B. The meta-constitution of the *Constitution Act, 1982*: continued definitional struggles

The *Constitution Act, 1982* did not represent a completely new start for the Canadian Constitution.<sup>53</sup> What it did represent was a mix of renovation – the changes to the British North America Act, now the Constitution Act, 1867, for example – replacement and additions – the Charter and the amending formulae, for example. Certain new ambiguities were introduced into the written parts of the constitution – such as, the relationship of Part V’s amending formula with section 101 in the Constitution Act, 1867<sup>54</sup> – but that is to be expected with any statute, constitutional or otherwise, which does not supersede, at least not entirely, what already exists. Among the biggest problems with the introduction of the Constitution Act, 1982 is that it resulted in there being two main texts of the constitution, each with their own internal logic, and no clear way of reconciling the two. In particular, how are courts to reconcile the preamble of the 1867 Act and its implied, unwritten, British-style constitution with section 52 of the 1982 Act, which seems to make all parts of the constitution supreme law? Before moving on to examine the post-1982 jurisprudence on defining the Constitution of Canada and its attempts to reconcile section 52 and the 1867 preamble, this section examines the new meta-constitution of 1982.

### *i. The New Meta-Constitution of 1982*

The key changes included in 1982 were the Charter of Rights and Freedoms and the amending formulae. However, the text of what would become the Constitution Act, 1982 went through a

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<sup>53</sup> Cairns, ‘Politics of Constitutional Conservatism’, (n 17). That being said the age of a constitution is typically calculated as being the length of time that particular amendment procedures are followed, Bjørn Erik Rasch and Roger D Congleton, ‘Amendment Procedures and Constitutional Stability’ in Roger D Congleton and Birgitta Swedenborg (eds) *Democratic Constitutional Design and Public Policy* (MIT Press 2006) 319, 320.

<sup>54</sup> WR Lederman, ‘Constitutional Procedure and the Reform of the Supreme Court of Canada’ (1985) 26 *Cahiers de Droit* 195, 197-199.

number of changes before its final form was patriated in 1982. As such my analysis in this section includes the proposed Constitution Act, 1980 which represents the federal government's attempt at unilateral patriation.<sup>55</sup> I do not intend to exhaustively document each textual change to the meta-constitution but, where relevant, I will highlight where text was changed between 1980 and 1982, as minor textual changes such as altering the position of certain sections, had significant implications for what ultimately became supreme law in 1982.

Instead of offering a relatively simple method of amendment, the 1982 formulae offered several which, as was soon noted, did not necessarily improve upon the pre-1982 situation.<sup>56</sup> At the November 1981 meeting the amending formula was one of the key issues to be decided,<sup>57</sup> suggesting that all parties recognized their importance. Canada's limited ability to amend its own constitution had hindered the country's political independence and placed Canada at the mercy of a foreign Parliament. The complexity of Canada's amending formulae may be a result of their development at a much later date,<sup>58</sup> but they are also indicative of certain conflicts between the provinces, particularly between the English provinces and Quebec. A key sticking point prior to 1982 was how best to protect provincial powers from diminution without provincial approval and a range of formulas were developed to try and answer such concerns. At the same time, however, the amending formulae received much less attention than the *Charter*, 1982's other main constitutional change.<sup>59</sup>

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<sup>55</sup> This document is reproduced in 'Legislative Texts Relating to the Constitution Act, 1982' (1985) 30:4 McGill Law Journal 753 starting at 755 [Constitution Act, 1980].

<sup>56</sup> Scott, 'Pussycat, Pussycat'(n 18) .

<sup>57</sup> Howard Leeson, *The Patriation Minutes* (Centre for Constitutional Studies 2011) 17; J Peter Meekison, 'The Amending Formula' (1982) 8 Queen's Law Journal 99, 99.

<sup>58</sup> Meekison, (n 57), 100. For an argument against their complexity see Kate Glover, 'Complexity and the Amending Formula' (2015) 24:2 Constitutional Forum constitutionnel 9.

<sup>59</sup> Donald Smiley, 'A Dangerous Deed: The Constitution Act, 1982' in Keith Banting and Richard Simeon (eds) *And No One Cheered: Federalism, Democracy and the Constitution Act* (Methuen 1983) 85. See also, Cairns, 'Politics of Constitutional Conservatism' (n 17) 209-210.

The formulae, which were eventually agreed upon in 1982, offer five ways for the Canadian Constitution to be amended.<sup>60</sup> Some parts of the Constitution can be amended by the general procedure which requires the approval of two-thirds of the provincial legislatures, that together have at least fifty percent of the population (the 7/50 rule), and the approval of the federal Parliament; other parts of the constitution require the unanimous agreement of all provincial legislatures and the federal Parliament; Parliament can make some constitutional amendments by itself, and then there are those amendments which apply to some but not all provinces – these require the approval of the federal Parliament and the legislatures of the affected province(s).<sup>61</sup> It should also be noted that all amendments involving the federal Parliament and at least one province, can go ahead without a resolution of the Senate if such a resolution is not adopted within 180 days of the House of Commons' resolution.<sup>62</sup> It is tempting to view the various methods as reflecting the need to balance provincial interests with national unity and as setting out a handful of items which are so central as to need unanimous agreement before they can be amended.<sup>63</sup> However, section 41 is, or at least was, a reflection of the concerns of provincial premiers in the early 1980s. Its form and content were by no means pre-ordained, nor did it reflect any over-arching national vision.<sup>64</sup> Theoretical coherence can, of course come later, and is often created by courts and scholars after the fact. As we shall see, some Canadian constitutional scholars have created a theory that only the entrenched parts of the constitution are supreme but this theory runs counter to the text.

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<sup>60</sup> There is a sixth way but this way only applies to provinces seeking to amend their own provincial constitutions. See James Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Privy Council Office 1996). See also, Newman, 'Defining the "Constitution of Canada"' (n 18) 440-457.

<sup>61</sup> Constitution Act, 1982, (n 1), ss38, 41, 43-44.

<sup>62</sup> *ibid*, s 47.

<sup>63</sup> As indeed the Supreme Court of Canada does in the *Senate Reference*, see, *Senate Reference*, (n 12) [41].

<sup>64</sup> Cairns, 'Politics of Constitutional Conservatism' (n 17) 210.

The final form of the amending formulae differed in a few key ways from what the federal government had initially proposed in 1980. Although the version suggested in 1980 also had a range of amendment procedures, unanimity was not one of them; instead, they offered amendment by referendum.<sup>65</sup> The 1980 version also explicitly included the Charter in the list of items which needed a more rigorous form of amendment such as the general procedure or by referendum.<sup>66</sup> It was not until November 1981 that amendment by referendum and the references to the Charter were removed from the formulae.<sup>67</sup> The effect of omitting the Charter from either the general amending procedure or the unanimous procedure is that the Charter can be and has been amended under section 43,<sup>68</sup> but also that it could be amended under section 44. The scope of Charter amendment under these two sections would be quite limited and would not result in wholesale changes to the Charter. Section 44 could be used, for example, to alter the maximum duration of the House of Commons.<sup>69</sup> The bulk of Charter amendments, however, would likely fall under the general procedure given that the Charter is clearly part of the Constitution of Canada. The exception here would be any amendment to the Charter's guarantee that citizens can interact with the federal government in English or French as that is covered by section 41(c) and requires unanimity.

In addition to Part V, the Constitution Act, 1982 added section 52 which functions as a recognition section and tells us what the Constitution of Canada is. Section 52 has three things to say about the Constitution of Canada: 1) it is the supreme law of Canada;<sup>70</sup> 2) it *includes*

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<sup>65</sup> Constitution Act, 1980, (n 55), s 42.

<sup>66</sup> *ibid*, s 50(b).

<sup>67</sup> Constitution Act, 1981, ss 40, 41 reproduced in Notice of Motion by the Minister of Justice (18 November 1981) in 'Legislative Texts' (n 55 ) 825, 838-839

<sup>68</sup> Constitution Amendment, 1993 (New Brunswick). See also, Dwight Newman, 'The Bilateral Amending Formula as a Mechanism for the Entrenchment of Property Rights' (2013) 21:2 Constitutional Forum constitutionnel 17.

<sup>69</sup> This possibility is further discussed below, fn 161 to 164.

<sup>70</sup> Constitution Act, 1982, (n 1), s52 (1).

several other legal instruments;<sup>71</sup> 3) it can only be amended ‘in accordance with the authority contained within the Constitution of Canada.’<sup>72</sup> The last part of this tripartite definition implicitly calls to mind Part V, but it seems to suggest that there might be other sources of amending authority, outside of Part V.<sup>73</sup> By itself, then, section 52 is circular and does not help with settling disputes about what is and is not part of the constitution. Such disputes can and have arisen in a number of contexts. For example, there have been disputes about legislation which arguably cannot be valid except as an amendment,<sup>74</sup> and, in the case of the *Supreme Court Reference*, about whether government action is contrary to something which may or may not be in the constitution.<sup>75</sup>

Much like Part V, section 52 changed significantly between the proposed Constitution Act, 1980 and the Constitution Act, 1982. The most striking difference is that in the 1980 proposal only the *Charter* was supreme and was protected by section 25 which read: ‘Any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.’<sup>76</sup> The 1980 version also had a definitional section which read:

- (1) The Constitution of Canada includes
  - (a) the *Canada Act*;
  - (b) the Acts and orders referred to in Schedule I; and
  - (c) any amendment to any Act or order referred to in paragraph (a) or (b).
- (2) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.<sup>77</sup>

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<sup>71</sup> *ibid*, s 52 (2).

<sup>72</sup> *ibid*, s 52 (3).

<sup>73</sup> Scott, ‘Pussycat, Pussycat’ (n 18) 262.

<sup>74</sup> *Conacher v Canada (Prime Minister)*, 2010 FCA 131, [2011] 4 FCR 22 (Federal Court of Appeal (Canada)) [*Conacher FCA*]. See also, *Campbell v Canada (AG)*, 1988 CanLII 3043 (British Columbia Court of Appeal).

<sup>75</sup> This is further explored below.

<sup>76</sup> Constitution Act, 1980, (n 55), s25.

<sup>77</sup> *ibid*, s 52.

By February 13, 1981 the supremacy clause and the definitional section had been rolled into one section with supremacy applying to ‘the Constitution of Canada’; the very wording which later became section 52 of the Constitution Act, 1982.<sup>78</sup> This change in wording put the Charter on equal footing with the rest of the constitutional statutes and removed the potential for the Charter to invalidate other statutes which were part of the constitution. However, as noted, the Charter’s ultimate removal from the matters listed in sections 41 and 42, means that Charter amendments can occur under sections 38, 41, 43 or 44 depending on the subject matter of the amendment. In addition, this melding of what was previously two separate sections in the 1980 proposal has the effect of making all amendments under the unilateral, federal power (now section 44) into supreme law. It is not clear that anyone realized the implications of a three-pronged section 52 in 1982 and, when read with the open list in section 52, it seems as though supreme status has been, or could be, conferred on a range of federal statutes.

The pre-1982 jurisprudence of the *Upper House Reference* and the *Patriation Reference* foreshadow the shape that the Constitution Act, 1982 took. The *Upper House Reference* seems to predict the various thresholds of consent eventually allowed for under Part V. Part V also sets out what the ‘substantial consent’ referred to by the Supreme Court of Canada in the *Patriation Reference* looks like. The *Upper House Reference*’s comments about section 91(1) make section 44 seem like the earlier section’s clear successor. Yet, section 44 poses certain unique issues of its own. Namely, the relationship between section 44 and section 52 in the Constitution Act, 1982 has the potential to create confusion with respect to the Constitution of Canada. Section 44 allows some parts of the Constitution of Canada to be amended via federal legislation. It does

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<sup>78</sup>See, Minutes of the Proceedings and Evidence of the Special and Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (13 February 1981) 32nd Parl, 1st Sess in ‘Legislative Texts’, (n 55) 773, 796, s58.

not, however, require the bill to say that it is an amendment to the constitution.<sup>79</sup> Consequently, as the constitution is supreme law under section 52 and federal legislative amendments are allowed under the authority of section 44, the federal Parliament can make supreme law without saying so. Walters argues that any such stealth amendments would make a mockery of a written constitution's claim to supremacy.<sup>80</sup> Walters' point seems intuitively correct, but Canada's Constitution is more than just the written texts and, as 2014 made clear, there is disagreement about what is and is not included in the Constitution. Before moving on to look at the 2014 decisions, it is necessary to examine what the Supreme Court of Canada had to say about the new meta-constitution of 1982.

*ii. The Jurisprudence on the Meta-Constitution, 1982-2013*

Almost immediately the Constitution Act, 1982 faced a legal challenge in the form of the *Quebec Veto Reference*.<sup>81</sup> This question centred on whether or not there was a constitutional convention granting Quebec a veto over constitutional amendments. In their decision the Court made it clear that 'the new procedure for amending the Constitution of Canada ... entirely replaces the old one in its legal as well as in its conventional aspects.'<sup>82</sup> In other words, Quebec had lost its veto and the new meta-constitution, or at least the amending formulae of the meta-constitution, completely replaced the earlier amending procedures. Yet the patriation of the Constitution of

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<sup>79</sup> Nor is it necessarily limited to changes to the text of the Constitution, Newman, 'Defining the "Constitution of Canada"' (n 18) 494-498.

<sup>80</sup> Mark Walters, 'The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7' (2013) 7 *Journal of Parliamentary and Political Law* 37, 52.

<sup>81</sup> *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793 (Supreme Court of Canada) [*Quebec Veto Reference*].

<sup>82</sup> *ibid* 806.

Canada did not supersede the pre-1982 jurisprudence. In fact, the Court continued to rely on this jurisprudence to delineate what is (or is not) included in the Constitution of Canada.

In *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the Assembly)*, the Court had to decide whether the Charter applied to Assembly members when they exercised their privileges as members. In particular, the case centred on whether the members of the Nova Scotia House of Assembly could exclude television cameras from an independent broadcasting company.<sup>83</sup> A majority of the Court held that the Charter did not apply because the Assembly's privilege was part of the Constitution of Canada and '[i]t is a basic rule, not disputed in this case, that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution.'<sup>84</sup> McLachlin J (as she then was) rooted her decision in the preamble to the Constitution Act, 1867, 'historical tradition and the pragmatic principle that the legislatures must be presumed to possess such constitutional powers as are necessary for their proper functioning.'<sup>85</sup> As such, it would seem as though the recognition aspects of the pre-1982 meta-constitution, that is the vague reference in the preamble of the 1867 Act to a British-style constitution, were not superseded in 1982. Except that McLachlin J's reasoning appears to turn what was unenforceable prior to 1982 – the unwritten rules of a British-style constitution – into enforceable law. In dissent, Sopinka J found it odd that the framers would have opted to entrench certain privileges in the preamble by 'a general reference.' He felt that McLachlin J's argument removed the assembly's control over its own 'rights and privileges' meaning that

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<sup>83</sup> *NB Broadcasting* (n 39) 332-341.

<sup>84</sup> *ibid* 373.

<sup>85</sup> *ibid* 374-375.

amendments to such rights and privileges could only be achieved by an amendment to the Constitution Act, 1982 under section 43 or even section 38.<sup>86</sup>

The *Provincial Court Judges Reference* dealt with the validity of provincial judges' salary cuts. These salary cuts were perceived as undermining judicial independence and impartiality. In this case, the Court again examined the scope of the constitution. A majority of the Supreme Court held that the written parts of the constitution did not 'comprise an exhaustive and definitive code for the protection of judicial independence.'<sup>87</sup> Here the majority's primary concern may have been judicial independence but their reasoning seems equally applicable to any constitutional feature, particularly those which are largely unwritten.<sup>88</sup> The majority noted that section 52(2) suggests that the Constitution of Canada includes unwritten rules and then referred to the preamble of 1867 and its 'organizing principles' as the source of these unwritten rules.<sup>89</sup> The reason the majority traced the source of the unwritten rules to the preamble appears to have been motivated by the recognition that written constitutions 'promot[e] legal certainty and through it the legitimacy of constitutional judicial review.'<sup>90</sup> Here the majority seems anxious to avoid falling into the trap of saying what the constitution *is* rather than what it *means*; in other words, they are attempting to avoid making law, instead of finding it. In a sense what the majority says, and what the Court has said in other cases is: here is what the constitution is meant to mean, this is what the Fathers of Confederation thought they were agreeing to.<sup>91</sup> Of course, the problem here is that, although not directly stated, the majority seems to think that the

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<sup>86</sup> *ibid* 396.

<sup>87</sup> *Provincial Court Judges Reference*, (n 39) 64.

<sup>88</sup> *ibid* 63-64.

<sup>89</sup> *ibid* 68-69.

<sup>90</sup> *ibid* 68.

<sup>91</sup> As La Forest J put it in his dissent 'The philosophical underpinnings of government in a British colony were a given, and find expression in the preamble' *ibid* 184.

1982 reforms turned the 1867 preamble into a source of enforceable supreme law. If so, they did not offer any guidance in how to distill enforceable rules from the preamble.

The following year, the *Quebec Secession Reference* saw the Governor-in-Council ask the Court three questions including whether the Constitution of Canada allowed Quebec to secede unilaterally. The Court said that unilateral secession would not be legal but following a referendum in support of secession the rest of the country would have a duty to negotiate. Not surprisingly the decision was highly politicized and soon attracted ample academic attention. My interest in the decision is not so much the answer to the question but how the question prompted the court to expand on their understanding of what the Constitution of Canada is. The Court observed that ‘[o]ur Constitution is primarily a written one... Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles.’<sup>92</sup> The Court’s reference to ‘an historical lineage’ is at once a form of reasoning familiar to common-law lawyers and a suggestion that there is a strong cultural aspect to the Canadian Constitution: the constitution cannot be understood simply by reading the text, knowledge of both the history and the unspoken commitments which emerge from that history are required for a full understanding of the constitution.<sup>93</sup> In turn, this respect for the historical lineage of Canada’s Constitution suggests that it has a mix of traditional and legal-rational legitimacy as opposed to democratic legitimacy.<sup>94</sup> What this does is it tilts the balance in favour of the courts with respect to constitutional interpretation. In Canada, this deference to the courts as the guardians of constitutional interpretation is then further enhanced

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<sup>92</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, 247 (Supreme Court of Canada) [*Quebec Secession Reference*].

<sup>93</sup> Berger (n 7) 251-252, 288.

<sup>94</sup> On the lack of democratic legitimacy see, Peter Oliver, ‘Canada, Quebec, and Constitutional Amendment’ (1999) 49:4 *University of Toronto Law Journal* 519, 588, and 588 n227; Cairns, ‘Canadian Constitutional Experiment’ (n 42) 229; Cairns, ‘Politics of Constitutional Conservatism’ (n 17) 217.

by the reference procedure. Such deference is not, however, helpful in answering the question of what effect “constitutional principles” might have.

Warren Newman argues that the Court treats constitutional principles as binding gap fillers in the constitutional text.<sup>95</sup> Yet he also argues that these principles do not have the direct force of law, they simply have a role to play in applying and understanding the written text.<sup>96</sup> Where these principles become problematic is in trying to figure out what exactly section 52 or Part V means or applies to. Newman’s analysis might well suffer from the ‘textual myopia’<sup>97</sup> referred to by Berger but perhaps the Court is trying to reconcile the broader meaning of “constitution” with the more modern idea that a “constitution” is simply a document or collection of documents. One way to reconcile these two meanings is to use the text of the written constitution to ascertain the shape of the broader constitution, the body politic. The Supreme Court of Canada took that step in the *Supreme Court Reference* and the *Senate Reference*, and used the meta-constitution to identify the broader shape of the Constitution of Canada. Prior to these two references, the main meta-constitutional conundrum was what criteria could be used to determine whether or not sources not included in the schedule might be supreme law. As will become clear, in resolving that predicament, the Court has introduced another, one which threatens to further restrict parliamentary sovereignty by greatly expanding the scope of what counts as supreme law and the judiciary’s role in identifying it.<sup>98</sup>

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<sup>95</sup> Warren J Newman, “‘Grand Entrance Hall,’ Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada’ (2001) 14 *Supreme Court Law Review* (2d) 197, 201 [Newman, ‘Grand Entrance Hall’].

<sup>96</sup> *ibid* 204

<sup>97</sup> Berger (n 7) 250.

<sup>98</sup> It is arguable that this has some echoes with India’s basic structure doctrine. For a brief overview see, Richard Albert, ‘The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada’ (2016) 41:1 *Queen’s Law Journal* 143, 157 [Albert, ‘Theory and Doctrine’ QLJ]; See also, Richard Albert, ‘The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada’ (2015) *Boston College Law School Legal Studies Research*

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Paper No 376, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2649447](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649447) accessed 25 April 2016, 13-15 [Albert, 'Theory and Doctrine'].

### C. The Rise of Constitutional Topics: the *Supreme Court Reference* and the *Senate Reference*

In this section my focus is on the *Supreme Court Reference* and the *Senate Reference*; in particular, I examine what both had to say about how to figure out what is and is not included in the Constitution of Canada and, as a result, what changes must be done in accordance with Part V of the *Constitution Act, 1982* in order to be valid. For ease of analysis, I examine each reference in turn.

#### *i. Supreme Court Reference*

In the *Supreme Court Reference* the Supreme Court had to decide whether section 41(d)'s reference to the 'composition of the Supreme Court of Canada' includes changes to the qualifications of its members. The reference question emerged out of the federal government's attempt to appoint Marc Nadon to one of the three Quebec seats guaranteed under the Supreme Court Act. At the time Nadon was a supernumerary judge of the Federal Court of Appeal but had previously been a member of the bar of Quebec for a number of years.<sup>99</sup> The legal challenge to his appointment centred on how to read sections 5 and 6 of the Supreme Court Act and whether or not the government could issue declaratory legislation with respect to this Act to make Nadon's appointment valid.<sup>100</sup> The Supreme Court split on this matter with the majority ruling against Nadon's appointment while Moldaver J ruled in favour of it.

The key difference between the majority decision and the dissent was whether or not section 6 limited Quebec candidates to *current* Quebec judges and *current* Quebec barristers or advocates. The majority said that it did, while Moldaver J said that it did not and both judgments

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<sup>99</sup> *Supreme Court Reference*, (n 11) [3].

<sup>100</sup> Declaratory legislation is that used by a government to make the meaning of a previous statute clear.

argued that their reading was in keeping with the historical understanding of the eligibility requirements of Supreme Court judges.<sup>101</sup> Under section 5 of the Supreme Court Act, both current and former judges and barristers or advocates of at least ten years standing are eligible for appointment to the Supreme Court of Canada. As Quebec has a different legal system, the Supreme Court Act reserves three seats for individuals trained in Quebec Civil Law. According to section 6 of the Supreme Court Act, the candidates for these Quebec judgeships must ‘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.’<sup>102</sup> The government argued that sections 5 and 6 must be read together so that both the ten years standing and the reference to former members are included in the section 6 eligibility requirements.<sup>103</sup> While the majority agreed that the two sections must be read together, they held that reading them together does not allow *former* members of the Quebec bar to be appointed under section 6. The majority read section 6 as making “additional specifications” for the three Quebec judges and ‘[o]ne of these is that they must currently be a member of the Quebec bar.’<sup>104</sup>

Having so ruled, the next question for the majority was whether Parliament could enact declaratory legislation about the meaning of section 6 and whether such legislation would change ‘the composition of the Supreme Court of Canada.’<sup>105</sup> The government argued that that the eligibility requirements of the Supreme Court had not been ‘entrenched’ in the Constitution and,

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<sup>101</sup> *Supreme Court Reference* (n 11) [18] (per the majority), [117] (per Moldaver J, dissenting).

<sup>102</sup> Supreme Court Act, (n 12) s 6.

<sup>103</sup> *Supreme Court Reference*, (n 11) [36].

<sup>104</sup> *ibid* [37].

<sup>105</sup> *ibid* [72].

as such, Parliament had the power to amend the eligibility criteria of the Supreme Court under section 101 of the Constitution Act, 1867.<sup>106</sup> Section 101 reads:

[t]he Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

As the majority went on to note, this was as a forward-looking section designed to leave room for Canada to establish a general court of appeal.<sup>107</sup> No such court existed at Confederation and it took the better part of a decade for one to be established given the extent of Quebec's opposition to this court.<sup>108</sup>

Due to the idiosyncrasies of Canadian constitutional development, by the time of patriation, the Supreme Court of Canada was playing a key constitutional role without being explicitly entrenched in the Constitution. The *Constitution Act, 1982* expressly protects the composition of the Supreme Court and requires unanimity for any amendments affecting composition. To explain the appearance of the Court in Part V, the government attempted to rely on Peter Hogg's "empty vessels" theory. The majority found such a theory to have ridiculous results including inadequate constitutional protection for the Supreme Court.<sup>109</sup> In fact, the majority stated that at the time of patriation 'the clear intention was to freeze the *status quo* in relation to the Court's constitutional role, pending future changes.'<sup>110</sup> Crucially, the majority cites to the explanatory notes to Part V which describe the section 41 list as being about 'matters ... of fundamental importance.'<sup>111</sup> According to the majority, unanimity was the only way to

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<sup>106</sup> *ibid* [73].

<sup>107</sup> *ibid* [78].

<sup>108</sup> *ibid* [79]-[81].

<sup>109</sup> *ibid* [99].

<sup>110</sup> *ibid* [100].

<sup>111</sup> *ibid* [92].

ensure that Quebec's representation on the Court could not be altered without Quebec's consent. While the government can make routine amendments for 'the continued maintenance of the Supreme Court', it cannot alter 'the constitutionally protected features of the Court' even if such features are more implicit than explicit in the constitutional text.<sup>112</sup> One wonders if this constitutional protection extends to the various conventions of the Supreme Court, such as having one judge from the Atlantic Provinces, and two from Western Canada. Such questions may be answered at some point in the future, perhaps through another reference question.

The other effect of the majority's decision in the *Supreme Court Reference* is that the composition and qualifications of Supreme Court Justices appear to be one and the same. As such, the federal government could not now unilaterally amend the qualifications to require all Supreme Court Justices to be bilingual.<sup>113</sup> Granted, there is something of a convention to always appoint bilingual judges to the Supreme Court but this is not always followed. Hugo Cyr recently argued that the bilingual requirement for Supreme Court appointments is already in the constitution and adding an explicit legislative requirement would be merely declaratory.<sup>114</sup> He roots his argument in the majority's emphasis that all parts of Canada need to see the Court as legitimate. Perhaps the final determination of the question of bilingualism will take another reference question but given that Justice Moldaver was unilingual at the time of his appointment,<sup>115</sup> any decision holding that bilingualism is in fact required by the constitution could provoke some concerns with respect to the decisions which Moldaver J has played a part in. I say concerns as per the *Manitoba Language Reference* the de facto doctrine would uphold

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<sup>112</sup> *ibid* [101].

<sup>113</sup> Macfarlane (n 14) 901.

<sup>114</sup> Cyr (n 14) 107

<sup>115</sup> Matthew Shoemaker, 'Bilingualism and Bijuralism at the Supreme Court of Canada' (2012) *Canadian Parliamentary Review* 30,34.

the decisions made by an imperfectly constituted bench.<sup>116</sup> That being said, it is doubtful that bilingualism is actually protected by the constitution.<sup>117</sup>

Moldaver J's dissent in the *Supreme Court Reference* broadly accepted the government's argument about how to read sections 5 and 6 together. As such he did not feel it useful to answer the second question about whether the declaratory legislation proposed by the government would amount to a constitutional amendment requiring unanimity.<sup>118</sup> He was doubtful that 'any and all changes to the eligibility requirements will necessarily come within 'the composition of the Supreme Court of Canada' in s.41(d).'<sup>119</sup> Moldaver J pointed out that had Parliament intended Quebec appointees to be current members, 'surely it would have said so in clear terms.'<sup>120</sup>

The effect of the majority's decision in the *Supreme Court Reference* seems to be that certain sections of the Supreme Court Act are included in the Constitution. What this means is that the schedule is not an exhaustive list, and does not preclude the possibility that certain sections of other acts, passed between 1867 and 1982, might also be part of the Constitution. The majority justified their decision on the grounds that the Supreme Court plays a key role in Canada's 'constitutional architecture.'<sup>121</sup> Thus, in order to figure out what other legislative provisions might be part of the constitution, we must look to whether or not these provisions touch on the constitutional architecture. In fact, the *Supreme Court Reference* goes further than this and makes it clear the constitution does not simply include parts of other statutes but what

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<sup>116</sup> *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 755-757, 19 DLR (4th) 1.

<sup>117</sup> Macfarlane (n 14) 901. See also, Leonid Sirota, 'The Comprehension of "Composition"' (*Double Aspect*, 16 May 2016) <<https://doubleaspectblog.wordpress.com/2016/05/16/my-comprehension-of-composition/>> accessed 18 May 2016.

<sup>118</sup> *Supreme Court Reference*, (n11) [154].

<sup>119</sup> *ibid* [115].

<sup>120</sup> *ibid* [127].

<sup>121</sup> *ibid* [88], [97]-[100].

the court referred to as ‘essential features.’<sup>122</sup> As such, figuring out the scope of what is and is not constitutionally protected is much more complicated than simply examining the statute book, it will require an assessment of the features of institutions and whether these features are essential to the role those institutions play in the constitutional structure.

## *ii. Senate Reference*

In the *Senate Reference* the government asked the Supreme Court a series of questions about how to make specific changes to the Senate. In its arguments before the Court, the federal government relied on a narrow textual analysis of the Constitution, an approach which was unanimously rejected by the Court. The Court criticized the government’s approach to both consultative elections and Senate abolition as privileging ‘form over substance.’<sup>123</sup> With respect to the former, the government tried to argue that introducing elections would change neither the constitutional text nor the ‘formal mechanism for appointing Senators.’<sup>124</sup> Regarding Senate abolition, the government tried to argue that this could be done under the general procedure because abolition would ‘take[] away all of the Senate’s powers and all of its members.’<sup>125</sup> The government rooted its argument in section 42 (1)(b) and (c)’s reference to the Senate’s powers and members and the claim that all other references to the Senate in Part V would be ‘spent’ upon abolition.<sup>126</sup>

There was precedent for the government’s argument but the precedent in question is relatively old. The government’s close textual analysis echoes the Judicial Committee of the

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<sup>122</sup> *ibid* [94].

<sup>123</sup> *Senate Reference*, (n 12) [52], [106]

<sup>124</sup> *ibid* [103]

<sup>125</sup> *ibid* [96].

<sup>126</sup> *ibid* [96].

Privy Council's comments in *R v Nat Bell Liquors* about the validity of Alberta's Direct Legislation Act.<sup>127</sup> In *Nat Bell Liquors* Alberta had to indirectly defend the constitutionality of its Direct Legislation Act which allowed for the electorate to petition for certain pieces of legislation. As a result of this Act, Alberta had introduced prohibition legislation which, or so the argument went, was unconstitutional because it had not been enacted in accordance with the British North America Act.<sup>128</sup> The problem with the Direct Legislation Act was that it seemed to 'alter[] the scheme of legislation laid down ... by the British North America Act.'<sup>129</sup> In response to claims of invalidity the Privy Council observed that a 'law is made by the provincial legislature when it has been passed in accordance with the regular procedure and has received the Royal Assent duly signified by the Lieutenant-Governor on behalf of His Majesty. Such was the case with the [Liquor] Act in question.'<sup>130</sup> The argument of invalidity in *Nat Bell Liquors* centred on Alberta's prohibition legislation not that of the Direct Legislation Act and the Privy Council expressly said that there was 'no utility' in investigating the latter Act's constitutionality.<sup>131</sup> The Privy Council ignored that, in substance, the Direct Legislation Act altered the legislative scheme, even if the exact wording did not 'formally' interfere with 'the discharge of the functions of the legislature.'<sup>132</sup>

Where the *Senate Reference* and *Nat Bell Liquors* differ is in their approach to constitutional interpretation. *Nat Bell Liquors* pre-dates the famous "living tree doctrine" which

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<sup>127</sup> *R v Nat Bell Liquors*, [1922] UKPC 35 [*Nat Bell Liquors*]; Direct Legislation Act, SA 1913, c 3

<sup>128</sup> J Patrick Boyer, *Lawmaking by the People: Referendums and Plebiscites in Canada* (Butterworths 1982) 30-34.

<sup>129</sup> *Nat Bell Liquors*, (n 127) 3.

<sup>130</sup> *ibid* 4.

<sup>131</sup> *ibid*.

<sup>132</sup> *ibid* 4. Compare for example the discussion of Manitoba's direct legislation statute, *Re Initiative and Referendum Act*, [1919] 3 WWR 1, 48 DLR 18. For contemporary criticism of *Nat Bell Liquors* see, Berriedale Keith, 'Notes on Imperial Constitutional Law' (1922) 4 *Journal of Comparative Legislation and International Law* 233.

emerged in the *Persons Case* in 1930,<sup>133</sup> and clearly relies on a close textual interpretation of the constitution rather than the broad and purposive approach adopted by the Supreme Court in the *Senate Reference*.<sup>134</sup> Alberta's experiment with direct legislation may not have changed the wording of the constitution or altered the procedure through which an Act was passed – it did not *force* the provincial government to pass legislation – but it did alter the role of the legislature with respect to legislation introduced under the Act. It was this potential to alter the role of the Senate which led the Supreme Court to rule that the introduction of consultative Senate elections could only be done under the general amending procedure. Such elections would make the Senate answerable to the popular will in a way which was contrary to Canada's constitutional design.<sup>135</sup>

Not only did the Court criticize the government for valuing form over substance, they also accused the government of attempting to make section 44 the default amending formula.<sup>136</sup> The latter accusation arose in the analysis of whether or not Parliament could unilaterally alter senatorial tenure. The Court may have agreed that tenure was not included in the language of section 42 but they did not think that meant Parliament could unilaterally change senatorial tenure. The Court held that section 44 has a limited scope but support for this holding is not found in the text of the relevant section or in Part V but in the debates and commentary surrounding the introduction of Part V.<sup>137</sup> The Court also referenced the role of the Senate to further bolster the idea that the reform of tenure needs provincial consent.

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<sup>133</sup> *Edwards v Canada (AG)*, [1930] AC 124, [1929] UKPC 86, 9.

<sup>134</sup> *Senate Reference*, (n 12) [52].

<sup>135</sup> *ibid* [60]-[63].

<sup>136</sup> *ibid* [75].

<sup>137</sup> *ibid* [76].

The problem with the Court's reasoning is that the *text* of section 44 does not make it clear that it is as limited as the Court found it to be. The Court could have argued that section 44 has to be read with section 38 because the latter explicitly states that it is the 'general procedure' while the former only limits itself with respect to sections 41 and 42. For obvious reasons there cannot be two general procedures, but even this argument does not explain why section 44 is as limited as the Court said. While it might be an accepted form of legislative interpretation to look to Parliamentary debates and position papers, the Constitution Act 1982 is fundamentally different from an ordinary statute and errors of judicial interpretation are not so easily corrected.<sup>138</sup> The Court's comments about the limited nature of section 44 make more sense if that section is considered to be an adapted version of the old federal power under section 91(1).<sup>139</sup> Section 44 is not a direct continuation of section 91(1), however. The Court's comments about the latter section in the *Upper House Reference* made it clear that it was limited to one statute, while section 44 includes the entirety of the Constitution of Canada, though changes are limited to executive government, the House of Commons, and the Senate.

The problem with the argument that section 44 is a modified continuation of section 91(1) is that it was meant to be a complete replacement.<sup>140</sup> The Court describes sections 44 and 45 as 'fulfill[ing] the same basic function as ss91(1) and 92(1)' and cites to explanatory note 7 of the April 1981 proposal in support of this claim.<sup>141</sup> The Court does not actually reproduce the note in the text of its decision but for the purposes of clarity, I do so here:

This provision allows Parliament, acting alone, to amend those parts of the Constitution of Canada that relate solely to the operation of the executive government of Canada at the

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<sup>138</sup> Oliver (n 94) 585-586.

<sup>139</sup> *Senate Reference*, (n 12) [46].

<sup>140</sup> Schneiderman notes that the historical record is unclear on this point with some disagreement over whether section 44 was meant to overcome *Upper House Reference* or be consistent with it, Schneiderman (n 14) 199, fn114.

<sup>141</sup> *Senate Reference*, (n 12) [46].

federal level or to the Senate or House of Commons. Some aspects of certain institutions important for maintaining the federal-provincial balance, such as the Senate and the Supreme Court, are excluded from this provision and are covered in section 9 and 10. This provision is intended to replace section 91(1) of the B.N.A. Act.<sup>142</sup>

In short, note 7 makes it clear that section 44 was meant to replace section 91(1), not maintain it. The other reason the Court's comments about section 44 ring false is that the wording of section 44 did not change in any material way between the proposed Constitution Act, 1980 and the Constitution Act, 1982.<sup>143</sup> If the provinces had wanted to limit the federal parliament's power of unilateral amendment, they could have added more restrictive language into section 44. Instead, the April Accord of 1981 reproduces, with only minor changes, the wording used by the federal government in their 1980 proposal.

The federal government had more success with their arguments about Parliament's power to amend Senators' property and net worth requirements. The Court largely agreed that such changes could be done under section 44 because such changes did not affect the Senate's 'fundamental nature and role.'<sup>144</sup> The only caveat the Court added was that Quebec would have to agree to the abolition of the property requirement given that Senatorial qualifications are different for Senators from Quebec.<sup>145</sup>

What is perhaps most notable about the *Senate Reference* is the Court's definition of a constitutional amendment:

The concept of an "amendment to the Constitution of Canada", within the meaning of Part V of the *Constitution Act, 1982*, is informed by the nature of the Constitution and its rules of interpretation. As discussed, the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By

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<sup>142</sup> Hurley (n 60) 227; and, 'Documents Relating to the *Constitution Act, 1982*' (1984) 30:4 McGill Law Journal 645, 664.

<sup>143</sup> Compare, Constitution Act, 1980, (n 55), s 48 and Constitution Act, 1982, (n 1), s 44.

<sup>144</sup> *Senate Reference*, (n 12) [90].

<sup>145</sup> *ibid* [85]-[86].

extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture.<sup>146</sup>

With such an understanding of the 'Constitution of Canada' it is clear that changes to the 'constitutional structure' as well as actual alterations to the text of the Constitution (whatever might be included in that text) will be amendments under Part V.<sup>147</sup> While such comments could be read as a warning to any government against attempting to alter the constitution without following the appropriate procedure, the question remains: where are we to find information about the 'structure' and 'architecture' of the Constitution if not the text of the Constitution itself? Furthermore, if everything architectural is part of the constitution and all parts of the constitution are supreme law, just how much supreme law does Canada have?

The Court seemed to answer the first question, at least in part, by looking at the text of the amending formulae itself and extrapolating from that text. In other words, the Court looked to the amending formulae to figure out what is and is not in the Constitution. As the Court put it, '[t]he words employed in Part V are guides to identifying the aspects of our system of government that form part of the protected content of the Constitution.'<sup>148</sup> Such comments are, however, counter-intuitive given that Part V is not meant to be a guide to what is and is not part of the constitution. Rather, Part V's purpose is to single out the matters which are not covered by the general amending procedure. The Court blurs the two functions of the meta-constitution together and in so doing highlights the confusing nature of Canada's meta-constitution.

Admittedly the circular nature of section 52 is not much help in determining what is and is not

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<sup>146</sup> *ibid* [27].

<sup>147</sup> *ibid* [107].

<sup>148</sup> *ibid* [64].

constitutional but the Court's reliance on Part V results in there being constitutional topics rather than readily identifiable provisions.

With respect to the various procedures in Part V, the Court's comments about section 41 are worth a closer look. The Court describes the matters outlined in section 41 as 'fundamental' and 'essential to the survival of the state.'<sup>149</sup> Such comments seem like an over-statement and are, to some extent historical revisionism. It does seem somewhat bizarre to say that a province having fewer MPs than Senators is fundamental to anything other than the support of several smaller provinces;<sup>150</sup> but, perhaps ensuring such representation is a key part of the Canadian federal bargain.<sup>151</sup> Certainly, it was the price of getting the support of such provinces in 1981. More importantly, such comments about 'fundamental' matters do suggest a criterion for assessing what matters will be considered part of the Constitution and thus supreme law. Presumably this idea of fundamental matters is somehow linked to the Court's comments about constitutional architecture. The question then becomes would certain changes in political practice, such as the Prime Minister convening an advisory group before appointing the Governor General, be a change to the constitutional architecture? Such a change would arguably be caught by section 41(a)'s reference to the 'office' of the Governor General, doubly so given that the Court understood senatorial elections as a change which could only be made under section 38 as such elections fell under section 42(1)(b)'s reference to method of selection.

The Court's reliance on the amending formula to help identify the scope of the constitution suggests that the Constitution of Canada consists of important *topics* instead of

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<sup>149</sup> *ibid* [32], [41]. It should be noted that the latter quotation is taken from Benoit Pelletier, *La modification constitutionnelle au Canada* (Carswell 1996) 208.

<sup>150</sup> Constitution Act, 1982, (n 1), s 41(b).

<sup>151</sup> Dodek has described the Court as showing "extreme deference and respect for the Senate as an institution", Dodek, 'Politics' (n 14) 662.

special *rules*. As such Part V functions as both an amending section and a recognition section. When the *Senate Reference* and the *Supreme Court Reference* are read together they point to the complexity of the amending formula and the idea that section 52(2) is not a closed list. Put more simply, if the Constitution is as broad as the *Senate Reference* implies and can, as the *Supreme Court Reference* along with the earlier cases suggest, include statutes (or at least certain sections thereof) not explicitly mentioned in the schedule, is it not possible that there have been a range of purported amendments which are constitutionally invalid because they have failed to follow the procedures set out in Part V?<sup>152</sup>

#### **4. The Implications**

In this section I examine the implications of the 2014 decisions for Canada's meta-constitution as well as teasing out some lessons for constitutional design in a broader sense.

##### A. What's Next for Canada's Meta-Constitution?

The exact shape that Canada's amending formula would take proved to be a key issue in the 1981 negotiations, yet these negotiations did not deliver a clear and easily understandable set of ways to amend the Constitution. The confusion inherent in the formulae, with their failure to clearly delineate the full range of limits to each method, is further compounded by the fact that it is not clear which documents, statutes, or parts of statutes are to be considered part of the Constitution. The Supreme Court's jurisprudence on the matter has added another layer of

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<sup>152</sup> For a survey of the theory and doctrine of unconstitutional constitutional amendments see Albert, 'Theory and Doctrine' QLJ (n 98).

complexity by referring to various unwritten commitments which are considered part of the Constitution. Consequently, it seems as though Part V as well as section 52 offer ways to discover what principles and laws are included in the Constitution. In this sub-section I explore some potential ways to resolve the issues with Canada's meta-constitution.

The obvious answer to the question of what's next for the Constitution of Canada is a series of reference questions, either piecemeal or as one large reference. Admittedly, reference questions, particularly those like the *Senate Reference* and the *Supreme Court Reference*, put the Court in a difficult position. The question of what the Constitution is, what additional statutes does it contain, is an uncomfortable mix of the legal and the political.<sup>153</sup> The Court may well wish to avoid politics or to avoid commenting on proposed policies and have good reasons for so doing. As the majority discussed in the *Supreme Court Reference*, it is vital that *all* parts of Canada have confidence in the Court's ability to do its job well. Undue interference in politics would be just as damaging to the Court's reputation as a lack of legal expertise. Nonetheless, a series of reference questions could only come about as the result of political will. The existence of the reference question procedure and its continued use suggests a large degree of deference towards the courts, particularly the Supreme Court, as the legitimate interpreters of the Constitution. Arguably it makes the Supreme Court of Canada the final arbiter of what it and is not constitutional both in the sense of adhering to the texts of the constitution and being part of the Constitution and thus supreme law.<sup>154</sup>

The *Senate Reference* and the *Supreme Court Reference* point to the difficulties of drafting a constitution over a century after a country's founding. The Supreme Court's latest

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<sup>153</sup> *Quebec Secession Reference*, (n 92) 227-228.

<sup>154</sup> There is an argument to be made here about institutional dialogue theory but due to constraints of space, I leave such arguments aside.

comments suggest that certain constitutional conventions, if they are significantly architectural, may have the status of supreme law. In addition, the Court's comments also suggest that if a piece of legislation is about a constitutional topic but has not followed the appropriate amendment procedure, then it is invalid. One likely example of a now unconstitutional statute is the regional vetoes statute.<sup>155</sup> This Act purports to prevent any government minister from introducing a constitutional amendment under section 38 or 41 until two thirds of the provinces have assented. It also seems to make it so that the House of Commons could not propose an amendment without such provincial approval. Given that this Act legislates on the topic of amendment without unanimity (as required by section 41(e)) it is probably no longer valid.<sup>156</sup>

Yet the Federal Court case of *Conacher* seems to suggest that statutes like the Regional Vetoes Act would not be struck down as *ultra vires* but would simply be unenforced. *Conacher* was an application for judicial review of Prime Minister Stephen Harper's decision to advise the Governor General to dissolve Parliament and set an election date of October 14, 2008.<sup>157</sup> Duff Conacher attempted to argue that this violated section 56.1 of the Canada Elections Act which reads:

(1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.

(2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009.<sup>158</sup>

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<sup>155</sup> An Act Respecting Constitutional Amendments, SC 1996, c 1 [Regional Vetoes Act]. See also Ted Morton, "No Statecraft, Questionable Jurisprudence: How the Supreme Court Tried to Kill Senate Reform" (2015) 8:21 School of Public Policy Research Papers, 10-11; Macfarlane (n 14) 902.

<sup>156</sup> Hawkins (n 10) 534. But see, Glover, 'Four Readings' (n 14) 858.

<sup>157</sup> *Conacher v Canada (Prime Minister)*, 2009 FC 920 [1], [2010] 3 FCR 411 (Federal Court (Canada)) [*Conacher FC*].

<sup>158</sup> Canada Elections Act, SC 2000, c9, s56.1.

In response to *Conacher*, the government argued that section 56.1 ‘was never intended to be legally binding.’<sup>159</sup> The government rooted its argument about section 56.1’s supposed unenforceability in the fact that, if it was meant to be enforced, it had the potential to alter the Office of the Governor General and such changes would need a constitutional amendment.<sup>160</sup> Instead, the government argued that section 56.1 created a ‘statutory expectation’ of an election every four years.<sup>161</sup> The term ‘statutory expectation’ is a contradiction in terms as most people expect that laws will be enforced, not that they are mere guidelines which a government may ignore at will. If a government wishes to ignore a law, said law should be repealed or amended. The Federal Court sidestepped the section 56.1 issue and held that *Conacher* was asking the court to intervene in political issues, thus section 56.1 remains on the statute books but appears to be unenforceable. Neither the Federal Court nor the Federal Court of Appeal explicitly adopted the government’s argument that section 56.1 created a ‘statutory expectation’ or what exactly the effect of such an expectation would be. It may be that such statutory expectations could crystallize into conventions after several decades or so but that would still leave them as unenforceable, at least in the courts.

The government’s argument in *Conacher* with respect to section 56.1 of the Canada Elections Act seems a little far-fetched. Leaving aside the issue of a specified date which does seem to alter the Office of the Governor-General, it could be argued that section 56.1 falls within the ambit of section 44 of the Constitution Act, 1982 because it deals with matters relating to the House of Commons and executive government. The more pressing question with section 56.1 of the Canada Elections Act is whether by creating a new maximum term for Parliament, it amends

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<sup>159</sup> *Conacher FC*, (n 157) [52].

<sup>160</sup> *ibid* [51].

<sup>161</sup> *ibid* [52], [55].

or contradicts section 4 of the Charter which limits the terms of legislative bodies to five years.<sup>162</sup> The Charter, as a whole, is not one of the matters listed in sections 41 and 42 and so certain parts of it could be amended by mere legislation under section 44. In which case, does section 56.1 amend section 4(1) of the Charter and possibly also section 4(2) of the Charter? Perhaps due to the role the Governor General plays in dissolving Parliament, changes to section 4 of the Charter will need to be done under section 41. In the alternative, those Charter sections which are not caught by sections 41 or 43 may need to be amended under section 38 even if they seem to apply only to the matters listed in section 44. In which case, there is room for an argument that because section 56.1 does not *extend* the maximum term of a Parliament it is valid *legislation*.<sup>163</sup> Again, however, the problem becomes that even if section 56.1 is a valid legislative amendment, can it be enforced in the face of the Charter's limit of five years? Probably not. The Charter is supreme law and will trump section 56.1.

Perhaps like the Regional Vetoes Act, section 56.1, is a convention-in-waiting, an emergent part of the unenforceable political constitution. This does, of course, lead to a potentially bizarre situation whereby, following the logic of the Supreme Court's jurisprudence, parts of what was the unenforceable, unwritten, political aspects of the constitution are now part of the legal and thus enforceable constitution, while actual laws are unenforceable because they purport to create new conventions, or could lead to a new convention in future. The Supreme

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<sup>162</sup> The full text reads:

(1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

<sup>163</sup> Doug Stoltz, 'Fixed Date Elections, Parliamentary Dissolutions and the Court' (2010) 33:1 Canadian Parliamentary Review 15, 19.

Court has previously stated that courts enforce law but not conventions yet since 1982 that line appears to have blurred in two ways. First, the logic of section 52 turned certain conventions into enforceable law, provided such conventions are part of the constitutional architecture; and, second, since 1982 governments have tried to create new conventions through statute.<sup>164</sup>

The question raised by both the Regional Vetoes Act and section 56.1 of the Canada Elections Act is whether governments can strengthen the Constitution's guarantees through legislation. It seems obvious to say that no such guarantee could be weakened by legislation; for example, a government could not, outside a time of war, pass legislation saying that elections will be held every seven years. So why would the answer be different if the guarantee is strengthened?<sup>165</sup> Perhaps because a constitution's guarantees tend to be baselines rather than aspirations, strengthening their guarantees is in keeping with the spirit of the constitution. Yet, the question remains, can such legislative alterations be enforced in the face of an unaltered and contrary provision of the constitution?

Absent a series of constitutional challenges, the first option for dealing with Canada's meta-constitution is to leave it as it is and allow the Court to continue as it has done. This is arguably the easiest option, though it does leave the Court open to accusations of over-stepping its role. After all, the Court's role is to ensure that all laws are passed in accordance with the Constitution which is a question of interpretation. It is not the Court's role to say what the Constitution *is*, only what it *means*. Yet, in Canada, the former question is unclear making constitutional interpretation difficult. Such an approach could also make the Court the target of

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<sup>164</sup> Hawkins refers to such endeavours as 'constitutional workarounds' and notes that they can include motions of the House as well as statutes, Hawkins (n 10).

<sup>165</sup> Dawood notes that the Court rejected reforms which would have enhanced democracy thus it is arguable that there is little difference between strengthening and weakening guarantees, see Dawood, (n 14) 740.

reformist ire because of the chilling effect on democratic reform.<sup>166</sup> In addition, leaving the Court to continue as it has done leaves important questions unanswered. There is room for individuals to bring challenges before the courts, as in *Conacher* and as in Aniz Alani's attempt to force the federal government to appoint Senators.<sup>167</sup> As useful as such challenges might be they tend to be decided on technicalities, leaving the bigger, foundational questions unanswered.

The Court may not have explicitly suggested that another round of constitutional negotiations is needed but its caution with respect to amendments may well force the issue. Certainly, if the Senate is to be abolished or significantly amended, the need for unanimity, or at least widespread consensus,<sup>168</sup> likely means another constitutional conference is needed in order to properly canvass the interests and wishes of all parties. Of course, the idea of re-opening the constitutional debate may not be a popular one and there is no guarantee that another round of constitutional negotiations would be any more successful than the last two attempts at reform.

What the Court could do is clarify the legal effect of section 44. The scope of section 44 is now clear, following the *Senate Reference* and the *Supreme Court Reference* it seems likely that Part V means that Parliament cannot pass legislation on constitutional topics unless the proposed changes are minimal and in no way fall under section 41 or 42 or engage provincial interests. In this way section 44 appears to allow something like the 'housekeeping' that the Supreme Court referred to in the *Upper House Reference*.<sup>169</sup> What is less clear is what needs to

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<sup>166</sup> Arguably there is already some anger at the Court for its role here, Hawkins (n 10) 514. See also, Dawood (n 14) 739-40, 750 (noting that the *Senate Reference* has limited the potential for reform).

<sup>167</sup> <http://www.cbc.ca/news/canada/british-columbia/stephen-harper-s-unappointed-senate-seats-unconstitutional-vancouver-lawyer-says-1.2873629> See also, *Alani v Canada (Prime Minister)*, 2015 FC 649 aff'd *Canada (Prime Minister) v Alani*, 2016 FCA 22.

<sup>168</sup> In theory much Senate reform could be achieved under section 38 but if the federal government opts to follow the Regional Vetoes Act, the threshold for consensus becomes much higher, see, Andrew Heard and Tim Swartz, 'The Regional Veto Formula and its Effects on Canada's Constitutional Amendment Process' (1997) 30:2 *Canadian Journal of Political Science* 339.

<sup>169</sup> *Upper House Reference*, (n 39) 65.

be done to make amendments under section 44 – do any purported amendments need to invoke section 44 to be valid supreme law? To use an example from the provincial context, does a human rights statute have to invoke section 45 to gain supremacy over other laws, or is it enough for the Act to simply say all statutes should be construed in accordance with it? Is it the case that any federal legislation dealing with the matters listed in section 44 is supreme law? If we take Walters’ argument seriously and agree that it would be absurd for law to be supreme without saying so, then numerous acts may need to be re-enacted to confer explicitly their section 44 supreme status. Leaving aside the observation that the *Supreme Court Reference* has made sections of a statute supreme law, re-enacting acts to make them explicitly supreme might be useful in clarifying the extent of Canada’s Constitution, but it would also result in numerous interpretive issues. After all, following the logic of *New Brunswick Broadcasting*, no part of the Constitution can abrogate another part. So how could any court reconcile the various parts of the supreme law?

With respect to the interpretive issues, there is a strain of thought which tacitly divides the Canadian Constitution into ordinary law and supreme law, with the latter sometimes referred to as entrenched.<sup>170</sup> According to the logic of the amending formula, some parts of the Constitution are more entrenched than others. That much is beyond question, but there are those who argue that only the entrenched parts are supreme, or even that it is only the entrenched parts that are the Constitution.<sup>171</sup> This is textually implausible given that section 52 refers to the entire

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<sup>170</sup> *Reference re Senate Reform*, 2014 SCC 32 (Factum of the Amicus Curiae [31], [35], [43] and [11 n 47]). See also, Glover, ‘Structure, Substance’ (n 14) 247-248 Schneiderman (n 14) 224. At times, Newman seems to question the idea that supreme law has to be entrenched but at other times he seems to accept it, Newman ‘Defining the “Constitution of Canada”’ (n 18) 432-434, 479; Warren J Newman, ‘Putting One’s Faith in a Higher Power: Supreme Law, the Senate Reform Reference, Legislative Authority and the Amending Procedures’ (2015) 34 *National Journal of Constitutional Law* 99, 105.

<sup>171</sup> Schneiderman argues that because section 44 amendments are done through ordinary law they are not entrenched and so not part of the Constitution, Scheiderman, (n 14) 224

Constitution of Canada as ‘supreme law’ and would result in different provisions of the constitution trumping others. Such trumping would be in direct contradiction to the majority’s comment in *New Brunswick Broadcasting* – no part of the constitution can abrogate another. Different degrees of entrenchment make some parts harder to change than others but it does not render any part of the Constitution less than supreme. In short, the interpretation issues remain even with the ordinary versus entrenched parts of the Constitution argument.

Another potential way around the issues posed by section 44 and section 52 is the proclamation versus law distinction.<sup>172</sup> Sections 38, 41, 43 require amendments to be made by ‘proclamation’ whereas sections 44 and 45 allow the respective legislatures to make laws amending the constitution. As section 52 states any law incompatible with ‘the provisions of the Constitution’ is invalid this might allow amendments made under section 44 to be subject to the rest of the Constitution. However, the use of proclamations may just be a way of ensuring that amendments under sections 38, 41, and 43 are made public; that such amendments must explicitly state they are amendments. The proclamation-law distinction is just another version of the entrenched-as-supreme fallacy. The proclamation-law distinction may have made sense for 1980’s proposed constitution where the supremacy clause and the definitional clause were separate but that is not the case for the Constitution Act 1982. Consequently, the need to figure out exactly how section 44 operates is urgent.

## B. Broader Implications

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<sup>172</sup> Schneiderman uses this distinction as well, *ibid.*

The current version of Canada’s meta-constitution emerged not with the country’s founding but over a century later. It may be the case that the issues found in Canada’s meta-constitution result from its ex-post-facto creation but it still contains a number of other lessons, both theoretical and practical. With respect to the former, Canada’s experience highlights the role that the meta-constitution plays and how amending sections must be read with definitional sections in order to understand what the constitution is. The uncertainty over the extent of Canada’s supreme law and the question of how to figure out what is and is not part of the constitution results from both the wording of Canada’s meta-constitution and from judicial interpretation of it. The Supreme Court has attempted to impose coherence on the written parts of the constitution by extrapolating principles and features and using these to construct a “constitutional architecture.” Such moves tacitly invoke the broader, original meaning of constitution, ‘the whole of the body politic, including values, norms, behaviours, and institutions.’<sup>173</sup>

The Supreme Court of Canada’s reference to constitutional architecture calls to mind the basic structure doctrine which has been seen in both India and Belize.<sup>174</sup> The Supreme Courts of both countries have used the basic structure argument to limit what is, on paper, an unlimited legislative power to amend the constitution.<sup>175</sup> In Belize, the Supreme Court used the values referenced in the preamble to the constitution to impose limits on the legislature’s amending power.<sup>176</sup> While in India, the Supreme Court will recognize only those legislative amendments

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<sup>173</sup> Berger (n 7) 250.

<sup>174</sup> Albert, ‘Theory and Doctrine’ (n 98) 13-14.

<sup>175</sup> *ibid.*

<sup>176</sup> *Bowen v Belize (AG)* (2009), Claim No 445 of 2008 (SC)[134], available at: <http://www.belizejudiciary.org/web/wp-content/uploads/2012/12/Supreme-Court-Claim-No.-445-of-2008-Barry-M.-Bowen-and-The-Attorney-General-of-Belize-AND-Belize-Land-Owners-Association-Limited-et-al-and-Attorney-General-of-Belize-Judgment.pdf> ; For an overview of this litigation see, *Belize (Prime Minister) & Belize (AG) v Vellos et al*, [2010] UKPC 7 [1]-[31].

which do not alter the ‘basic foundation and structure of the Constitution.’<sup>177</sup> Albert notes that the Indian Constitution does not explain what this foundation and structure is but he argues that constitutional amendment rules can express constitutional values, particularly in countries like India and Canada which have a hierarchy of amending rules.<sup>178</sup> He also notes that such hierarchies of amendment procedure can be motivated by ‘political bargaining’ among other things.<sup>179</sup> He did not, however, examine the amendment formulae with the definitional sections but, in both Belize and India, the courts are relying on ideas implicit in the main constitutional text to limit changes to that text by legislation alone.

The idea of basic structure or architecture of a constitution is, then, a counter-majoritarian limit on elected representatives. As such, the meta-constitution, or more properly, judicial interpretation of the meta-constitution can enhance judicial power to determine what is and is not constitutional. In so doing, courts ensure that they cannot be readily abolished or have their power limited through unilateral legislative action, and that the broader shape of the body politic will be similarly protected. As such the meta-constitution can be used to enhance political stability, even if it is at the expense of being certain about what features or statutory provisions will be considered constitutional and thus supreme law.

## 5. Conclusion

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<sup>177</sup> *Kesavananda Bharati Sripadagalvaru v Kerala* 1973 4 SCR 225 (Supreme Court of India) [316], available at <http://indiankanoon.org/doc/257876/> cited in Albert, ‘Theory and Doctrine’ (n 98) 14

<sup>178</sup> Albert, ‘Theory and Doctrine’, (n 98) 14, Richard Albert, ‘The Expressive Function of Constitutional Amendment Rules’ (2013) 59:2 McGill Law Journal 225.

<sup>179</sup> Albert, ‘Expressive Function’ (n 178) 247.

The recent *Senate Reference* and *Supreme Court Reference* highlight the difficulties facing a country with an unclear meta-constitution. The Supreme Court of Canada has opted to play it safe and, whether it realizes it or not, may have greatly expanded what exactly is considered part of the Constitution. Ultimately the legal questions raised by Canada's meta-constitution are political questions: what rules and architecture are sufficiently fundamental to be part of the Constitution and how can political reform be achieved when the scope of the constitution is unclear?

The issues with Canada's meta-constitution point to a further problem with modern constitutional democracies: the role of unwritten constitutions and the broader meaning of constitution. At times, the judicial comments about Canada's unwritten constitution invoke the broader, original meaning of constitution,<sup>180</sup> and it may be that the Supreme Court's approach to Canada's meta-constitution offers one way to reconcile the modern meaning of constitution with its broader meaning. By using Canada's meta-constitution to identify constitutional topics, however, the Court undermines the certainty of the constitutional text while securing the continuity of the unwritten commitments and the "historical lineage" of the broader constitution.

I have argued that a crucial, yet often overlooked part of a written constitution is the meta-constitution. The meta-constitution sets out what the constitution actually is and how it can be amended. Without such information countries run the risk of constitutional gridlock or constitutional crises. Courts may well be able to come up with rules of interpretation which can forestall gridlock or crises in countries where the meta-constitution is unclear. Yet such judicial actions can only ever be a sticking plaster and run the risk of being de facto constitutional

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<sup>180</sup> See, Berger (n 7).

amendments in and of themselves. The Canadian example suggests that framers of constitutional texts should be aware of how these texts, particularly if they are to be entrenched, affect the unwritten portions of the constitution and of how this could inadvertently expand the scope of what becomes an enforceable part of the constitution.