Immuring Dicey's Ghost: The *Senate Reform Reference* and Constitutional Conventions

Léonid Sirota

ALTHOUGH THE METAPHOR of "constitutional architecture" appeared in some of the Supreme Court of Canada's previous opinions, it took on a new importance in *Reference re Senate Reform*, where the Court held that amendments to constitutional architecture had to comply with the requirements of Part V of the *Constitution Act, 1982*. However, the Court provided very little guidance as to the scope of this entrenched "architecture." As a result, the metaphor's meaning and implications have been the subject of considerable scholarly debate. This article contributes to this debate by arguing that "constitutional architecture" incorporates (some) constitutional conventions. It further takes the position that, instead of relying on this confusing metaphor, the Court should have candidly admitted that conventions were central to its decision by acknowledging that the text of the Canadian Constitution cannot be fully understood without reference to conventions.

Part I reviews, first, the Supreme Court's opinions in which the notion of constitutional "architecture" has been mentioned, focusing first on this concept's place in the *Senate Reform Reference*, and second, some of the scholarly commentary that has endeavoured to make sense of it. Part II sets out my own view that constitutional "architecture," as this concept is used by the Supreme Court, is concerned primarily if not exclusively with constitutional conventions. Part III considers

BIEN QUE LA métaphore de l'« architecture constitutionnelle » figure dans des décisions précédentes de la Cour suprême du Canada, elle s'est vue accorder une plus grande importance dans le *Renvoi relatif à la réforme du Sénat*, dans lequel la Cour a estimé que les modifications à l'architecture constitutionnelle devaient être conformes aux exigences de la partie V de la *Loi constitutionnelle de 1982*. Cependant, la Cour a fourni très peu d'indications quant à la portée de cette « architecture » enchâssée. Par conséquent, le sens et les implications de cette métaphore ont fait l'objet d'un débat doctrinal considérable. Le présent article contribue à ce débat en soutenant que l'« architecture constitutionnelle » intègre (certaines) conventions constitutionnelles. Il soutient également la position selon laquelle, au lieu de s'appuyer sur cette métaphore source de confusion, la Cour aurait dû admettre franchement que les conventions étaient au centre de sa décision, reconnaissant que le texte de la Constitution canadienne ne peut être pleinement compris sans référence aux conventions.

La première partie passe tout d'abord en revue les avis de la Cour suprême dans lesquels la notion d'« architecture » constitutionnelle a été mentionnée, en se concentrant en premier lieu sur la place qu'occupe ce concept dans le *Renvoi relatif à la réforme du Sénat*, et en deuxième lieu, sur certains des commentaires ressortis de la recherche savante qui tentent de l'expliquer. La deuxième

whether it is possible to determine just which conventions the notion of constitutional architecture encompasses, examining the conventions' importance and their relationship to the constitutional text as possible criteria, and concluding that neither allows precise determinations. Part IV sets out what would have been a less confusing way of addressing the significance of conventions to the questions the Court was facing in the *Senate Reform Reference*: frankly recognizing that conventions were relevant to the interpretation of the applicable constitutional texts. Part V examines two objections to the incorporation of conventions (via "architecture" or through interpretation) into the realm of constitutional law, arguing that this incorporation is not illegitimate and that it will not stultify the Constitution's development. Part VI concludes with an appeal for greater transparency on the part of the Supreme Court.

partie expose mon propre point de vue selon lequel l'« architecture » constitutionnelle, selon l'usage que fait de ce concept la Cour suprême, concerne principalement, sinon exclusivement, les conventions constitutionnelles. La troisième partie examine s'il est possible de déterminer précisément quelles conventions sont englobées dans la notion d'architecture constitutionnelle, en examinant l'importance des conventions et leur relation avec le texte constitutionnel comme critères possibles, et en concluant que ni l'une ni l'autre ne permet d'arriver à des déterminations précises. La partie quatre expose ce qui aurait été une façon se prêtant moins à la confusion d'aborder l'importance des conventions par rapport aux questions auxquelles la Cour était confrontée dans le cadre du *Renvoi relatif à la réforme du Sénat,* soit : reconnaître franchement que les conventions étaient pertinentes à l'interprétation des textes constitutionnels applicables. La partie cinq examine deux objections à l'incorporation des conventions (par l'« architecture » ou par interprétation) dans le domaine du droit constitutionnel, en faisant valoir que cette incorporation n'est pas illégitime et qu'elle ne entravera pas le développement de la Constitution. La sixième partie, en conclusion, en appelle à une plus grande transparence de la part de la Cour suprême.

CONTENTS

Immuring Dicey's Ghost: The *Senate Reform Reference* and Constitutional Conventions

Léonid Sirota[*]

If the Canadian Constitution is a castle,[1] then its battlements, like those of Elsinore, are haunted by a ghost. A.V. Dicey died in old age, surrounded by loyal friends and a loving wife.[2] But his spectre, or at least the phantom of a rigid separation between the law and the conventions of the constitution on which Dicey insisted in his magnum opus, *Introduction to the Study of the Law of the Constitution*,[3] can still appear as the Constitution's guards, the judges of the Supreme Court of Canada, go about their rounds.[4]

---

* Auckland University of Technology Law School. I am grateful to Dwight Newman and Charles Rickett, as well as the anonymous reviewers, for comments on previous versions of this paper. The usual disclaimer applies.

1 See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 109, 150 DLR (4th) 577 [*Provincial Courts Reference*], Lamer CJ describing the preamble of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK) as "the grand entrance hall to the castle of the [C]onstitution" (*ibid*); Adam Dodek, "Uncovering the Wall Surrounding the Castle of the Constitution: Judicial Interpretation of Part V of the Constitution Act, 1982" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) [Macfarlane, *Amendment*] 42 at 43.

A note on the word "Constitution": some writers capitalize it; others do not. Nothing would turn on this, were it not that capital-C "Constitution" might be taken to refer specifically to a constitutional *text*. While I follow the *Ottawa Law Review*'s preference, as well as contemporary Supreme Court usage, in capitalizing "Constitution," I would like to make clear that I intend no such implication. "Constitution" refers both to textual and extra-textual norms; when I refer to constitutional text, I say so specifically.

2 See Mark D Walters, "Dicey on Writing the *Law of the Constitution*" (2012) 32:1 Oxford J Leg Stud 21 at 26 [Walters, "Dicey on Writing"].

3 See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London, UK: Macmillan and Co, 1915).

4 *Cf* Michael Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005)

The guards paid their respects to the ghost when they upheld the federal government's legal right to patriate the Constitution unilaterally, even as they asserted that this right had been negated by constitutional conventions.[5] They have never retreated from their position. Although the phantom was never more than an apparition,[6] the guards saw it standing in their way once more when they were asked to pronounce on the constitutionality of the federal government's Senate reform plans.[7]

The guards did not attack the ghost directly. Ostensibly, the Court's opinion barely mentioned conventions, despite focusing on the changes in the constitutional position of the Senate that the enactment of the proposed reform would have produced, an issue to which the conventions that define this position at present are obviously relevant.[8] Instead of squarely addressing the fact that the Senate reform proposal would have upended constitutional conventions, the Court resorted to the notion of a "constitutional architecture," holding that amendments to that architecture, as well as those to the text of entrenched constitutional provisions, can require resort to the procedures set out in Part V of the *Constitution Act, 1982*.[9]

Yet I shall argue that in reality the Court's opinion has the effect—perhaps the deliberate effect—of entrenching at least some, although possibly not all, of the conventions of the Canadian Constitution, erasing the bright line that Dicey sought to draw between convention and law. The notion of "architecture," although underdeveloped in the *Senate Reform*

43:3 Osgoode Hall LJ 223 at 226. "A.V. Dicey, who died in 1922,…like the Phantom, is the ghost who still walks in the grove of administrative law" (*ibid*).

5 See *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753, (*sub nom Reference re Amendment of the Constitution of Canada* (*Nos 1, 2 and 3*)) 125 DLR (3d) 1 [*Patriation Reference* cited to SCR].

6 See Léonid Sirota, "Towards a Jurisprudence of Constitutional Conventions" (2011) 11:1 OUCLJ 29 [Sirota, "Jurisprudence"]; Léonid Sirota, "The Supreme Court of Canada and Constitutional Conventions" (2017) 78 SCLR (2d) 31 [Sirota, "Court and Conventions"]. See also Fabien Gélinas, "Les conventions, le droit et la Constitution du Canada dans le renvoi sur la «sécession» du Québec: le fantôme du rapatriement" (1997) 57:2 R du B 291.

7 See *Reference re Senate Reform*, 2014 SCC 32 [*Senate Reform Reference*].

8 Some of the academic commentary published prior to the Court's decision sought to draw the Court's attention to this fact. See Mark D Walters, "The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7" (2013) 7 JPPL 3 [Walters, "Reform of the Senate"]; Fabien Gélinas & Léonid Sirota, "Constitutional Conventions and Senate Reform" (2013) 5 RQDC 107.

9 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ["*Constitution Act, 1982*"].

Reference, refers to "[t]he assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another."[10] In the Canadian context, the assumptions of the constitutional text's framers and their intentions as to the interaction between constitutional provisions include conventions. To be clear, however, my aim in this article is to explain and critique the Supreme Court's opinion in the *Senate Reform Reference* by emphasizing the role of conventions in it. Of course, the interest of such a critique lies, in part at least, in its implications for future cases. Nevertheless, it is not my ambition to set out a comprehensive theory of constitutional conventions, their relationship with other elements of the Constitution, or the way in which the courts ought to treat them.

In Part I, I first review the Supreme Court's opinions in which the notion of constitutional "architecture" has been mentioned, focusing on this concept's place in the *Senate Reform Reference* and, second, survey the scholarly commentary that has endeavoured to make sense of it. In Part II, I set out my own view that constitutional "architecture," as this concept is used by the Supreme Court, is concerned primarily if not exclusively with constitutional conventions. Then, in Part III, I consider whether it is possible to determine just which conventions are encompassed by the notion of constitutional architecture. I examine the conventions' importance, and their relationship to the constitutional text as possible criteria, and conclude that neither allows precise determinations. Part IV sets out a better, less confusing, way of addressing the significance of conventions to the questions the Court was facing in the *Senate Reform Reference*: frankly recognizing that conventions were relevant to the interpretation of the applicable constitutional texts. Part V examines two objections to the incorporation of conventions (via "architecture" or through interpretation) into the realm of constitutional law, from which they have long been excluded. I argue that this incorporation is not illegitimate, whether on a living constitutionalist or even on an originalist approach, and that it will not stultify the Constitution's development. Part VI concludes with an appeal for greater transparency on the part of the Supreme Court.

10 *Senate Reform Reference*, *supra* note 7 at para 26.

I. THE SUPREME COURT ON "CONSTITUTIONAL ARCHITECTURE"

A. The *Secession Reference* and the *Supreme Court Act Reference*

The architectural metaphor first appeared in the Supreme Court's opinion in *Reference re Secession of Quebec*.[11] The Court declared that "[o]ur Constitution has an internal architecture," such that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole."[12] This "architecture" is underpinned by fundamental constitutional principles, such as democracy and federalism. Indeed, "[t]he principles dictate major elements of the architecture of the Constitution."[13] However, "architecture" as such plays no further role in the Court's reasons, which focus on the application of principles in the context of a hypothetical attempt by a province to secede.

After more than a decade and a half, the metaphor re-appears in the Supreme Court's jurisprudence (in the majority opinion) on the constitutionality of Parliament's attempt to expand (as the majority saw it) the eligibility criteria for appointment to one of the Québec seats on the Court.[14] The opinion—ostensibly written by seven judges but, as Peter McCormick suggests, likely by Chief Justice McLachlin[15]—found that the abolition of appeals to the Judicial Committee of the Privy Council "had a profound effect on the constitutional architecture of Canada" by making the Supreme Court an essential arbiter of Canadian federalism.[16]

This and other changes in the Supreme Court's functions resulted in "those concerned with constitutional reform accept[ing] that future reforms would have to recognize the Supreme Court's position within the architecture of the Constitution."[17] As a result, the mention of the Court in the amending formulae of Part V of the *Constitution Act, 1982*[18] had "the clear intention…to freeze the *status quo* in relation to the Court's

11 [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference* cited to SCR].

12 *Ibid* at para 50.

13 *Ibid* at para 51.

14 See *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 [*Supreme Court Act Reference*].

15 See Peter McCormick, "*Nom de Plume*: Who Writes the Supreme Court's 'By the Court' Judgments?" (2016) 39:1 Dal LJ 77 at 117.

16 *Supreme Court Act Reference*, *supra* note 14 at para 82.

17 *Ibid* at para 87.

18 *Constitution Act, 1982*, *supra* note 9, ss 41(d) and 42(1)(d).

constitutional role."[19] The majority found that, despite the *Supreme Court Act*[20] not being mentioned among the documents "include[d]" in the "Constitution of Canada"[21] protected from amendment not in accordance with Part V,[22] the Court's status was indeed frozen in accordance with the Part V framers' intention.

B. The *Senate Reform Reference*

In the *Senate Reform Reference*, the Supreme Court was asked to provide its views on the procedures that would need to be followed to implement a variety of possible amendments to the constitutional rules governing the appointment of Senators and their term of office, as well as to outright abolish the Senate.[23] Most amendments, the Court opined, required compliance with the general amending formula set out in Part V, while abolition required the provinces' unanimous consent.

After setting out the questions before it and "briefly introduc[ing] the institution at the heart of this Reference,"[24] the opinion, ascribed to "the Court" itself (but, according to Peter McCormick, also likely written primarily by Chief Justice McLachlin),[25] proceeds to discuss the nature of the Canadian Constitution and its amending procedures. "The Constitution of Canada," the opinion states, "is 'a comprehensive set of rules and principles' that provides 'an exhaustive legal framework for our system of government'."[26] But, more than just a set of rules and principles, "[t]he Constitution [also] implements a structure of government,"[27] and has itself "an 'internal architecture' [which] expresses the principle that '[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole'."[28] Most importantly for my argument, the Court insists that to

19 *Supreme Court Act Reference*, *supra* note 14 at para 100.

20 *Supreme Court Act*, RSC 1985, c S-26.

21 *Constitution Act, 1982*, *supra* note 9, s 52(2) and Schedule.

22 *Ibid*, s 52(3).

23 For a description of the background to and the hearing in the *Senate Reform Reference*, see Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford, UK: Hart Publishing, 2019) at 168–70.

24 *Senate Reform Reference*, *supra* note 7 at para 13.

25 McCormick, *supra* note 15 at 117.

26 *Senate Reform Reference*, *supra* note 7 at para 23, quoting *Secession Reference*, *supra* note 11 at para 32.

27 *Senate Reform Reference*, *supra* note 7 at para 25.

28 *Ibid* at para 26.

understand this constitutional structure, and thus the Constitution as a whole, we must take into account "[t]he assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another."[29] As a result, "amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture"[30] and thus to its underlying assumptions.

This understanding of constitutional amendment turns out to be crucial for the Court's opinion on one type of proposed change to the Senate: the introduction of "consultative elections" whose outcomes the Prime Minister will be statutorily required to "consider" before recommending persons for the Governor General to "summon" to the Senate.[31] The Court notes that this "would amend the Constitution of Canada by fundamentally altering its architecture."[32] More specifically, this amendment "would modify the Senate's role within our constitutional structure as a complementary legislative body of sober second thought"[33]—one that will be aware of its lack of democratic legitimacy and therefore likely give way to the will of the elected House of Commons in case of conflict.[34] In the Court's view, "[t]he appointed status of Senators, with its attendant assumption that appointment would prevent Senators from overstepping their role as a complementary legislative body, shapes the architecture of the *Constitution Act, 1867*."[35] Holding "consultative elections would fundamentally modify the constitutional architecture" because these elections "would weaken the Senate's role of sober second thought and would give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design."[36] It is only after this discussion that the Court turns to the constitutional text, finding there "support[]" for a conclusion it already reached when considering "architecture."[37]

By contrast, the Court's consideration of both the proposed limitation of the Senators' term of appointment and the abolition of the property qualification for appointment to the Senate does not refer to constitutional

29 *Ibid*.
30 *Ibid* at para 27.
31 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 24, reprinted in RSC 1985, Appendix II, No 5 ["*Constitution Act, 1867*"].
32 *Senate Reform Reference*, *supra* note 7 at para 54.
33 *Ibid*.
34 *Ibid* at para 58.
35 *Ibid* at para 59.
36 *Ibid* at para 60.
37 *Ibid* at para 64.

architecture. Instead, the Court asks itself whether these changes would fundamentally alter the nature of the Senate itself. It concludes that the former would, and thus requires amendment with provincial consent under subsection 38(1) of the *Constitution Act, 1982*, while the latter would not, and so can be implemented unilaterally pursuant to section 44, except for changes to special provisions relative to Québec.

The Court returns to the notion of constitutional architecture when answering the final question of the *Senate Reform Reference*: which amending procedure must be followed to abolish the Senate outright? Rejecting the federal government's submission that abolition falls within the scope of paragraphs 42(1)(b) or (c) of the *Constitution Act, 1982*, as being concerned with "the powers of the Senate" or "the number of members by which a province is entitled to be represented in the Senate" or that of section 38(1), the "residual" amending provision, the Court takes the position that it requires unanimous provincial consent. The first argument for this conclusion is an interpretation of the constitutional text, which is heavily influenced by its framers' intent,[38] as well as the words they used. But the Court also says that the relevant constitutional provisions were "drafted on the assumption that the federal Parliament would remain bicameral in nature, *i.e.* that there would continue to be both a lower legislative chamber and a complementary upper chamber,"[39] and that "[t]he abolition of the upper chamber would entail a significant structural modification of Part V."[40] Thus, although there is no explicit reference to architecture except in the introductory passage of this part of the Court's opinion, it seems to implicitly refer to the notion of architecture as the Court defined it earlier.[41]

C. Academic Commentary

The notion of "constitutional architecture" appears in some of the Supreme Court's most significant opinions discussing the very nature of

38 *Ibid* at paras 100–101. See also J Gareth Morley, "Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada" (2016) 53:3 Osgoode Hall LJ 745 at 792–95 [Morley, "Dead Hands"]; Sébastien Grammond, "Compact is Back: The Supreme Court of Canada's Revival of the Compact Theory of Confederation" (2016) 53:3 Osgoode Hall LJ 799 at 815; Léonid Sirota & Benjamin Oliphant, "Originalism in Canadian Constitutional Jurisprudence" (2017) 50:2 UBC L Rev 505 at 525–26.

39 *Senate Reform Reference*, *supra* note 7 at para 106.

40 *Ibid* at para 107.

41 I will return to the significance, or lack thereof, of this implicit reference below.

the Canadian Constitution and the process by which this Constitution can be changed. It plays an especially notable role in the Court's reasoning in the *Senate Reform Reference*, albeit only with respect to one or two of the questions the Court was asked to address. Yet the Court's explanation of just what this architecture is, what it includes, and what it does not, is remarkably brief and opaque. There is no discussion of the uses to which this concept might be put in future cases. As a result, in the wake of the *Senate Reform Reference*, scholars have been drawn to the notion of "architecture," trying to answer the questions the Supreme Court seemingly left open—an endeavour of which this article is a continuation. I briefly review others' hypotheses here, before setting out my own views in the next Part.

For Noura Karazivan, the *Supreme Court Act Reference* and the *Senate Reform Reference* are only two of an increasing number of cases where the Supreme Court engages in "structural analysis" to interpret the Constitution.[42] While some such cases identify and apply underlying constitutional principles, an increasing number involve:

> resort by the Supreme Court of Canada to the relation and functional components of the concept of constitutional structure. This practice sets out the relationships that link Canada's constitutional structure. Structural analysis is used to identify the 'parts' that make up the 'whole' and to protect the characteristics essential to their good functioning.[43]

Thus, while the Court's opinion provides an opportunity to raise questions regarding this practice's legitimacy,[44] it marks no new departure in its jurisprudence.

For Kate Glover too, the *Senate Reform Reference* belongs to the Supreme Court's structuralist jurisprudence, although contrary to Professor Karazivan she argues that underlying principles—notably federalism—were key to the Court's analysis.[45] However, she notes that "many questions remain for future cases," starting with "the scope of the constitutional architecture that is entrenched."[46] Indeed, Professor Glover notes that

42 See Noura Karazivan, "De la structure constitutionnelle dans le Renvoi relatif au Sénat: vers une gestalt constitutionnelle?" (2015) 60:4 McGill LJ 793 [Karazivan, "Structure constitutionnelle"].

43 *Ibid* at 811 [translated by author].

44 *Ibid* at 819–36.

45 See Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the Senate Reform Reference" (2014) 67 SCLR (2d) 221 [Glover, "Lessons"].

46 *Ibid* at 250.

"the Court's analysis of the consultative elections issue creates some confusion" on this point, because it "seem[s] to suggest that at least some of the conventional dimensions of the selection process are subject to the Part V amending procedures"; this raises the possibility "that constitutional conventions generally are subject to Part V" too.[47] Professor Glover finds this possibility a cause for concern because it may mean that "the future of constitutional evolution will be much more rigid than is called for by Part V,"[48] but does not explore it further.

Christa Scholtz shares Professor Glover's disquiet, although she arrives at it from the opposite direction.[49] She argues that the Supreme Court's reasoning in the *Supreme Court Reference* negates the significance of conventions in the Canadian constitutional order. In Professor Scholtz's view, the architectural metaphor used first in the *Secession Reference* and now in the *Senate Reform Reference* serves to present the Constitution as a legally coherent and complete whole. This denies the need—indeed leaves no room—for conventions that serve to attenuate the "frictions" between the Constitution's components and precludes further constitutional development through conventional means.[50]

For his part, Emmett Macfarlane treats the Supreme Court's reliance on constitutional architecture as an innovation—and an unwelcome one. In his view, "the justices' reliance on the amorphous notion of the constitutional architecture…adds to, rather than alleviates, the uncertainty over what other changes to the appointments process might be feasible without formal constitutional amendment and provincial consent,"[51] both with respect to the Senate and more broadly. Regrettably, "[t]his may have the effect of chilling future attempts at constitutional change or, at the very least, increasing contestation and future legal challenges to reform efforts."[52] Professor Macfarlane, it is worth noting, does not endeavour to define the notion of constitutional architecture himself. Elsewhere, he seems to suggest that its definition is entirely up to the Court, a matter of

47 *Ibid* at 250–51.

48 *Ibid* at 251.

49 See Christa Scholtz, "The Architectural Metaphor and the Decline of Political Conventions in the Supreme Court of Canada's *Senate Reform Reference*" (2018) 68:4 UTLJ 661.

50 *Ibid* at 662.

51 Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada" (2015) 60:4 McGill LJ 883 at 900 [Macfarlane, "Unsteady Architecture"].

52 *Ibid* at 903.

whimsy or of the Court's views of what the Constitution ought to be more than of law.[53]

Finally, Michael Pal, while recognizing that "[a]t this stage, we have no conclusive answers on the reach of the *Senate* [*Reform*] *Reference*," suggests that it creates "a vast zone of uncertainty."[54] The *Supreme Court Act Reference*, for its part, uses "a similar test."[55] Legislation affecting "institutions not in existence in 1867 or 1982, but which have arguably evolved to play fundamental roles,"[56] such as Officers of Parliament,[57] as well as the electoral system and "constitutional conventions that affect the important features of core institutions,"[58] would fall within this "grey zone." While it is not clear that such legislation would amend constitutional architecture as understood by the Supreme Court, it is no more certain that it would not do so. Elsewhere, Professor Pal suggests that it is "likely" that Parliament would be unable to pursue unilateral electoral reform,[59] although this view has been sharply criticized by others.[60]

Another illustration of Professor Macfarlane's fears about the "amorphous" constitutional architecture's chilling institutional innovation can be found in Professor Glover's recent work. Professor Glover suggests that

53 Macfarlane, *Amendment*, *supra* note 1. "Despite the justices' firm denial that the desirability of amendments is a question for the Court, their own analysis in the *Senate Reform Reference* hinges [to a great extent] so much on their articulation of the principles underlying the constitutional architecture and the role of the Senate" (*ibid* at 295).

54 Michael Pal, "Constitutional Amendment After the Senate Reference and the Prospects for Electoral Reform" (2016) 76 SCLR (2d) 377 at 384.

55 *Ibid* at 383–84.

56 *Ibid* at 384.

57 *Ibid*. For this point, Professor Pal relies on Adam Dodek's discussion in Macfarlane, *Amendment*, *supra* note 1.

58 *Ibid* at 385.

59 See especially Michael Pal, "Why Canada's Top Court Must Weigh in on Electoral Reform", *The Globe and Mail* (15 January 2016), online: <theglobeandmail.com/opinion/why-canadas-top-court-must-weigh-in-on-electoral-reform/article28198932/>. See also Alexandre Thibault & Patrick Taillon, "Trudeau veut faire mieux, mais peut-il agir seul?", *Le Devoir* (11 February 2016), online: <ledevoir.com/politique/canada/462611/mode-de-scrutin-federal-trudeau-veut-faire-mieux-mais-peut-il-agir-seul> (making a similar argument on the basis of purported "essential characteristics" of the House of Commons).

60 See Emmett Macfarlane, "Constitutional Constraints on Electoral Reform in Canada: Why Parliament is (Mostly) Free to Implement a New Voting System" (2016) 76 SCLR (2d) 375; Leonid Sirota, "Yes, They Can" (19 January 2016), online (blog): *Double Aspect* <doubleaspect.blog/2016/01/19/yes-they-can>. For a response to Thibault & Taillon, *ibid*, see especially Maxime St-Hilaire, "Révision du système électoral fédéral: Trudeau peut agir «seul»" (22 March 2016), online (blog): *À qui de droit* <blogueaquidedroit.wordpress.com/2016/03/22/revision-du-systeme-electoral-federal-trudeau-peut-agir-seul>.

"the administrative state—not in all its particulars, but in its essence and function—is a necessary or essential feature of Canada's constitutional architecture," so that any attempts to "dismantle or undermine" it would require an amendment in accordance with Part V of the *Constitution Act, 1982*.[61] Again, one might be skeptical of the merits of this view (which sits uneasily with Professor Glover's own earlier worries about the process by which extra-legal rules, namely conventions, might become entrenched "and the legitimacy of that process").[62] If correct, however, it would provide further support for the concern that the Constitution's "architecture" is that of a mausoleum.

There is, it thus seems fair to say, considerable uncertainty about the import of the notion of constitutional architecture. For some, it is only a development of well-established structural constitutional analysis. For others, on the contrary, it is portentous if also uncertain. As I shall presently argue, however, both of these views are wide of the mark.

II. AN ARCHITECTURE OF CONSTITUTIONAL CONVENTIONS

The scholarly commentary on the notion of constitutional architecture, with the partial exception of Professor Glover's and Professor Pal's, does not capture what is most intriguing about the way in which the Supreme Court deploys this concept in the *Senate Reform Reference*: its unstated incorporation of constitutional conventions. Professor Karazivan goes so far as to say that "the Court does not inquire whether constitutional conventions…would be affected"[63] by the federal government's reform plans, while Professor Scholtz claims that the Court's conception of the Constitution leaves no room for conventions. In my view, this is not so. Rather, although the Court is not explicit about this, its invocation and description of the Constitution's architecture shows that it is aware of the issues having to do with constitutional conventions. Once we understand this, it becomes clear that the notion of constitutional architecture is less amorphous and threatening than Professors Macfarlane and Pal, among others, have suggested—but arguably even more radical.

---

61 See Kate Glover, "*Dunsmuir* & the Constitutional Status of the Administrative State" (2018) Can J Admin L & Prac: Special Issue—A Decade of *Dunsmuir* / Les 10 ans de *Dunsmuir* 141 at 142.

62 Glover, "Lessons", *supra* note 45 at 251.

63 Karazivan, *supra* note 42 at 822 [translated by author].

There is only a faint, and quite possibly unintended, hint at the relationship between "constitutional architecture" and conventions in the *Secession Reference* which states that "architecture" is supported—indeed "dictated"—by underlying fundamental principles. This is what one would expect if this "architecture" included or consisted of conventions, which are themselves instantiations of such principles. As Professor Heard explains, "conventions are born out of and protect the largely unwritten principles of the [C]onstitution."[64] That said, ultimately, the architectural metaphor bears no justificatory load in the *Secession Reference*.

The *Supreme Court Act Reference* is somewhat different. Its description of political actors—"those concerned with constitutional reform"—as accepting the necessity of recognizing a position the Supreme Court achieved as a result of piecemeal evolution—which did not affect formal constitutional instruments—is reminiscent of the way in which one might describe political actors as accepting a constitutional convention. The majority is of the view that this acceptance forms part of the context within which the references to the Supreme Court in Part V of the *Constitution Act, 1982* must be read. This, in their view, justifies the conclusion that these references are not, as the federal government contended, an "empty vessel" to be filled when the Court would be explicitly entrenched in the future. As we shall see, this prefigures the function of conventions in the *Senate Reform Reference*.

As mentioned above, the notion of constitutional architecture discussed in the *Senate Reform Reference* refers to "[t]he assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another."[65] What are these assumptions? What sorts of interactions does the Supreme Court have in mind? The Court is not explicit about this, which is why the academic commentary on its opinion is so uncertain. To understand what the Court means, we have no choice but to rely on the examples in the *Senate Reform Reference* itself.

The assumption to which the Court refers when answering the question concerning the abolition of the Senate is simply that the Senate will continue to exist. No interactions between components of the constitutional structure are involved beyond those obviously contemplated by the constitutional text itself—that is, the Senate's participation in the

64 Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 2014) at 227. See especially Gélinas, *supra* note 6 at 320.

65 *Senate Reform Reference*, *supra* note 7 at para 26.

amendment process. This invocation of constitutional architecture is, in truth, quite meaningless. A constitution's framers can be expected to assume that the institutions they set up will continue to exist, until they are abolished or modified pursuant to the amendment mechanisms that the framers established. That expectation tells us nothing about the way in which an amendment may be carried out—if, as under Part V, there are multiple plausible amending formulae. Indeed, the reference to the assumption of the Senate's continued existence does little if any work in the Court's reasons. As Professor Karazivan observes, "the Court mostly employed textual and historical arguments" on this point.[66]

The assumptions involved in the Court's answer to the question regarding the permissibility of allegedly consultative elections of Senators are different. The relevant ones concern the interactions or relationships between the Senate and other constitutional actors: on the one hand, the Prime Minister (and the Governor General), in the process of appointment of Senators, and on the other, the House of Commons in the legislative process. These interactions or relationships, unlike the mere existence of the Senate, are not to be found in the constitutional text. Indeed, they are not to be found in what, until the *Senate Reform Reference*, was understood to be constitutional law.

In particular, these constitutional interactions are not the sort of structural inference from the constitutional text (whether considered as a whole or with a focus on the relationships between individual provisions)[67] that, as Professors Karazivan and Glover show, have for some time now featured in the Supreme Court's jurisprudence. To be sure, these interactions are related to constitutional principles. For instance, that the appointed Senate is a "complementary" legislative body that gives way to the elected House of Commons in cases of conflict is consistent with the democratic principle. However, the principles do not dictate the terms of these interactions. Gareth Morley points out that, "[a]s the Australian example shows, a federal parliamentary democracy can function with an

66 Karazivan, "Structure constitutionelle", *supra* note 42 at 797 [translated by author]. "The Court reached this conclusion not because abolition would fundamentally alter the foundational architecture of the Constitution as imagined in 1867, but rather because abolition would rearrange the structure of the Part V amendment process agreed to in 1982" (Glover, "Lessons", *supra* note 45 at 237).

67 Solum defines "structural features of the constitutional text" or "structure for short" as "properties of the text that emerge from the ways in which individual clauses relate to one another": Lawrence B Solum, "Originalism and the Unwritten Constitution" (2013) 2013:5 U Ill L Rev 1935 at 1947 [Solum, "Unwritten Constitution"].

elected upper house."[68] In other words, selecting Senators on the basis of "consultative" elections would also have been consistent with the principles of democracy and (arguably) federalism.

Similarly, it is not enough to say that what is at issue in the question of "consultative" elections is the identification of those "characteristics" of the Senate "that are necessary to its good functioning,"[69] at least if by "good functioning" we mean something like the preservation (or enhancement) of the Senate's institutional capacity as a legislative body. This is how the "good functioning" of institutions involved in the structural cases reviewed by Professor Karazivan is best understood. It refers, for example, to the ability of the public service to effectively and impartially support the political executive in *Ontario (AG) v OPSEU*,[70] of provincial courts to provide independent and impartial adjudication in the *Provincial Courts Reference*, and of the Supreme Court to take Québec's social values into account in the *Supreme Court Act Reference*. Therefore, the good functioning of the Senate presumably refers to its functioning as a legislative body: its scrutinizing legislation proposed by the House of Commons and proposing its own, using debates and select committees to hold government to account, and so on. The Senate could do these things *well* if it were (effectively) elected, although it would do them *differently* from the way it does them now.

Mr. Morley suggests that "[t]he real issue" with "consultative" elections of Senators "is not that these arrangements could not work with the structure of the Constitution, but that they were not the arrangements reached by the political actors behind Confederation."[71] This is true so far as it goes, but it is not the whole truth. For if the issue had simply been one of enforcing the "bargain" made at Confederation, the Supreme Court could have said so, similarly to what its majority did with respect to the statutory interpretation question in the *Supreme Court Act Reference*. There the Court interpreted the *Supreme Court Act* and enforced what it took to be the meaning of its terms, derived in part from the intentions of its framers and the contents of the bargain they had struck.[72] There was no need to discuss the "assumptions" underlying the text. Why, then, did the Court do so in the *Senate Reform Reference*? The reason is that the terms of

68 Morley, "Dead Hands", *supra* note 38 at 793.

69 Karazivan, "Structure constitutionelle", *supra* note 42 at 819.

70 [1987] 2 SCR 2, 41 DLR (4th) 1.

71 Morley, "Dead Hands", *supra* note 38 at 793.

72 *Supreme Court Act Reference*, *supra* note 14 at paras 46–56.

the relationships that govern appointments to the Senate and the Senate's role in the legislative process are, and were always expected to be, set by constitutional conventions.

During the Confederation Debates of 1865 (where the Province of Canada's legislature approved the Québec Resolutions, which formed the basis of what we now know as the *Constitution Act, 1867*), John A. Macdonald set out his expectations regarding the role the "upper house" of the new federal "General Legislature"—not yet named the Senate and Parliament—would occupy in the new constitutional framework. He confidently predicted that "here as in England, to the Lower House will practically belong the initiation of matters of great public interest."[73] Although the Senate, he insisted—perhaps both echoing and contradicting Madison—"must be an independent House, having a free action of its own,…it will never set itself in opposition against the deliberate and understood wishes of the people" as expressed by the House of Commons.[74] It would be conscious of "having no mission from the people,"[75] and have no distinct constituency to represent—in contrast to the House of Lords in the United Kingdom at the time.[76]

Admittedly, Macdonald also counted on partisan appointments to the Senate to "maintain[] the sympathy and harmony between the two houses" of Parliament.[77] In this regard, he showed more realism than the Supreme Court gave him and his fellow framers credit for when it claimed that they had "sought…to remove Senators from a partisan political arena."[78] George Brown, meanwhile, saw another virtue in the fact

---

73 John A Macdonald, "Hon Attorney-General Macdonald" in HE Egerton & WL Grand, eds, *Canadian Constitutional Development, Shown by Selected Speeches and Despatches, with Introductions and Explanatory Notes* (London, UK: John Murray, 1907) 355 at 375.

74 *Ibid* at 378.

75 *Ibid* at 380.

76 *Ibid* (arguing that "[t]he members of our Upper House will be like those of the Lower, men of the people, and from the people" what Macdonald means by this is that, not being from an altogether separate social class, like the members of the House of Lords, Senators would be more sensitive to the importance of the popular mandate enjoyed by the House of Commons). See especially Joseph Blanchet in Janet Ajzenstat *et al*, eds, *Canada's Founding Debates* (Toronto: University of Toronto Press, 2003) at 94–95.

77 Macdonald, *ibid* at 381; other participants in the debates were, if anything, even clearer that appointments would be "rewards to…supporters" for "political services at elections and otherwise": see David Reesor in Ajzenstat *et al*, *ibid* at 88–89.

78 *Senate Reform Reference*, *supra* note 7 at para 57. See also Noura Karazivan, "Constitutional Structure and Original Intent: A Canadian Perspective" (2017) 2017:2 U Ill L Rev 629 (asserting that partisan appointments to the Senate are "far from the ideal conceived by the Fathers of Confederation").

that the government of the day would make appointments to the Senate, arguing that this meant that the voters would retain (indirect) control over these appointments.[79]

More importantly, Brown argued in favour of an appointed upper house (a long-held position in his case, as he had opposed the move to an elected upper house in the then-Province of Canada)[80] in order to avoid conflict between partisan majorities in the two chambers, especially regarding money bills.[81] Brown warned that although obstruction on the part of an elected upper house "may be called unconstitutional," there is nothing to prevent its members—if they are elected—"from practically exercising all the powers that belong to [the lower house]."[82]

But, of course, there is virtually nothing in the *Constitution Act, 1867* to do this either. The only limited exception to this principle, which confirms Macdonald's practical insight into "maintaining the sympathy and harmony between" the House of Commons and the Senate, is section 26, which allows the appointment of four or eight additional Senators, thus enabling the government of the day to overcome a hostile but narrow majority in the Senate. On the face of the constitutional text, the powers of the Senate and the House of Commons are virtually identical.[83] The reason for this, as the Supreme Court observed in the *Senate Reform Reference*, is the "assumption that appointment would prevent Senators from overstepping their role as a complementary legislative body."[84] This expectation has largely been borne out.

As Andrew Heard notes, "[w]hile there are legal provisions at the heart of the Senate selection process and its powers, conventions remain defining elements of both."[85] Convention makes appointments the prerogative of the Prime Minister—as the Fathers of Confederation knew it would.[86] Moreover, while "[a]s a matter of strict law the Senate enjoys a total freedom to amend, delay, or reject outright any bill or motion…important conventions limit [the Senate's] freedom to deal with measures passed by

79 See George Brown in Ajzenstat *et al*, *supra* note 76 at 85–86.

80 See George Brown, "Hon George Brown" in Egerton & Grand, *supra* note 73 at 417.

81 *Ibid* at 417–18.

82 *Ibid* at 418.

83 But see *Constitution Act, 1867*, *supra* note 31. "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons" (*ibid*, s 53).

84 *Senate Reform Reference*, *supra* note 7 at para 59.

85 Heard, *supra* note 64 at 141.

86 *Ibid*.

the Commons."[87] That said, the Senate's "basic amending role is clearly accepted" by the other political actors,[88] and "[t]here are few defining principles about when and why the Senate should amend particular pieces of legislation."[89] Professor Heard observes, however, that there is some uncertainty about "the constitutional propriety of the Senate's defeat of measures already approved by the House of Commons."[90] Although there have been "five outright defeats [of such measures] in recent decades," Professor Heard concludes that they can only be justified, if at all, by the need to give effect to some important constitutional principle.[91]

Put together, these conventions and the practice of limited partisanship in the Senate make the upper house "a chamber of 'sober second thought'," a significant but "complementary" constitutional actor, to borrow a term much used by the Supreme Court.[92] It is these conventions that are the "assumptions that underlie the [constitutional] text" in relation to the Senate. Indeed, there is not one, but two such texts. There are, of course, the provisions of the *Constitution Act, 1867* relative to the constitution of the Senate, the appointment of Senators (notably section 24), and the powers of the Senate (notably sections 17 and 91, the latter insofar as it provides that Senatorial "advice and consent" is necessary for the enactment of legislation). But there is, in addition, paragraph 42(1)(b) of the *Constitution Act, 1982*, which specifies the way in which "[a]n amendment to the Constitution of Canada in relation to…the powers of the Senate and the method of selecting Senators" may be enacted.[93] The conventions that the Fathers of Confederation anticipated in the mid-1860s were long in place by the time the amending formula was crafted in the early 1980s.

Bound to, or unwilling to proclaim its departure from, the Diceyan view of conventions as inherently separate from and external to law, the Supreme Court chose not to even mention these conventions explicitly, and only referred to the "relationships" that they govern in defining the

87 *Ibid* at 143. Professor Heard contrasts the position of the Senate in this regard with that of the UK House of Lords which, despite the imposition of legal limits on its power by the *Parliament Act 1911* (UK) and *Parliament Act 1949* (UK), "ha[s] been far more active in amending and delaying legislation already passed by the House of Commons than has the Canadian Senate with its unlimited legal powers" (*ibid*).

88 *Ibid* at 144. Professor Heard notes that "[e]ven newly elected governments faced with an Opposition- dominated Senate have accepted the vast majority of amendments" (*ibid* at 145).

89 *Ibid* at 147.

90 *Ibid* at 152.

91 *Ibid* at 152.

92 *Ibid* at 142; Macdonald, *supra* note 73 at 375.

93 *Constitution Act, 1982*, *supra* note 9, s 42(1)(b).

concept of constitutional architecture. Yet it does not follow that in the Court's opinion in the *Senate Reform Reference* "conventions are," as Professor Scholtz puts it, "squeezed into constitutional marginalia."[94] Rather than relegated to the margins, conventions are strategically located between the lines of the Court's opinion. Far from "misconstru[ing] the absence of textual provisions regulating the balance of power between Parliament's two chambers as oversight rather than being consistent with conventional constitutionalism,"[95] the Supreme Court is well aware that "conventional constitutionalism" was always meant to supply the regulations that the Fathers of Confederation knowingly left unstated in the constitutional text. Indeed, in the *Senate Reform Reference*, conventions are well-nigh *all* there is to "constitutional architecture" understood as the constitutionally protected set of relationships between institutions.

To be sure, if one stipulates that conventions are constitutional rules that are not enforced by the courts, then any rule that is in any way "enforced," or simply said to be enforceable, *ipso facto* ceases to be a convention. Indeed, the idea of judicial enforcement of convention becomes not the "'holy grail' of Commonwealth constitutional scholarship,"[96] but a mere contradiction in terms. On this view, the enforcement or declaration of enforceability of a rule previously regarded as conventional necessarily reduces the number and importance of conventions in a constitutional order. Even the incorporation of conventions into an enforceable "constitutional architecture" becomes tantamount to their erasure.

Yet the interesting questions—and ones that must really be addressed in understanding the opinion that the Supreme Court gave, and that which it ought to have given, in the *Senate Reform Reference*—concern the role of the rules that would previously have been classified as conventional, regardless of the label one might attach to them once the opinion has been released. In my view, it is convenient to identify these rules as conventional in origin, partly because this is how we are used to thinking of them and partly because this label provides a useful indication of the source of these rules. Yet whatever label one might use, the real issue is whether the Court incorporated constitutional rules that were previously regarded as

94 Scholtz, *supra* note 49 at 686.

95 *Ibid* at 688.

96 Farah Ahmed, Richard Albert & Adam Perry, "Judging Constitutional Conventions" (2019) 17:3 Int'l J Const L 787 at 788, citing NW Barber, "Law and Constitutional Conventions" (2009) 125 LQ Rev 294 at 302.

matters of politics alone into law. As I have argued above, it did just that, and this is significant.

Reliance on constitutional architecture in the *Senate Reform Reference*, then, is neither business as usual, as Professor Karazivan has suggested, nor a denial of the importance of constitutional conventions, as Professor Scholtz posits, nor yet an assertion of an unlimited power to invalidate reforms of constitutional significance, as Professors Pal and Macfarlane worry. It is innovative, even revolutionary, because it amounts to the entrenchment in constitutional *law* of constitutional rules hitherto—and elsewhere perhaps still—deemed extra-legal.[97] To this extent Professor Scholtz is right: the *Senate Reform Reference* is a rejection of the *Patriation Reference*—if not of its "understanding of what the Canadian Constitution is all about," then at least of its embrace of Diceyan orthodoxy postulating the separation of law and convention.[98] But this rejection is not open-ended, because the number of conventions that could potentially be entrenched and enforced as part of "constitutional architecture" is finite and they may be identifiable in advance. Nevertheless, important questions remain.

III. WHICH CONVENTIONS ARE PART OF THE CONSTITUTION'S ARCHITECTURE?

Most obviously, saying that there is an entrenched constitutional architecture consisting—at least in some significant part—of constitutional conventions does not tell us which conventions, beyond those involved in the *Senate Reform Reference* itself, are part of this architecture. Conventions, as the Supreme Court itself has long acknowledged, make up an "important

97 Compare *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, [2018] AC 61 (holding, *inter alia*, that a convention—even one recognized in legislation—is not susceptible of judicial enforcement) and *R (Miller) v Prime Minister*, [2019] UKSC 41, [2020] AC 373 [*Miller (No 2)*], which arguably enforces conventions. See *e.g.* John Finnis, "The Unconstitutionality of the Supreme Court's Prorogation Judgment" (2019), online (pdf): *Policy Exchange* <policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf> at para 26; Adam Perry, "Enforcing Principles, Enforcing Conventions" (3 December 2019), online (blog): *UK Constitutional Law Blog* <ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/>; Leonid Sirota, "Heresy!" (4 November 2019), online (blog): *Double Aspect* <doubleaspect.blog/2019/11/04/heresy>.

98 Scholtz, *supra* note 49 at 691.

[and] a necessary part of our Constitution."[99] However, as Andrew Heard convincingly argues, it is a "mistake," if a "widespread" one, "to treat [conventions] as if they are all the same and belong in just one category."[100] They are numerous and varied, and it is at least possible that only some, but not others, form part of the Constitution's entrenched architecture.

In this respect, the Supreme Court's lack of candour, evident in its failure to acknowledge the role of conventions in its decision, is lamentable. A more forthright discussion of conventions may well have forced the Court to establish the criteria that qualified conventions for promotion to the status of legal constitutional rules. By relying on an ill-defined concept of "constitutional architecture," the Court was able to sidestep this admittedly difficult question. Yet the short-term economy of judicial effort comes at the expense of longer-term guidance to future courts and, perhaps more importantly, to would-be constitutional reformers.

What can we infer about the constitutional status of conventions in the absence of clear guidance from the Supreme Court? In this Part, I consider two potential ways of fitting conventions within the "architectural" framework developed, insofar as it was developed, in the *Senate Reform Reference*. The first focuses on the relative importance of different conventions; the second, on the relationship between conventions and constitutional text. I conclude that neither approach is satisfactory *as a means of defining constitutional architecture*. However, in the next Part, I argue that the textual approach is nevertheless sound, and should be adopted even as the unhelpful concept of architecture ought to be discarded.

A. The Importance Criterion

There is, admittedly, no agreed-upon classification of the importance of conventions. As already noted, the very possibility of such a classification is sometimes denied.[101] Yet the idea that some conventions are especially important, while others less so, is intuitively appealing. The majority opinion on the conventional question in the *Patriation Reference* suggested that an incumbent government's attempt to retain office after the opposition won the majority of seats in the House of Commons "could be regarded

99 *Patriation Reference*, *supra* note 5 at 877; *Secession Reference*, *supra* note 11 at para 32. See also Heard, *supra* note 64 at 1. "Every major aspect of the [C]onstitution is shaped by conventions" (*ibid*).

100 Heard, *supra* note 64 at 211.

101 See note 100 and accompanying text.

as tantamount to a *coup d'état*."[102] Not all breaches of convention could be described in this way: think, for example, of inappropriate ministerial criticism of a judge or a court's verdict. This is a breach of convention that may call for denunciation but seems unlikely to be by itself the harbinger of an immediate subversion of the Constitution.[103] Thus, the idea of sorting conventions according to their importance should not be dismissed out of hand.

Professor Heard proposes a hierarchy of conventions that could, in his view, serve to guide decisions as to their judicial enforcement, among other things. The hierarchy is based on the importance of, and agreement on, the principles underlying conventional rules and the terms of the rules themselves, as well as precedents.[104] Professor Heard distinguishes "fundamental," "semi-rigid," and "flexible conventions" (as well as "infra-conventions" and "usages," neither of which are conventions properly so called). Fundamental conventions, which "closely embody or buttress vital constitutional principles and are supported by a strong consensus on both the value of the principle involved and the terms of the rule itself," must be sedulously followed in accordance with their terms, at the risk of "significant changes in the operation of the [C]onstitution."[105] By contrast, although "their absence would significantly alter the operation or character of the [C]onstitution," semi-rigid conventions "have some flexibility in terms," either in the sense that these terms are somewhat vague or that they could be slightly modified without significant effect.[106] Finally, what Professor Heard terms flexible conventions "may be disregarded from time to time without significant impact," although they could not be discarded altogether without seriously affecting the Constitution.[107] Borrow-

102 *Patriation Reference*, *supra* note 5 at 882.

103 See Sean Fine, "Trudeau, Wilson-Raybould Draw Lawyers' Ire Over Remarks in Wake of Stanley Verdict", *The Globe and Mail* (19 February 2018), online: <theglobeandmail.com/news/national/trudeau-wilson-raybould-draw-lawyers-ire-over-remarks-in-wake-of-stanley-verdict/article38025701/>. But see "Was it wrong for Trudeau and Wilson-Raybould to Tweet About the Boushie Verdict? Two Experts Debate", *CBC News* (14 February 2018), online: <cbc.ca/news/opinion/tweets-boushie-debate-1.4534208> (presenting conflicting views on the issue).

104 Heard, *supra* note 64 at 207.

105 *Ibid* at 211–13, 215.

106 *Ibid* at 212.

107 *Ibid*.

ing terms used by Jeremy Waldron in a different context, we might say that there is "room for exemption" in the operation of these conventions.[108]

Fundamental, semi-rigid, and flexible conventions are all the subject of "a consensus of opinion over the application of their principles. Furthermore, those principles would be tangibly undermined in the absence of these conventions."[109] However, in Professor Heard's view, only the former two types are suitable for "formal codification by…constitutional entrenchment"[110] (*i.e.* entrenchment in the constitutional text) or for judicial application.[111] There is sufficient consensus around the terms of fundamental and semi-rigid conventions, and they are so important to the constitutional framework that it would be appropriate to treat them as essentially law-like. By contrast, "[t]he circumstances in which details of [flexible conventions] may be substituted or may be breached with propriety ought to be determined in the political arena rather than in any judicial setting."[112]

Now, according to Professor Heard, the Senate's acquiescence to the policy choices of the House of Commons is a flexible convention.[113] Although it is important that the Senate give way to the House of Commons as a general matter, occasional rebellions are not unknown,[114] and at least arguably do not imperil the normal functioning of Parliament or do irreparable harm to the democratic principle.[115] It would, however, be difficult to describe precisely when, or how often, the Senate might reject bills passed by the House of Commons. In Professor Heard's view, the

---

108 See Jeremy Waldron, "One Law for All? The Logic of Cultural Accommodation" (2002) 59:1 Wash & Lee L Rev 3 at 18. Waldron's topic is religiously- or culturally-motivated exemptions from generally applicable laws. With some laws, he argues, no exemptions could be tolerated—it is imperative that they be applied to each case that falls within their remit—while in other cases an exemption can occasionally be made without compromising the law's integrity.

109 Heard, *supra* note 64 at 213.

110 *Ibid* at 218.

111 *Ibid* at 221. "If there is a place for conventions in the courtroom, it will apply to fundamental conventions and semi-rigid conventions" (*ibid*).

112 *Ibid* at 218–19.

113 Heard, *supra* note 64.

114 See note 90 and accompanying text.

115 But see Andrew Coyne, "New Senate Activism Undermines the Very Principle of Democracy", *National Post* (8 June 2016), online: <news.nationalpost.com/full-comment/andrew-coyne-new-senate-activism-undermines-the-very-principle-of-democracy> arguing that for Senators "to substitute their own judgment for those the people elected to represent them is in gross violation of that principle" (*ibid*). On this view, the rule of Senatorial deference to the House of Commons would be a semi-rigid convention (if it allowed at least some uncertain measure of amending capacity) or even a fundamental one.

convention that the Senate must give way to the House of Commons is thus unsuited for formal entrenchment and judicial enforcement.

Yet we know that this convention is part of the constitutional architecture that the Supreme Court, in the *Senate Reform Reference*, has held to be entrenched and thus enforceable, if only against attempts to amend the Constitution. Perhaps the Court's opinion to that effect was simply misguided. If it was, this is arguably a consequence of its failure to confront the issue of conventions directly. Had it thought clearly about the conventions at issue, it may have concluded, as Professor Heard seems to suggest it should have, that the conventions at issue were unsuited for judicial enforcement, even if others would have been amenable to it.

But this seems a little too quick. Professor Heard's warning against the blanket rejection of a judicial role in giving effect to conventions excludes flexible conventions, yet it seems applicable to them: "[a]ny judicial decision based only on positive laws alone, and ignoring relevant fundamental or semi-rigid conventions, would enforce a legal framework bearing little semblance to the actual character of the [C]onstitution."[116] The Supreme Court's opinion on the constitutionality of "consultative" elections in the *Senate Reform Reference* rests on the conclusion that the same would have been true if it accepted the federal government's invitation to ignore the flexible convention of Senatorial deference.[117]

There is, I would argue, a distinction to be made here, which Professor Heard, whose book was published too early to take the Supreme Court's opinion into account, did not anticipate. It would indeed be very difficult, perhaps impossible and likely quite undesirable, for a court to decide how much "room for exemption" there is in the convention of Senatorial deference to the Commons,[118] or when it "may be breached with propriety."[119] But it does not follow that a court faces similar difficulties in finding that this convention exists (even though its precise contours may be uncertain) and the Constitution would be altered, not indeed by a momentary departure from this convention, but at any rate by legislation whose effect would be to thoroughly undermine it.

This suggests, however, that Professor Heard's classification of conventions is not a helpful guide to deciding which of them are, and which are not, sufficiently important to be regarded as forming part of the Constitution's

116 Heard, *supra* note 64 at 221.

117 *Senate Reform Reference*, *supra* note 7 at paras 55–60.

118 Waldron, *supra* note 108 at 18.

119 Heard, *supra* note 64 at 219.

architecture. Perhaps a different classification would succeed where Professor Heard's fails. The failure of such a well-thought-out effort may give us pause, but this is not enough to prove that any attempt to remedy it is *bound* to be futile. Nevertheless, instead of either making such an attempt here or venturing a conclusive demonstration of its impossibility, I will next consider a different way of classifying conventions: not based on their importance, but on a more easily applicable measure.

B. The Textual Criterion

Another possibility is that the "constitutional architecture" described by the Supreme Court encompasses those conventions that are among the "assumptions" underpinning specific provisions of the constitutional text. As we have seen, the part of the *Senate Reform Reference* that actually relied on the concept of "architecture" concerned the terms "the powers of the Senate and the method of selecting Senators" in paragraph 42(1)(b) of the *Constitution Act, 1982*.[120] These terms cannot be fully understood without reference to the conventions limiting the Senate's ability to oppose the House of Commons and making appointment to the Senate the prerogative of the Prime Minister, rather than the result of a more direct democratic process. It is telling, for example, that Professor Scholtz's attempt to isolate "the legal meaning of the 'method of selecting Senators'" involves a re-writing of what she deems an "unfortunate" constitutional text.[121] Professor Scholtz thinks that the framers of Part V made a mistake in not specifying "who is charged with the constitutional authority to make any legal choice or selection with respect to [S]enators."[122] Yet it seems plausible that the framers' circumlocution, their choice of the somewhat vague expression "method of selecting Senators," was deliberate. If they had wanted to entrench nothing more than the Governor General's role of formally "summoning" Senators, they could easily have done so.

There are other parts of the *Constitution Acts, 1867* and *1982* that similarly rely on "assumptions" about constitutional conventions. Perhaps most notably, references to "the Queen's Privy Council for Canada,"[123] to

120 *Senate Reform Reference*, *supra* note 7 at paras 59–60.

121 Scholtz, *supra* note 49 at 690.

122 *Ibid*. Professor Scholtz deplores what she terms the "usage of the passive voice in section 42(1)(b)"—yet the *Constitution Act, 1982*, *supra* note 9, s 42(1)(b) does not contain the passive voice in "the powers of the Senate and the method of selecting Senators": *ibid* at 688, 690.

123 *Constitution Act, 1867*, *supra* note 31, s 11.

the Governor General acting on that Council's advice,[124] and thus to "the office of…the Governor General,"[125] assume the existence of conventions making the cabinet competent to carry out the Privy Council's constitutional functions and requiring the Governor General to accept the cabinet's advice. These conventions must, therefore, be regarded as part of constitutional architecture.

By contrast, a number of important conventions of the Canadian Constitution appear to contradict rather than support the provisions of constitutional texts. Perhaps the most significant such conventions are those negating the federal powers of reservation and disallowance of provincial legislation,[126] expressly provided for by the *Constitution Act, 1867*.[127] Another example, to which Professor Heard refers, is the conventional desuetude of section 56 of the *Constitution Act, 1867*, which requires the Governor General to transmit federal legislation to which he or she assents to the UK government, giving it the opportunity to disallow it. It is tempting to think that such conventions are not part of the constitutional architecture, because they are not among the "assumptions" that must necessarily be made to make sense of constitutional texts. Yet this may be too quick.

It may plausibly be argued that the conventions that nullify some of the Constitution's textual provisions are among the underlying assumptions that explain why this text was not amended more than it was in 1982 or at some other point. To take up Professor Heard's example, had section 56 of the *Constitution Act, 1867* not been nullified by convention, it would possibly have been repealed at the time of Patriation, if not earlier, as part of Canada's development towards independence. Convention made its repeal superfluous. The same may well be true of the federal power of disallowance. But have the relevant conventions themselves become law, as part of "constitutional architecture?" In my view, the Supreme Court's opinion in the *Senate Reform Reference* does not provide an answer to this question.

It seems, then, that links to the provisions of the constitutional texts, important though they may be, can no more serve as the decisive criterion for designating conventions as belonging or not to constitutional architecture than Professor Heard's classification of their importance. The notion of architecture, although it is not quite open-ended, is still

124 *Ibid*, ss 13, 58, 93(3) and (4).

125 *Constitution Act, 1982*, *supra* note 9, s 41(a).

126 Heard, *supra* note 64 at 157.

127 *Constitution Act, 1867*, *supra* note 31, s 90.

significantly vague. In practice, this may not matter. Litigation involving section 56 seems an altogether hypothetical prospect, and even the disallowance power or the royal veto are unlikely to become relevant.[128] Nevertheless, the Supreme Court's unnecessary multiplication of constitutional entities is confusing. Yet this is not to say that the relationship between conventions and text is of no import generally or that it should have been ignored in the *Senate Reform Reference*—quite the contrary, as I shall presently argue.

IV. CONSTITUTIONAL TEXT, CONTEXT, AND CONVENTIONS

As suggested above, there is a close connection between some provisions of Canada's constitutional text and constitutional conventions. Indeed, as Professor Heard insists, these provisions cannot be usefully understood without reference to conventions.[129] As also noted above, provisions related to the Crown and the Privy Council are obvious examples, as are those related to Senatorial appointments and the Senate's powers. To give another albeit more controversial example, it is arguable that the entrenchment of "the composition of the Supreme Court of Canada" in subsection 41(d) of the *Constitution Act, 1982*[130] refers not only to the number of judges, including the number of judges from Québec, set out in positive law,[131] but also to the regional distribution of the Court's non-Québec seats, governed by convention.[132] To be sure, in the *Supreme Court Act Reference*, the Court did not refer to these conventions. Yet "the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982"[133] included conventional criteria, as well as legal ones, although of course no issue relating to conventions arose in that reference.

---

128 But see Shawn Jeffords & Paola Loriggio, "Toronto Asking Feds to Stop Ontario Council-Cutting Plan", *CTV News* (13 September 2018), online: <ctvnews.ca/canada/toronto-asking-feds-to-stop-ontario-council-cutting- plan-1.4091993>. The City of Toronto made a "request for the federal government to use its disallowance powers" to prevent the Ontario legislature from invoking section 33 of the *Canadian Charter of Rights and Freedoms* [*Charter*] to override a finding of unconstitutionality of a statute reducing the number of seats on the City Council. However, the federal government refused.

129 See text accompanying note 116.

130 *Constitution Act, 1982*, *supra* note 9, s 41(d).

131 *Supreme Court Act*, *supra* note 20, ss 4(1), 6.

132 Heard, *supra* note 64 at 164–65.

133 *Supreme Court Act Reference*, *supra* note 14 at para 91.

More precisely, conventions are part of the context within which legal texts, including entrenched constitutional provisions, are drafted.[134] Relevant conventions help courts elucidate the meaning of words that might otherwise appear vague, or draw the boundaries of provisions that may seem open-ended. When they interpret legal texts embedded in a context of conventions, courts ought to heed Professor Heard's above-noted warning that ignoring these conventions will risk distorting the law that the courts purport to enforce. Courts ought to give effect to those conventions that form part of the context of the constitutional provisions they apply.

Fabien Gélinas and I defended just this approach to resolving the questions before the Supreme Court in the *Senate Reform Reference*, urging the Supreme Court to adopt a reading of paragraph 42(1)(b) of the *Constitution Act, 1982*, which took conventions into account in the *Senate Reform Reference*.[135] This would have meant looking to conventions to find that the "powers of the Senate" were circumscribed by a duty of deference to the elected House of Commons, and that the "method of selecting Senators" entrenched by paragraph 42(1)(b) involved prime ministerial discretion rather than democratic choice. Both these features are thus protected from unilateral amendment by Parliament.

We argued for this position from a living constitutionalist perspective, noting that "if 'underlying principles…breathe life into' the [C]onstitution, the conventions that depend on, and give effect to, these principles are among the most important concrete manifestations of this life."[136] If one adopts a living constitutionalist approach to interpretation, one should strive to ensure that the constitutional text refers to the values and realities that exist at the time of interpretation.[137] Insofar as conventions, as they stand from time to time, embody these values[138] and are among these realities, they must be taken into account in giving effect to the text.

However, one need not be a living constitutionalist to think that constitutional interpretation can and ought to take conventions into account.

---

134 Ahmed, Albert & Perry, *supra* note 96 at 790.

135 Gélinas & Sirota, *supra* note 8 at 122.

136 *Ibid* at 117, quoting *Secession Reference*, *supra* note 11 at para 50.

137 See *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22. "[O]ur Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life" (*ibid*).

138 See WS Holdsworth, "The Conventions of the Eighteenth Century Constitution" (1932) 17:2 Iowa L Rev 161 at 163 (explaining that conventions are "the motive power of the [C]onstitution," ensuring "that the [C]onstitution works in practice in accordance with the prevailing constitutional theory of the time").

This position is consistent with at least some forms of originalism, notably "new" or "original public meaning" originalism.[139] As Lawrence Solum explains, public-meaning originalists seek to identify the "communicative content" of a constitutional text at the time of its enactment. To do so, they must identify "the publicly available context of constitutional communication"[140]—publicly available, of course, at the time of the communication, which is to say at the moment when the constitutional text was entrenched. The context "combines with the semantic meaning of the words and phrases to produce the 'communicative content' of the constitutional text."[141] Conventions can be part of the "publicly available context" within which constitutional texts are embedded; in Canada, they are, as explained above.[142]

It is not my purpose to dwell on the controversy between living constitutionalism and originalism here. Suffice it to note that the Supreme Court, despite its occasional pronouncements in favour of living constitutionalism,[143] has not only never clearly rejected originalism, properly understood,[144] but in fact resorts to it frequently, albeit erratically[145] (not least in the *Senate Reform Reference* itself).[146] Addressing this issue in any more detail here would be not only impracticable, but also unnecessary. At least so far as conventions relevant to the interpretation of Part V of the *Constitution Act, 1982* are concerned, there may not yet be a substantial difference in outcomes between a living constitutionalist and a public-meaning originalist approach, because the conventions of the Canadian Constitution have not substantially evolved between the moment of the entrenchment of Part V and the present.

---

139 For a discussion of originalism and its varieties, see Lawrence B Solum, "What Is Originalism? The Evolution of Contemporary Originalist Theory" in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 12; Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42:1 Queen's LJ 107 at 122–32.

140 Solum, "Unwritten Constitution", *supra* note 67 at 1939.

141 *Ibid*.

142 See text accompanying notes 73–84 describing the framers' expectations as to the conventions that would apply to the upper house as the context within which they drafted the provisions of the *Constitution Act, 1867* relative to the Senate.

143 See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536; *Reference re Same-Sex Marriage*, *supra* note 137; *R v Comeau*, 2018 SCC 15.

144 Oliphant & Sirota, *supra* note 139.

145 See Léonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50:2 UBC L Rev 505.

146 See text accompanying note 38.

Either a living constitutionalist or a public-meaning originalist interpreter ought, then, to read a number of the provisions of the *Constitution Act, 1867* and *Constitution Act, 1982* as incorporating conventions. Ostensibly, in the *Senate Reform Reference*, the Supreme Court took a different approach, not discussing conventions and instead speaking of constitutional architecture. Yet, as suggested above, this was little more than a different label attached to the same thing, for the architecture in question is one of conventions. Unfortunately, as I argued in the previous Part, the Court's approach is confusing because it does not clarify which conventions are part of the entrenched "constitutional architecture." It would have been preferable to answer the question about the constitutionality of the "consultative" elections project by directly discussing the conventions in question and the way in which they shape the meaning of paragraph 42(1)(b).

Relying on conventions insofar—and only insofar—as they are relevant to the interpretation of specific constitutional provisions makes it possible to give a clear answer to the question of what courts ought to do about those conventions that contradict or negate constitutional text, such as those that obviate the federal powers of reservation and disallowance. Clear constitutional text ought to prevail; it could not "be interpreted away by invoking conventions."[147] Thus, "Parliament could not formalize, by legislation, the abolition of the royal veto or the power of disallowance, because, although fallen into disuse and inexistent as a matter of convention, these powers are specifically provided for by explicit constitutional provisions."[148] As Professor Scholtz cogently insists, judicial enforcement of conventions in such circumstances would amount to (acknowledgment of an) "amendment of the Constitution without at all engaging the explicit procedures required by Part V [of the *Constitution Act, 1982*]'s blueprint" and thus requires courts to "jettison Part V."[149]

That said, I would note that Professor Heard is right to raise the question of "whether formal enforcement should be given to an archaic legal rule that conflicts with a fundamental convention," such as "the requirement in [section] 56 of the *Constitution Act, 1867* that the Governor General send a copy of all bills passed by Parliament to a British Secretary of State."[150] The better course of action may be for the court to declare such a legal rule non-justiciable. Moreover, the courts should in appropriate

147 Gélinas & Sirota, *supra* note 8 at 117.

148 *Ibid* at 118. The provisions in question are *Constitution Act, 1867*, *supra* note 31, ss 55, 57, 90.

149 Scholtz, *supra* note 49 at 693.

150 Heard, *supra* note 64 at 229.

cases—for example, if the federal government exercises its conventionally-barred but legally extant disallowance power— declare that the action in question is unconstitutional in the conventional sense albeit not in the legal one, much as the Supreme Court prospectively did in the *Patriation Reference*.

Admittedly, focusing on the relationship between constitutional text and conventions as part of the context in which it must be understood will not solve all the difficulties that can arise when conventions interact with constitutional texts. There is, for instance, agreement on the general proposition that "the interpretation of the expression 'the office of…the Governor General' [in subsection 41(a) of the *Constitution Act, 1982*] must take into account the convention that requires the Governor General to follow the advice of the Prime Minister and the cabinet."[151] It is not clear, however, what ought to follow from this, for example, if the courts were asked to pronounce on the constitutionality of a statute interfering with the Prime Minister's advice-giving function. Imagine, for instance, legislation explicitly preventing the Prime Minister from advising prorogation of Parliament without the consent of a majority of the House of Commons.

Mark Walters and Warren Newman have urged that the Prime Minister's and the cabinet's advice-giving functions are protected from amendment by subsection 41(a) of the *Constitution Act, 1982*, as being (a conventional) part of the "office of…the Governor General." The opposite view, which Professor Gélinas and I have defended, is that the entrenched "office of…the Governor General" relevantly involves following advice, regardless of how the substance of that advice is determined.[152] Nevertheless, regardless of who is right on this specific point, both sides agree that an attempt to interpret subsection 41(a) without regard to the conventions that effectively transfer many vice-regal powers to the cabinet or the Prime Minister would be divorced from constitutional reality.

The approach defended in this Part may, in many cases, be little different from the one the Supreme Court adopted in the *Supreme Court Act*

151 Gélinas & Sirota, *supra* note 8 at 116; Walters, *supra* note 8 at 58 (arguing that (some) constitutional conventions are incorporated into law by constitutional provisions relative to the Queen, Governor General, and Privy Council); Warren J Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis" (2009) 27 NJCL 217 at 224–25 (arguing that interference with the Prime Minister's advice to the Governor General would amount to interference with the "Office of the Governor General" within the meaning of subsection 41(a) of the *Constitution Act, 1982*).

152 See Gélinas & Sirota, *supra* note 8 at 114–16.

Reference, although it is superior in that it is simpler and less confusing. Of course, it departs more overtly than the invocation of a "constitutional architecture" from the orthodox view that there exists a clear separation between the realms of constitutional law and convention. (It is questionable, however, for how much longer the orthodoxy can retain its status in the wake of the *Senate Reform Reference* and, perhaps even more significantly, of the UK Supreme Court's recent decision in *Miller (No 2)*[153]). Thus, objections to the incorporation of any conventions into the sphere of constitutional law and thus the remit of the courts—to the legalization of conventions, as it were—apply to both the Supreme Court "architectural" approach and to the one defended here. They are the focus of the next Part.

V. OBJECTIONS TO THE LEGALIZATION OF CONVENTIONS

Two major lines of criticism emerge in the scholarly responses to the Supreme Court's reasoning in the *Senate Reform Reference*, beyond the uncertainty of its implications. First, the incorporation of conventions within the realm of constitutional law is said to be illegitimate. Second, it is said to close down avenues for necessary constitutional reform. This criticism is naturally directed at the Court's invocation of the architectural metaphor, but, as noted above, it would also have been relevant had the Court discussed conventions directly as sources of the meaning of the constitutional provisions it was interpreting.

A. Illegitimacy?

Conventions have, at least since Dicey's time, been thought not to be part of the law of the Constitution, and perhaps to be incapable of being part of it. In the *Patriation Reference*, the Supreme Court insisted that there is a clear dividing line between law and convention, notably because "[w]hat is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute."[154] The *Senate Reform Reference*, I have argued, goes against this view and ought to have challenged it more overtly. This raises questions, in Professor Glover's words, about "how the conventions became entrenched and the legitimacy of that process."[155] Put differently, how can the Court now make

153 See references in note 97.

154 *Patriation Reference*, *supra* note 5 at 784.

155 Glover, "Lessons", *supra* note 45 at 251.

into "legal limitations" rules that were not expressed in constitutional text? However, in my view, the objections to the legitimacy of the incorporation of at least some conventions into the realm of constitutional law—either as "constitutional architecture" or as part of the meaning of constitutional texts—are unpersuasive.

To begin with, the *Senate Reform Reference* was not the first time the Supreme Court rejected, without saying so, the position its majority took in the *Patriation Reference*.[156] It had already done so in the *Secession Reference*. There, it unanimously declared that "[u]nderlying constitutional principles…have 'full legal force'," [157] citing for this proposition a dissenting opinion in the *Patriation Reference* without even acknowledging that it was citing a dissent. Indeed, there is a better reason than mere irreverence to point this out. The Court has stepped back from what I have described elsewhere as the "pusillanimous positivism" that characterized the majority opinion in the *Patriation Reference*, and accepted that explicit expression in a constitutional text is not the only measure of what makes constitutional law.[158] To that extent, the *Senate Reform Reference* is not an innovation, but the continuation of a now well-established trend.

Is there any reason why constitutional principles are fit subjects for judicial recognition and occasional enforcement, but conventions, or an "architecture" consisting of conventions, are not? I do not think so. Conventions and underlying principles are, after all, very closely related. In Professor Heard's words, "[c]onventions are, in essence, evidence of the acceptance of these principles and of the rules of behaviour expected when these principles are applied to real-world constitutional processes."[159] This point deserves to be sharpened even more. Under the Canadian Constitution, conventions are sometimes *essential* evidence of the acceptance of fundamental principles. But for the conventions of responsible government, could the Canadian Constitution be fairly described as democratic? But for the conventions preventing the use of federal disallowance powers,

156 Nor is this the only context in which the Supreme Court rejects its precedents without engaging with them. See Dwight Newman, "The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study" (2016) 95:2 Nebraska L Rev 432 at 447. "[*S*]*ub silentio* overturning of precedents has been part of the *modus operandi* of the Supreme Court of Canada as of late" (*ibid*).

157 *Secession Reference*, *supra* note 11 at para 54, quoting *Patriation Reference*, *supra* note 5 at 845 (per Martland and Ritchie JJ).

158 Sirota, "Court and Conventions", *supra* note 6 at 45.

159 Heard, *supra* note 64 at 227.

could the Constitution be described as truly federal?[160] Professor Heard concludes that it would be "odd to embrace principles *simpliciter* but object to widely accepted rules that demonstrate the application and limits of these principles."[161] It is difficult to disagree.

That said, the Supreme Court's embrace of principles has often been self-doubting and half-hearted. In the *Secession Reference*, even as it went on to recognize the "full legal force" of unwritten principles, the Court insisted that "[o]ur Constitution is primarily a written one."[162] Later, it would unanimously insist that the principle of "[t]he rule of law is not an invitation to trivialize or supplant the Constitution's written terms. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text."[163] And surely, if the rule of law "is not an invitation to…supplant" constitutional text, neither are such principles as democracy or federalism. More recently still, in *Trial Lawyers Association of British Columbia v British Columbia (AG)*, the majority was careful to invoke the rule of law only as "further support" for conclusions reached on the basis of an interpretation of section 96 of the *Constitution Act, 1867*, rather than an independent foundation for them.[164] Nevertheless, Justice Rothstein, in dissent, accused the majority of "using an unwritten principle to support expanding the ambit of [section] 96 to such an extent [that] subverts the structure of the Constitution and jeopardizes the primacy of the written text."[165] Clearly, maintaining "the primacy of the written text" is a recurring, although not a constant, preoccupation for the Court.

Some arguments for doing so are obvious. One is democracy, understood as requiring courts to give effect to the choices made by the democratically empowered framers of the constitutional text. In *Imperial Tobacco*, the Court criticized a "conception of the unwritten constitutional principle of the rule of law [that] would render many of our written constitutional rights redundant and, in doing so, undermine the delimitation

160 See KC Wheare, *Federal Government*, 3rd ed (London, UK: Oxford University Press, 1953) at 21 (arguing that "although the Canadian [C]onstitution is quasi-federal in law, it is predominantly federal in practice").

161 Heard, *supra* note 64 at 227.

162 *Secession Reference*, *supra* note 11 at para 49.

163 See *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 67 [*Imperial Tobacco*].

164 2014 SCC 59 at para 38.

165 *Ibid* at para 93. See also *ibid* at para 99 (relying on the passage from *Imperial Tobacco*, *supra* note 163).

of those rights chosen by our constitutional framers."[166] Another argument is the rule of law, and in particular its requirement that law (including, in this instance, the law of the Constitution) be clear or intelligible. In the *Secession Reference*, the Court pointed out that "[a] written constitution promotes legal certainty and predictability."[167] By contrast, unwritten principles can seem "amorphous," as the Court disparagingly described them in *Imperial Tobacco*.[168]

However, these arguments apply with rather less force to constitutional conventions than to underlying principles. Constitutional principles such as democracy, federalism, and the rule of law are potentially very broad, and their meanings are contested. They are capable of a variety of applications, some incompatible with others, and many incompatible with constitutional text.[169] Although it is fair to say that the framers of 1867 or those of 1982 were contemplating a democratic, federal polity subject to the rule of law, it is equally fair to say, as the Supreme Court does in *Imperial Tobacco*, that they made specific choices about how these principles would be implemented, and that these choices are entitled to our respect (at least until we can gather sufficient consensus to overturn them through the constitutional amending procedure).

It is also true, as we have seen, that the framers were contemplating and indeed relying on the existence of some specific constitutional conventions. But in the case of conventions, what does respect for framers' authority require? To be sure, it might be argued that the framers' choice not to write conventional rules into the constitutional texts must be respected.[170] Yet it is also arguable that the framers' wish to create a polity that would *inter alia* be governed by these specific rules, and their choice

166 *Imperial Tobacco*, *supra* note 163 at para 65.

167 *Secession Reference*, *supra* note 11 at para 53.

168 *Imperial Tobacco*, *supra* note 163 at para 66. See also Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's LJ 389.

169 See Louis-Philippe Lampron, "Loi sur la laïcité: déroger aux chartes n'empêchera pas les contestations" (29 March 2019), online (blog): *Contact* <contact.ulaval.ca/article_blogue/laicite-deroger-aux-chartes-nempechera -pas-les-contestations> (arguing that the unwritten principle of protection of minority rights can prevent resort to section 33 of the *Charter* in certain circumstances, despite the latter's apparently unrestricted terms).

170 See Scholtz, *supra* note 49 at 690 (arguing that "the framers of 1982 could have codified all of the conventions of responsible government" but chose not to do so "for good constitutional reason"; however, it might not be so clear whether the framers were moved entirely by "good reason" rather than a desire to act quickly on such consensus as was to be found and defer other issues to the future, or simply a perceived lack of urgency to codify rules that were universally complied with in any event).

to draft constitutional provisions in a way that only makes sense if the continued existence of these rules is presumed, must be carried into effect by courts, as well as by political actors.

The rule of law, if anything, militates even more strongly in favour of recognizing conventions as legal rules. Although the legal recognition of conventions is sometimes criticized, or even said to be impossible, due to their uncertainty, these claims are largely exaggerated.[171] The requirements of the most important conventions of the Canadian Constitution—those which Professor Heard describes as "fundamental" and "semi-rigid"—are quite clear; in many cases, they are unambiguous. Even those conventional rules that are not so precise, and which Professor Heard argues do not lend themselves as easily to legal enforcement, can provide a basis for some judicial decisions, as the *Senate Reform Reference* shows. At a minimum, concerns over clarity and predictability do not categorically preclude the judicial enforcement of conventions, but rather suggest caution in individual cases.

But there is more. As Professor Solum explains in considering whether public-meaning originalists can embrace the notion of an "unwritten constitution," or of "extra-textual sources" of constitutional law, "the meaning of the Constitution for the public (at the time of framing and ratification) is a function of both semantic content and context,"[172] "[s]o public-meaning originalists should reject clause-bound interpretivism."[173] Needless to say, living constitutionalists do not disagree with public-meaning originalists about the importance of context to understanding the Constitution—only about the time at which that context (as well as the text) must be examined. As already noted, constitutional conventions are an essential part of the context in which the Constitution must be understood, whether at the time of its framing (if the relevant conventions already existed or were publicly expected to govern its functioning once it went into effect) or at the time of interpretation.

Professor Scholtz, however, adds another dimension to the critique of the use of both constitutional principles and constitutional architecture

171 See Colin R Munro, "Laws and Conventions Distinguished" (1975) 91 Law Q Rev 218 at 232–33 (arguing that "uncertainty abounds" as to the very existence of conventions); Geoffrey Marshall, "What Are Constitutional Conventions?" (1985) 38:1 Parliamentary Affairs 33 at 34 (arguing that "[a] convention's existence may not be doubted but many of its applications to particular factual situations may be open to argument"). See also Sirota, "Jurisprudence", *supra* note 6 at 37–38 (reviewing and responding to claims of conventions' uncertainty).

172 Solum, "Unwritten Constitution", *supra* note 67 at 1947.

173 *Ibid* at 1963.

by arguing that it reflects an overconfident assumption of constitutional coherence. She doubts "that constitutions can possibly be coherently designed, free from internal frictions and contradictions," and that "the foundational principles which the Court has identified," and which "have multiplied with the passage of time…can act in symbiosis with themselves and with our constitutional texts, with none ever trumping any other."[174] Professor Scholtz suggests that, since a certain amount of "internal frictions and contradictions" among a constitution's legal sources and between such sources and citizens' commitments from time to time is inevitable, the courts ought to reject the view "that law can do it all"[175] and acknowledge the significance of extra-legal constitutional norms—and of their extra-legal character.

Yet while the idea of a complete harmony between the principles of a constitution may be implausible, it is not clear that absolute coherence of a constitution's legal sources is necessary to justify their judicial enforcement.[176] Surely, judges are capable of deciding that, at least in the circumstances of a given case, one principle weighs more heavily than another, as the Supreme Court did in opining (correctly or not is beside the point here) that judicial independence outweighed democratic control over the public purse,[177] or of taking a convention into account when interpreting constitutional text, as they implicitly did (and ought to have done explicitly) in the *Senate Reform Reference*.

Besides, while a healthy skepticism about the capacities of constitutional designers is a commendable feeling, it seems excessive to deny that they can achieve at least some real measure of coherence and intelligibility. As discussed above, the Fathers of Confederation had a reasonably, perhaps even a remarkably, good understanding of how the Senate they were creating would function—including of the conventions that would govern its relationships with the other institutions of government. The Constitution they designed may not be able to "do it all," but it can in fact do a great deal.

As for the question of the process whereby conventions, or a convention-based architecture, become entrenched, there are two possible answers. One, which has already been suggested, would be that these rules are part of the context within which constitutional provisions must be

174 Scholtz, *supra* note 49 at 31–32.

175 *Ibid* at 32.

176 But see Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

177 *Provincial Courts Reference*, *supra* note 1.

understood, whether they were part of this context at the time the Constitution was made (on the originalist view) or are at the time it is interpreted (on a living constitutionalist view). In other words, constitutional conventions have been part of constitutional law all along (again on the originalist view) or perhaps enter the law through the mysterious process of the growth of the constitutional "living tree" (on the living constitutionalist view). However, it is arguable that, in some cases, the conventions are not really new branches of that tree at all but were indeed there right when it was planted.[178] The recognition of this context's legal significance is not an innovation of dubious legitimacy, but rather the correction of a mistake, albeit a longstanding one.

Living constitutionalists have another answer available, which originalists will reject: that conventions can become entrenched by judicial *fiat*, because the Supreme Court in its wisdom considers that the Constitution is "best conceived" as incorporating them.[179] If rights that "were within the contemplation" of constitutional framers,[180] or to which the Supreme Court simply decides "to give…constitutional benediction,"[181] can be added to the list of constraints on the power of governments and legislatures, why not conventions?

B. Constitutional Sclerosis?

There remains the question of whether, even assuming that conventions, or a conventions-based constitutional architecture, can legitimately be seen as part of the law of the Constitution, this jurisprudential development would stifle constitutional innovation by subjecting it to overbearing judicial supervision.[182] As noted above, Professor Glover worries that "if…constitutional conventions generally are subject to Part V, the future of constitutional evolution will be much more rigid than is called for by Part V" of the *Constitution Act, 1982*.[183] This understanding of Part V "would

178 See *Edwards v Canada (AG)*, [1930] AC 124 at 136. "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits" (*ibid*).

179 See *R v Comeau*, 2018 SCC 15 at para 91.

180 See *Health Services and Support – Facilities Subsector Bargaining Ass'n v British Columbia*, 2007 SCC 27 at para 78.

181 See *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 3.

182 Scholtz, *supra* note 49 at 686 (criticizing the Supreme Court's "assert[ion of] supervisory authority over constitutional amendment of any import, including what had previously been thought informal amendment through political conventions").

183 Glover, "Lessons", *supra* note 45 at 251.

compromise the flexibility, exhaustiveness and responsiveness of the Constitution,"[184] and hobble future constitutional reform—a worry that, as we have seen, other commentators on the concept of "constitutional architecture" also share.

Professor Scholtz raises more specific concerns in the same vein. She argues that constitutional "conventions that lie outside of law allow us to solve constitutional problems" that arise due to the incoherence or incompleteness of the Constitution's legal sources.[185] Yet the inclusion of "constitutional architecture" among these sources signals a very different view of conventions—one in which, instead of being practical problem-solving devices, they "seduce and sabotage a coherent legal constitutional order."[186] The Supreme Court's opinion in the *Senate Reform Reference* disregarded the fact that "[t]he conventions of responsible government allow for the government of the day to effect *de facto* constitutional change…so long as that government maintains the support of Canada's elected representatives in the lower house."[187] Such change need not have been anticipated by the Constitution's framers. They may not have conceived of a constitutional reform implemented through convention, but "they accepted the legitimacy of the political conventions which would allow such a scheme to be proposed many years later."[188] Thus, the notion of "constitutional architecture" stands in the way of reform that is both necessary and would have received the framers' blessing.

There is a tart positive law response to these arguments. If it is the case that constitutional law—for example, the public meaning of such phrases in Part V of the *Constitution Act, 1982* as "method of selecting Senators"—actually entrenches (some) constitutional conventions, then concerns about allegedly unfortunate consequences of this entrenchment ought to translate to advocacy of constitutional amendment, not of judicial non-enforcement. In other words, if we have a bad (or at least sub-optimal) Constitution, it is not the courts' job to make it better. That responsibility is ours, as citizens capable of demanding and, if we can convince our fellow citizens, securing change to the rules under which our governments exercise their powers.

184 *Ibid* at 248. But see text accompanying notes 45–47 (suggesting that Professor Glover seems to have embraced the reform-inhibiting capability of "architecture" in at least one area: the administrative state).

185 Scholtz, *supra* note 49 at 666.

186 *Ibid*.

187 *Ibid* at 688.

188 *Ibid* at 689.

Indeed, the problem of entrenchment blocking (potentially) worthwhile constitutional reform is not limited to "architecture" or conventions. For example, although many believe that there ought to be a legal requirement that judges appointed to the Supreme Court be bilingual,[189] there is a strong case to be made that the entrenchment of "the composition of the Supreme Court of Canada" in subsection 41(d) of the *Constitution Act, 1982*, as interpreted by the Supreme Court,[190] precludes the enactment of such legislation.[191] If this is indeed an undesirable policy outcome, then—assuming the Supreme Court read subsection 41(d) correctly (a dubious assumption)—the blame lies not with the Court's refusal to adopt a policy-inflected interpretation of that provision, but with the framers of Part V.

That said, the claim that recognizing conventions as belonging to the realm of entrenched constitutional law—either as (part of) constitutional architecture or as part of the context in which the constitutional text must be understood—will prevent future constitutional evolution or reform is in any case overstated. Of course, some reforms, including the project of more-or-less-covert democratization of the Senate through unilateral federal legislation, are now foreclosed. But foreclosing at least some conceivable constitutional reforms is the point of constitutional entrenchment and of provisions like subsection 52(3) of the *Constitution Act, 1982*, which provides that "[a]mendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of

189 Legislation to this effect has been repeatedly introduced in Parliament. See Bill C-548, *An Act to amend the Official Languages Act (understanding the official languages—judges of the Supreme Court of Canada)*, 2nd Sess, 39th Parl, 2008 (first reading 15 May 2008); Bill C-559, *An Act to amend the Supreme Court Act (understanding the official languages)*, 2nd Sess, 39th Parl, 2008 (first reading 5 June 2008); Bill C-232, *An Act to amend the Supreme Court Act (understanding the official languages)*, 1st Sess, 40th Parl, 2008 (first reading 26 November 2018); Bill C-208, *An Act to amend the Supreme Court Act (understanding the official languages)*, 1st Sess, 41st Parl, 2011 (first reading 13 June 2011); Bill C-203, *An Act to amend the Supreme Court Act (understanding the official languages)*, 1st Sess, 42nd Parl, 2015 (first reading 9 December 2015).

190 *Supreme Court Act Reference*, *supra* note 14 at para 5.

191 See Léonid Sirota, "The Comprehension of Composition" (16 May 2016), online (blog): *Double Aspect* <doubleaspect.blog/2016/05/16/my-comprehension-of-composition>; Kate Glover, "A Third View on Legislating Two Languages at the SCC" (18 May 2016), online (blog): *Double Aspect* <doubleaspect.blog/2016/05/18/a-third-view-on-legislating-two-languages-at-the-scc>. But see Sébastien Grammond, "Can Parliament Enact a Requirement That Supreme Court Judges Be Bilingual?" (13 May 2016), online (blog): *Administrative Law Matters* <administrativelawmatters.com/blog/2016/05/13/guest-post-sebastien-grammond-can-parliament-enact-a-requirement-that-supreme-court-judges-be-bilingual>.

Canada."[192] The critics of the *Senate Reform Reference* are not advocating an entirely flexible constitution. The question, then, is just how much will be lost by enforcing the requirement that reforms to (some of) the conventions of the Constitution be enacted in conformity with Part V.

One key point to note here is that the *Senate Reform Reference* does not preclude the growth of new constitutional conventions. It is important to recall that the Supreme Court's opinion was not concerned with the constitutionality of constitutional change effected purely through practice or the development of convention. Rather, the Court was asked to examine (hypothetical) legislation, albeit legislation intended to serve as an impetus to the development of a convention.[193] By virtue of section 52 of the *Constitution Act, 1982*, enactments must comply with constitutional limits on the powers of the bodies responsible for them (whether Parliament or provincial legislatures), including those limits that are set out in Part V of the *Constitution Act, 1982*. But while the Court set out a broad reading of Part V, mere governmental practice, or even the development of an *opinio juris* making practice obligatory, are beyond its reach.

Thus, for instance, the current Prime Minister has been able to institute a procedure for choosing prospective Senators designed to increase the role of merit and decrease that of partisanship in this process.[194] If the current Prime Minister's successors retain his approach to Senatorial selection, and if they form the sense that this process has become obligatory, it will be possible to speak of a new constitutional convention.[195] Alternatively, political practice might eventually settle on a different process. The key point here is that constitutional change would be happening through practice rather than through legislation.[196]

---

192 *Constitution Act, 1982*, *supra* note 9, s 52(3).

193 See Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*, 1st Sess, 41st Parl, 2011, Preamble (first reading 21 June 2011). "Whereas it is appropriate that those whose names are submitted to the Queen's Privy Council for Canada for summons to the Senate be determined by democratic election by the people of the province or territory that a senator is to represent" (*ibid*).

194 See "Independent Advisory Board for Senate Appointments: Assessment Criteria" (4 March 2020), online: *Government of Canada* <canada.ca/en/campaign/independent-advisory-board-for-senate-appointments.html>.

195 See *Patriation Reference*, *supra* note 5 at 888.

196 Provincial legislation setting up elections of proposed Senators, such as the now-expired *Senatorial Selection Act*, RSA 2000, c S-5, would be subject to constitutional constraints, just like federal legislation. Indeed, quite apart from the entrenchment of "constitutional architecture" or of conventions as context to the language of Part V of the *Constitution Act, 1982*, it is not at all obvious what head of provincial power can sustain such legislation.

Or, to return to the example of bilingualism as a criterion for appointments to the Supreme Court, even if Parliament is constitutionally prevented from imposing this requirement by statute, prime ministers remain free to only appoint bilingual judges (as the current Prime Minister has in fact done); this practice, if it takes hold and comes to be perceived as obligatory, can develop into a convention.[197] The fact that this convention may be at odds with the meaning of subsection 41(d) of the *Constitution Act, 1982* and the interpretation the *Supreme Court Act Reference* gave this provision is irrelevant. Subsection 41(d) does not prevent the appointment of bilingual judges; nor does it require that at least some judges not be bilingual. Nor can it prevent the development of an *opinio juris* requiring prime ministers to appoint bilingual judges. In other words, like the rest of Part V of the *Constitution Act, 1982* it controls the development of constitutional law, but not the emergence of new conventions.

The practices adopted by the current Prime Minister are, however, crucially different from the "consultative" elections scheme rejected in the *Senate Reform Reference* in that they do not rely on legislation. As a result, they can be abandoned by a future government without the need to further change the law—unless, of course, they are embraced not only by the current Prime Minister, but by subsequent ones, and develop into conventions as a result. On the living constitutionalist view—but not the originalist one—these conventions could come to be regarded as being part of the Constitution's architecture, or as necessary to interpreting provisions relative to Senatorial appointments and the Supreme Court.

To be sure, as a matter of politics, it may well be the case that a Prime Minister would be able to induce Parliament to amend a statute such as one instituting "consultative" elections or requiring judicial bilingualism (almost) as easily as to change his or her own practices in relation to Senatorial or judicial appointments.[198] Yet, legally speaking, changes to the law

---

Provinces can legislate with respect to provincial matters, and the appointment of Senators is not such a matter.

197 See Justin Trudeau, "Why Canada Has a New Way to Choose Supreme Court Judges", *The Globe and Mail* (2 August 2016), online: <theglobeandmail.com/opinion/why-canada-has-a-new-way-to-choose-supreme-court-judges/article31220275/>.

198 Still, it is worth pointing out that the Senate, whose concurrence would be necessary for the enactment of constitutionally significant legislation, notably legislation under section 44 of the *Constitution Act, 1982*, may have a different partisan majority from the House of Commons, and be unamenable to prime-ministerial persuasion, entreaties, or bullying; this concern may have been especially pressing if the Senate had been allowed to become in effect an elected body.

and to practice are quite different matters. The law remains binding until it is repealed; practice has no such force. When a new government comes into office, it must follow existing law as it finds it, but it need not follow the previous government's practice—provided that it has not crystallized into a convention—unless it chooses to do so. In that sense, a statute setting up "consultative" elections to the Senate or restricting the pool of jurists eligible for a Supreme Court appointment to bilingual individuals has a permanence—albeit a contingent one—that a prime-ministerial practice lacks. For this reason, it is appropriate to treat practice and legislation as distinct mechanisms for constitutional change, as the *Senate Reform Reference* does.

In short, it does not follow from the *Senate Reform Reference* that, as Professor Scholtz suggests, "no consequential constitutional amendment can be informal and remain enforced through conventions alone."[199] Extra-legal constitutional developments, including arguably consequential changes to Senatorial and judicial appointments, are still possible, so long as they are in fact genuinely informal. Such developments will, however, remain subject to reversal by subsequent governments, at least until such time as it becomes possible to say that they have acquired the character of conventions in their own right.

The other important objection to the critique of the *Senate Reform Reference* as unduly impeding constitutional innovation is that the conventions in whose entrenchment it results are, to a considerable extent, fundamental to the Constitution's functioning. As a result, it is most doubtful that giving governments the ability to free themselves from their strictures, or even allowing Parliament and provincial legislatures to do so, is something to be wished for. Professor Scholtz herself appears to endorse the view (expressed by the dissenting opinion on the conventional questions in the *Patriation Reference*) of "the conventions of responsible government…as 'definite'."[200] Indeed, as we have seen, it is these conventions that to her mind justify the federal government's ability to engage in extra-legal constitutional innovation. But what if the innovation undermines this foundation for its own legitimacy?

Alternatively, if the conventions of responsible government are "definite," what follows from this? And are there others who belong to the same category with the same consequences? The Supreme Court's position in

199 Scholtz, *supra* note 49 at 687.

200 *Ibid* at 677, citing *Patriation Reference*, *supra* note 5 at 858, Laskin CJ and Estey and McIntyre JJ, dissenting.

the *Patriation Reference* was that the violation even of "definite" conventions—or, presumably, attempts to depart from them—could only call for political remedies. It is not clear whether Professor Scholtz and other critics of the *Senate Reform Reference* would still accept this view. If they do, then the "definiteness" of these conventions is evanescent. If they do not, their dispute with the holding of the *Senate Reform Reference* concerns nothing more than the list of what they would call "definite," or what the Supreme Court might call "architectural," conventions. This dispute would still be very important, especially since, as I have argued above, the Court itself fails to provide useful guidance about its outcome, but its scope would be limited. In particular, if one accepts that at least some important conventions are beyond the reach of extra-legal amendment, claims that treating other conventions as having the same status will lead to unwarranted constitutional stasis seem overwrought.

VI. CONCLUSION

In pronouncing on the constitutionality of the then-federal government's plans for reforming the Senate, and in particular of the scheme of making the Senate democratic by introducing "consultative elections," the Supreme Court did not explicitly address the impact of this proposal on constitutional conventions. Rather, it opined that the reform would amount to an amendment of the Canadian Constitution's "architecture," which cannot be brought about by ordinary legislation.

However, contrary to what some scholars have suggested, this does not mean that the Court was oblivious to the existence of conventions regulating the Senate's place in the constitutional framework, let alone hostile to the very notion of conventions. Rather, conventions are the principal component of the "constitutional architecture" that the Supreme Court invokes, but only defines as consisting of assumptions underlying the constitutional text. The text—first the *Constitution Act, 1867*, and then the amending formulae included in the *Constitution Act, 1982*—has been written with conventions, including those governing the Senate, in mind. The Supreme Court's opinion recognizes this but does not say so.

This is unfortunate. The Supreme Court's circumlocution results in a lack of clarity about which conventions are entrenched as part of the "constitutional architecture" and which are not. Two possible criteria for answering this question, that of the importance of conventions to the constitutional order, and that of their relationship with the constitutional

text, are difficult to fit with the notion of "architecture." Yet despite this problem, fundamental criticism of the *Senate Reform Reference* is misguided. Recognizing that conventions are among the legal, entrenched rules of the Constitution is neither illegitimate nor bound to condemn the Constitution to stasis.

That said, it is regrettable that, instead of exorcising the ghost of Dicey's ideas about the existence of a categorical separation between constitutional law and constitutional convention, the guardians of the Canadian Constitution seem to have opted for the alternative strategy of immuring it by making improvements to their castle. These improvements may yet successfully confine the ghost to a narrow space, which the courts will be able to pass by undeterred by the "clanking [of its] chains."[201] Yet the Supreme Court's construction activities are perhaps still underway, and it is too early to appreciate the robustness and durability of its stonework. In my view, it would have been preferable to give the ghost a decent and final burial. Though the Supreme Court may think him well immured, he may yet escape. And even if he does not, the rattling of the rusty metal is, if no longer a threat to the development of our constitutional law, then at least a tiresome distraction.

201 See *United Australia v Barclays Bank* (1940), [1941] AC 1 at 37, Lord Atkin. "When these ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred" (*ibid*).