The Stories We Tell:
The Supreme Court of Canada and the Constitution

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Abstract

This dissertation is a study of the Supreme Court of Canada and the constitution. At its heart is a dissatisfaction with the assumptions about the constitution that underlie existing accounts of the Court. These assumptions fail to adequately capture structural and lived realities of Canadian constitutionalism. As a consequence, our understandings of the Supreme Court's role and significance in the constitutional life of the country are tidy, but incomplete in meaningful - indeed harmful - ways.

To overcome these shortcomings, this dissertation offers a new account of the Court in Canada's constitutional order. This new account begins by disrupting the assumptions that underlie the existing narratives. Two reorientations are central. First, the analysis in this dissertation attends to structural dimensions of the constitution, which have been in the shadow of rights-based constitutionalism since patriation. Second, the analysis draws on the insights of legal pluralism, which helpfully inform much constitutional knowledge in Canada but have not been adequately accounted for in understandings of the Supreme Court. This reorientation reveals matters that play a significant role in the Court's institutional life but have been overlooked and undervalued in the existing accounts. In particular, these matters include the horizontal and shifting institutional framework within which the Court operates, the agonistic dimensions of constitutional disputes, and the multijural character of constitutionalism in Canada.

Relying on a structural reading of the constitution, this dissertation tells a different story about the Supreme Court in Canada's legal order. It first considers the present, urging a shift in expectations, attitudes, and practices in relation to the Court. It then imagines the future, arguing for an approach to Court reform that is sensitive to the aspirations of institutional design, and the possibilities and limits of constitutional amendment in Canada.

Résumé

La présente thèse est une étude de la Cour Suprême du Canada et de la constitution. Cette étude est motivée par une insatisfaction envers les suppositions sur la constitution qui sous-tendent les récits existants sur la Cour. Ces suppositions ne parviennent pas à saisir adéquatement les réalités structurelles et expérientielles du constitutionalisme canadien. Par conséquent, notre compréhension du rôle de la Cour suprême dans la vie constitutionnelle du pays est peut-être ordonnée, mais elle demeure significativement, et même nuisiblement, incomplète.

Cette thèse présente un nouveau récit sur le rôle de la Cour dans l'ordre constitutionnel canadien. Ce dernier commence par défaire les suppositions qui sous-tendent les récits existants. Deux réorientations centrales s'imposent. Premièrement, les dimensions structurelles de la constitution, restées dans l'ombre d'un constitutionalisme basé sur les droits depuis le rapatriement, sont incorporées à l'analyse. Deuxièmement, le récit fait appel aux idées du pluralisme juridique, qui ont informé de manière utile l'étude du constitutionalisme canadien sans pourtant avoir été incorporées dans l'examen de la Cour suprême. Cette double réorientation révèle certaines questions ayant joué un rôle important dans la vie constitutionnelle de la Cour, mais qui ont pourtant été négligées ou sous-évaluées dans l'étude du sujet. Il s'agit en particulier du cadre institutionnel horizontal et en déplacement continu dans lequel la Cour opère, de la dimension combative des débats constitutionnelles, et du caractère multijuridique du constitutionalisme au Canada.

Se fondant sur une lecture structurelle de la constitution, cette thèse présente un récit différent sur le rôle de la Cour suprême dans l'ordre juridique canadien. D'abord ancrée dans le présent, elle incite au changement dans les attentes, attitudes et pratiques liées à la Cour. Puis, tournée vers le futur, cette étude propose des pistes de réforme sensibles aux aspirations liées à la conception institutionnelle de la Cour, ainsi qu'aux limites et possibilités de l'amendement constitutionnel au Canada.

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Introduction

This dissertation is a study of the Supreme Court of Canada in the Canadian constitutional order. At its heart is a dissatisfaction with the assumptions about the constitution that underlie conventional accounts of the Court. These conventional accounts are found in scholarship, jurisprudence, political discourse, and media accounts. They tell many stories from many perspectives, but within their broad strokes, two storylines are particularly prominent.

The first is a storyline about how the Court came to be a significant institution in Canada. As the story goes, the Court was "quiet"[1] - a "minor blip on the Canadian political scene"[2]- for a century. It shed its timid reputation gradually: appeals to the Privy Council ended; the Court gained control over its docket; and the *Charter* and the principle of constitutional supremacy were entrenched. By the end of this evolution, the voice of the Court had become powerful, heard in homes, workplaces, churches, and schools across the country.

The second storyline is about the Court's power, its roles, and its judges. These are stories about the "constitutionally essential" Court,[3] home to the "most important decision-makers in Canada".[4] These narratives speak to the many hats the Court wears – final court of appeal, umpire of the

[1] Ronald I Cheffins, "The Supreme Court of Canada: The Quiet Court in an Unquiet Country" (1966) 4 Osgoode Hall LJ 259.
[2] Peter McCormick, *Supreme At Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company Ltd, 2000) at 3 [*Supreme At Last*].
[3] *Reference re Supreme Court Act, ss 5 and 6,* 2014 SCC 21, [2014] 1 SCR 433 at para 87 [*Supreme Court Act Reference*].
[4] Philip Slayton, *Mighty Judgments: How the Supreme Court of Canada Runs Your Life* (Toronto: Allen Lane Canada, 2011) at xviii.

division of powers, national legal advisor, policy-maker,[5] and guardian of the constitution. These narratives also reveal divergent views: The Court is either a bulwark against abuses of majority power or an unwelcome interloper in the democratic policy agenda. Its judges are either respectful of interested parties or colonized by interest groups. The Court should both be reformed and stay the same. And yet whatever the view, there is consensus that the Court is, for better or worse, legally and politically significant.

The limits of conventional narratives

These conventional narratives help us understand many institutional aspects of the Court. We learn of its relationship to Parliament and the provincial legislatures, the inescapably political character of its work, and the nature of rights adjudication. We learn too of the meaningful contributions of the Court's work to pressing issues of justice and policy, of the public and professional respect it holds and warrants, and of the depth of its jurisprudence.

But the narratives are less helpful when we try to understand other aspects of the Court and its institutional life; indeed, some aspects are obscured. For example, the narratives direct our gaze towards the ultimate constitutional authority of the Court, turning us away from its horizontal relationships and shifting position within an expansive network of public institutions that authoritatively interpret and implement the constitution. In the same way, the narratives avert our eyes from the ways in which citizens engage with and give meaning to the constitution in their practices and relationships, and as they navigate the many normative claims - from family,

[5] Benjamin Perrin, "The Supreme Court of Canada: Policy-Maker of the Year" (Ottawa: Macdonald-Laurier Institute, 2014).

communities of faith, the workplace, schools, and so on - that bear on their lives. The conventional narratives also focus our attention on the Court's capacity to settle our legal disputes over constitutional questions, directing us away from circumstances in which the Court should allow constitutional disputes to persist. And, the conventional narratives concentrate our energy on the need for the Court to be an accurate – and aspirational – expression of Canada's national identity, rooted in traditions of French and English, of common law and civil law. As a result, we neglect the material and symbolic ways in which the Court as an institution should also express the traditions of Indigenous law.

When we notice that the conventional narratives direct our attention in certain ways rather than others, we become alive to the gaps in the stories we tell about the Court. This would not be a matter calling for a remedy if the conventional narratives helped us to see or understand the world in a way that is better than other ways of seeing and understanding. But the claim of this dissertation is that the conventional narratives are not the better way, at least not in their current form. They are too tidy where there should be messiness; they are sometimes thin where there are rich opportunities for further analysis; they have some gaps where there is much to say. And so this dissertation offers a framework for revising our narratives about the Court and begins to undertake that revision.

The revised accounts value, rather than neglect, the agency of both individuals and a broad range of institutions in the constitutional realm. They seek to infuse the moral ends of the Court's institutional life with Canada's multiple legal traditions, rather than with only the common law and civil law. And they recognize the limits of adjudication in certain constitutional cases.

Ultimately, these accounts help us see the Court better as they are more attuned to the structure of Canada's constitution. This is a constitutional order that does not proceed "through the fiat of a closed set of founding fathers or their privileged successors", but rather "day by day", as a "body of experience" and through a network of institutions - including the Supreme Court - that we "adapt[] to that experience, providing a framework through which Canada's national life might persist and, if lucky, flourish".[6]

The assumptions underlying the conventional accounts

There are underlying assumptions about the nature of law that facilitate, and perhaps impel, the conventional accounts. These assumptions coalesce into an ethos or paradigm.[7] When authors and readers share basic assumptions - that is when they see the world through the same ethos or paradigm - a story can take certain starting points for granted and a dominant narrative can emerge.[8] The ethos need not line up precisely with any particular theory, but it will embody a set of governing values, attitudes and aesthetic commitments.[9] The ethos then makes sense of the narratives and the narratives reinforce the value of the paradigm.

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[6] Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 8, 260.
[7] Margaret Davies, "The Ethos of Pluralism" (2005) 27 Sydney L Rev 87. Harry Arthurs uses the language of 'paradigm' rather than ethos: Harry W Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985) at Chapter 1.
[8] For examples that reveal the power of dominant narratives, see e.g. Brian Z Tamanaha, *Beyond the Formalist-Realist Divide*: *The Role of Politics in Judging* (Princeton: Princeton University Press, 2010) and R Blake Brown, "The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff" (2002) 47 McGill LJ 559. On narrative commitments and domination generally, see WA Adams, "I Made a Promise to a Lady: Critical Legal Pluralism as Improvised Law in Buffy the Vampire Slayer" (2010) 6:1 Critical Studies in Improvisation, online: Critical Studies in Improvisation <http://www.criticalimprov.com>; Macdonald, Roderick A & Martha-Marie Kleinhans. "What is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS 25 at 43.
[9] Davies, *supra* note 7 at 90.

Looking at the conventional accounts about the Court, we see many claims about the constitution that are taken as given. It is assumed, for instance, that the range of legitimate constitutional interpreters are arranged in a relatively stable vertical hierarchy of official institutions. The courts, arranged in a pyramid with the Supreme Court at its apex,[10] are the interpreters of record, and are the ultimate keepers of constitutional meaning. It is further assumed that disputes over interpretation are amenable to judicial resolution and that such resolution is desirable. Further still, it is assumed that judicial resolutions of the Court are given from within an institutional order shaped by two legal traditions, the common and civil law.

These assumptions about the constitution that underlie the conventional accounts of the Court sit alongside more general propositions about law that are also reflected in the narratives. These propositions are consistent with prominent themes in twentieth-century Anglo-American legal theory. They reflect a belief that the state and its institutions are at the centre of law and that law is a coherent, autonomous system.[11] They also show a preoccupation with judges and judicial decision-making within conversations about the nature of law. These commitments – to centralism, monism, and a judge-centric understanding of law - resonate throughout the dominant narratives of the Court.

[10] Peter Russell describes Canada's legal system as a pyramid with a "very wide base narrowing to a sharp point with the Supreme Court at the apex": Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 333.
[11] Davies, "Ethos", *supra* note 7 at 91-93; Roderick A Macdonald, "Custom Made – For a Non-chirographic Critical Legal Pluralism" (2011) 26:2 CJLS 301.

A revised approach

To overcome the shortcomings of the conventional accounts, this dissertation offers a new account of the Court in Canada's constitutional order. This new account begins by disrupting the assumptions that underlie the existing narratives. Two reorientations are central.

First, the analysis in this dissertation is built from architectural concerns rather than through the window of rights adjudication. A concern with structural constitutionalism is not new in Canadian constitutional thought or jurisprudence, nor in the study of the Court, but it has tended to be on the backburner of public law scholarship since the adoption of the *Charter*.[12] Current public affairs signal the need for a shift; structural matters are deeply implicated in issues of persistent local and national concern, including Senate reform, electoral reform, the rules of succession, the composition of the Supreme Court, the duty to consult, the scope of executive discretion, and so on. Even more fundamentally, we cannot understand the Supreme Court in Canada's constitutional order without understanding, and carefully attending to, the structure of that order.

The architecture of the constitution speaks to fundamental institutions and their design. It signals distributions of power and relationships between actors and institutions, between "individuals and…cultural groups to one another and to the state".[13] It captures the core principles, assumptions,

[12] For examples of recent work dealing with the architecture of the constitution, see Warren J Newman, "Of Castles and Living Trees: The Metaphorical and Structural Constitution" (2015) 9:3 JPPL 471, Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the *Senate Reference,* and the Future of Constitutional Amendment in Canada" (2015) 60:4 McGill LJ 883, and Mark D Walters, "The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7" (2013) 7 JPPL 37. For recent jurisprudence, see e.g. *Supreme Court Act Reference, supra* note 3 and *Reference re Senate Reform,* 2014 SCC 32, [2014] 1 SCR 704.

[13] Frank R Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977) at ix.

traditions, and purposes that animate and enliven these institutions, distributions, and relationships. It refers to the elements of the constitution and the bonds between them. It is within this framework that the Supreme Court is imagined and imbued with an institutional morality. And it is this imagination and morality – and the ways that they change over time – that this dissertation seeks to better understand.

The analysis in this dissertation also relies on the structure of the constitution for its interpretive force.[14] Structural reasoning draws inferences about constitutional meaning from the structures of government and institutional relationships that are created by, and reflected in, the constitution.[15] Some of these structural features are expressly addressed in the constitutional text; others are unwritten and implicit. A structural approach to reasoning looks at both, recognizing that there is a deeper logic and set of ideas that animate a constitution, and that these elements must be attended to in the exercise of interpretation. The Supreme Court has explained structural reasoning as interpreting the constitution "with a view to discerning the structure of government that it seeks to implement",[16] and by accounting for the "assumptions that underlie the text", the constitution's "foundational principles", and the links between constitutional elements.[17] In this dissertation, structural reasoning is crucial, as we try to discern and account for the place and significance of the Court within the grander constitutional imagination.

[14] There are also forms of analytical structure and textual structure that assist in interpretation of the constitution: see e.g. Kate Glover, "Structure, Substance, and Spirit: Lessons from the *Senate Reform Reference*" (2014) 67 SCLR (2d) 221.
[15] See e.g. Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can Bar Rev 67; Charles L Black Jr, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969).
[16] *Senate Reform Reference*, *supra* note 12 at para 26.
[17] *Senate Reform Reference*, *supra* note 12 at paras 25-26. See also *Reference re Secession of Quebec,* [1998] 2 SCR 217 at para 49; *OPSEU v Ontario (AG)*, [1987] 2 SCR 2 at 57.

The second reorientation is this dissertation's reliance on the insights of legal pluralism. Such insights are found throughout the literature on Canadian constitutionalism and analyses of the Court's jurisprudence.[18] But they have tended to be absent from narratives about the role, significance, and reform of the Court, and the constitutional outlook that underpins them.[19] As we will see, the effect of this absence has been an understanding of the Supreme Court that does not account for meaningful features of Canada's constitutional life. The analysis offered in this dissertation aims to fill this gap.

A "pluralist ethos" is found "wherever there is a critique of the autonomy and separateness of law, and, wherever the coherence of law as a neutral system of norms derived simply from state authority is challenged".[20] Within this ethos, law is fully embedded in social life, it is historically and politically contingent, and the possibilities for legal decision-making are indeterminate and essential plural.[21] A pluralist perspective posits law as open, contextual, and limited,[22] indeed as inextricably human. It accounts for the unofficial normative environments of our lives and the "tacit legal regulation" that makes official law possible.[23] It accounts for the ways in which official law "reaches into the lives of legal subjects",[24] positing the individual as an actor who can navigate and transform official law.[25] It draws attention to social and normative diversity and difference in

[18] See e.g. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) and Howie Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39:1 Queen's LJ 175.
[19] For exceptions, see e.g. Shauna Van Praagh, "Identity's Importance: Reflections of - and on - Diversity" (2001) 80:1-2 Can Bar Rev 605; Jean-Guy Belley, "What Legal Culture for the Twenty-First Century?" translated by Nicholas Kasirer (2011) 26:2 CJLS 237.
[20] Davies, "Ethos", *supra* note 7 at 110.
[21] Davies, "Ethos", *supra* note 7 at 110.
[22] Davies, "Ethos", *supra* note 7; Van Praagh, *supra* note 19 at note 11.
[23] Davies, "Ethos", *supra* note 7 at 110; Roderick A Macdonald, *Lessons of Everyday Law* (Montreal & Kingston: McGill-Queen's University Press, 2002) at 6.
[24] Davies, "Ethos", *supra* note 7 at 103.
[25] Kleinhans & Macdonald, *supra* note 8 at 77.

social life,[26] highlighting the interaction of various normative commitments in both quotidian and official experience.

In the realm of public law, a pluralist ethos focuses our attention on the state as well as the citizen in thinking through the meaning and limits of the constitutional framework that we inhabit and bring to life. It is insistent that we seek to understand the role and position of state institutions and artefacts in a frame of plural institutions, communities of legal meaning, and interpretive agents. It is, as a result, a particularly helpful lens through which to consider the aspirations, limits, and stories of the Supreme Court in Canada's constitutional order.

A new set of narratives

When we study the Court through this reoriented lens, our attention is drawn to matters that play a significant role in the Court's institutional life but have been overlooked and undervalued in the existing accounts. In particular, these matters include the horizontal and shifting institutional framework within which the Court operates, the agonistic dimensions of the constitution, and the multijural character of constitutionalism in Canada. When we pay attention to these features of the constitution, we come to appreciate that the Court's authority is complicated somewhat by the sprawling and dynamic dimensions of the institutional matrix in which it works. It is complicated further by the ways in which the constitution is made and re-made by many actors, in various sites, and in interaction with a range of normative claims that bear on everyday life, most of which are,

[26] Davies, "Ethos", *supra* note 7 at 103.

quite rightly, independent of the Court. With this appreciation, we can see that our expectations of the Court – and what we call on it to do – must be similarly adjusted.

Our revised constitutional starting point also helps us to see that within an agonistic constitutional order, there are some legal disputes that are best left unsettled by the Supreme Court. These are disputes like the ones underlying the *Secession Reference* and *Haida Nation*.[27] In such disputes, the Court can still play a meaningful role, establishing conceptual frameworks, enriching analytical capacities, and opening procedural channels. However, the exercise of this non-settling role calls for patience and restraint in the confrontation with enduring constitutional tensions, as well as a measure of faith in the capacity of parties to find a path forward.

Within these new accounts, our understanding of the Court is further revised, indeed advanced, as the place of multijurality in Canadian constitutionalism is affirmed. We come to see that this multijurality must animate the institutional morality of the Court, finding expression in forms and modes that remain to be fully worked out. One compelling site of expression would be, of course, within the composition of the Court's bench, drawing our attention to constitutional claims and imperatives of representation and diversification amongst the judges of the Court.

Finally, the revised accounts – with their structural, pluralist approach – offer insights for our understanding of Court reform and, in particular, for the ways in which change unfolds both under the formal procedures of Part V of the *Constitution Act, 1982*, and more broadly.

[27] *Reference re Secession of Quebec,* [1998] 2 SCR 217; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.

Outline of the chapters

This dissertation proceeds in four chapters. Chapter One begins by recounting some of the narratives about the Court that are particularly prominent in the written scholarly and jurisprudential record. Offering a literature review of sorts, this Chapter records current thought about the Court, focusing on the broad themes that have preoccupied Courtwatchers over the past three decades. It recounts the two storylines set out above, telling of a Court that is in an era of significance unprecedented in its institutional life. It is a Court deeply engaged in the political debates and discussions of the country, one with a commanding voice and whose counsel is often sought. It is a Court that is truly 'constitutionally essential'.

Once the existing accounts are set out, Chapter 2 turns to the assumptions that underlie them. It identifies the assumptions about law and the constitution that inform the dominant narratives, sometimes overtly and sometimes implicitly. It focuses first on the assumption that Canada's constitutional architecture creates a hierarchy of institutional interpreters, with Parliament and the judiciary – ultimately the Supreme Court – jostling for position as final and authoritative interpreter. It then turns to the assumption that disputes about constitutional interpretation can – and should – be settled by the Court, and the assumption of Canada's constitutional bijurality. Chapter 2 makes the case for how to recalibrate these assumptions. This recalibration entails a better accounting of the structural dimensions of the constitution and insights of legal pluralism. This chapter takes up this approach to understanding the architecture of the constitution, pointing to the ways in which structural constitutionalism assists and advances constitutional interpretation in Canada.

Chapter 3 applies the constitutional lessons of Chapter 2 to the case of the Court. It tells the story of the Court in the constitutional landscape that is imagined in Chapter 2, showing how more careful attention to certain structural elements of the constitution – such as the agonistic character of constitutional principles, the dynamic, horizontal network of constitutional interpreters, and the multijural character of the constitution of Canada - enhances our understanding of the Supreme Court's position in the Canadian constitutional order. Chapter 3 gives an account of the constitutional significance of the Court that appreciates the range of institutions and actors who are engaged in constitutional interpretation, adding some nuance to prevailing attributions of interpretive supremacy to the Court. This account draws insights and observations from administrative law into the narrative about the significance of the Court, as well as stories of individuals and communities who live out the constitution in their daily lives. The account offered in Chapter 3 also contributes to existing accounts of the constitutional role of the Court by focusing not only on the dispute resolution function of the Court, but also on its role in empowering parties to navigate constitutional disputes in light of continued disagreement. Finally, the account in Chapter 3 explores how an appreciation of Indigenous legal traditions in Canadian constitutionalism bears on understandings of the Court's institutional dimensions.

Chapter 4 draws on the insights of Chapters 2 and 3 to explore the issue of Court reform. It is a slight shift in tone, undertaking a close analysis of the case law and focusing primarily on reform through official means, whether by federal legislation under section 101 of the *Constitution Act, 1867* or by resolution under Part V of the *Constitution Act, 1982*. It confronts doctrinal uncertainties about these formal processes, ultimately sketching a framework for how to reform

the Supreme Court. It begins with a blueprint of the Court's design, a necessary step when deciding whether the constitutional amending procedures apply to proposals for reform of the Court. It then identifies general principles that should inform the interpretation and application of Part V in cases of Court reform. To show these principles in action, Chapter 4 applies the framework to a case study, namely to proposals for a statutory judicial bilingualism requirement at the Court. This analysis indicates that Parliament cannot unilaterally enact a bilingualism requirement as it would amount to a constitutional amendment requiring unanimous consent of the houses of Parliament and the provincial legislatures. Chapter 4 concludes by turning its gaze to the multiple modes and complexities of constitutional and institutional change.

Conclusion

In *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England*, Arthurs' reminds us that "[n]othing just happens".[28] That is, "[l]egal institutions and ideas do not simply emerge, evolve, reshape themselves, deteriorate, or disappear of their own accord".[29] With these observations, Arthurs is urging us to see that the configuration and particulars of our legal systems and structures are not inevitable or natural; they are designed and described within a paradigm of the "assumptions and intellectual structures upon which our analysis and actions are based".[30]

[28] Arthurs, *supra* note 7 at 1.
[29] *Ibid.*
[30] *Ibid.*

Arthurs' claim echoes an earlier point of Justice Rand, who told an audience in 1965 that the Supreme Court, in its current form and place in the life of the country, is not unavoidable, neutral, or necessary. Its form and place are contingent, intended to perform designated roles within Canada's constitutional order, which might – in intention, role, or order – change over time. We must therefore, Justice Rand urged, occasionally "take time off" from assuming the Court is the way it ought to be in order to question the presuppositions we hold about the Court, its design, its significance, and its purpose.[31] On this view, any vision for the Court's future must rest on a consistently updated understanding of what it is, why we have it, if we need it, what we expect from it, and, I would add, how to configure it.[32]

This dissertation takes up the urging of Arthurs and Rand, taking time off to explore the place of the Court in Canada's constitutional order. In our diverse and multicultural world, one in which conceptions of local and global are fluid and contested, we should be compelled to ask how and why the Supreme Court of Canada – a single national court – is meaningful. What work, we should ask, is the institutional – and constitutional – form doing, "not just in the instrumental sense relevant to the ends being pursued through it, but in terms of shaping the lives, roles, expectations and agency of those participating within it?"[33] Put another way, we should be asking, in the paraphrased words of Lon Fuller: Does this institution, in the context of other institutions,

[31] Ivan C Rand, "The Supreme Court of Canada" (Lecture delivered to the Faculty of Law, University of New Brunswick, 1965), (2010) 34:1 Man LJ 7. "It will pay us all", Rand said, "to take time off occasionally to give some thought to these institutions which maintain the steadiness of our social condition…we can understand their workings; we can understand their necessity; and we can act to keep them strong and worthy of our aim as the object of our civilization" (23).
[32] *Ibid.*
[33] Kristen Rundle, "Reply" (2014) 5:1 Jurisprudence 133 at 134.

contribute to a pattern of law and of living that is satisfying and worthy of human capacities and motivations?[34] The chapters that follow aim to provide insight into these questions.

[34] Lon L Fuller, "Means & Ends" in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Long L Fuller,* Rev'd Ed (Oxford: Hart Publishing, 2001) at 69.

1 The Stories We Tell

We tell ourselves stories about the Supreme Court of Canada in order to make sense of its role and significance in the world.[1] This chapter recounts some of those stories, those that are prominent in contemporary Canadian discourse. These stories reflect and shape understandings of what is thought to be important about the Court today. Given the prominence of these accounts in the legal, socio-legal, and political science literature, in the jurisprudence, and in the press coverage of the Court, I refer to them throughout this dissertation as 'conventional' and 'dominant'.

This chapter tells these conventional narratives as a starting point for analysis. As the dissertation proceeds, it will become obvious that the primary interest lies in the stories' foundations - the beliefs about law and the constitution that they presuppose, and the purchase of these beliefs in Canadian legal culture. This chapter focuses on the stories; later chapters focus on their underlying beliefs.

This chapter presents the conventional accounts of the Supreme Court in three parts. Part I reviews the literature on the evolution and significance of the Court. It recounts the story of the Court's

[1] Drawing on Wilhelm Dilthey's hermeneutics, Berger explains that we understand our lives through an enduring process of narration and re-narration. We each encounter the world with a story, coming to make sense of the present in light of memories of the past and expectations for the future, sometimes retelling the whole in the process. These narratives have material effects on the way we live our lives, effects which may reveal – and call for revision of - the shortcomings of the story. "Equipped with these narratives that lend a particular significance or meaning to the phenomena of social life", Berger writes, "we are led to act in particular ways, judge in particular fashions, and thus to create particular political realities. When these social and political realities – the experiences of collective life – prove undesirable or unsatisfying, we must return to expose, critique, and demand re-narration of our larger stories": Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 146-7, and more generally 145-9 [Berger, *Law's Religion*].

trajectory within the Canadian constitutional order, from the "quiet",[2] "captive"[3] Court of the past to the prominent powerful institution of the present. This storyline tells the Court's institutional biography as a series of pivotal moments, which culminates in the affirmation of the Court's "constitutionally essential" status and Parliament's obligation to maintain and protect the constitutional core of the Court.[4]

Part II reviews the literature on the roles of the Court. Here, the dominant narrative is framed by metaphors – guardian, umpire, and dialogue – that have become forceful short hands, both descriptively and prescriptively, for the work of the Court. These metaphors have limits but they have shaped much of the research agenda, leading to a contemporary account of the Court that is told primarily through the lens of rights adjudication.

Part III is a review of the literature on the judges of the Court. Much of the focus is on the procedure by which the judges are appointed. Disclosing concerns with the scope of Prime Ministerial discretion, the literature chronicles deficits of democracy and federalism that plague the appointment process and demand reform, despite generally high regard for the judges appointed. There is a second focus when it comes to the judges, an emerging one and one of a somewhat different character. This is a story, a short one, of the state of the Supreme Court biography in Canada. The literature establishes that there is general consensus that the judges' lives and legacies are worthy of study, although for what purposes and to what ends are still being worked out.

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[2] Ronald I Cheffins, "The Supreme Court of Canada: The Quiet Court in an Unquiet Country" (1966) 4 OHLJ 259. To Cheffins, 'quiet' meant that the Court was "subdued" and "modest" (259).
[3] Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992); Bora Laskin, "The Supreme Court of Canada: a Final Court of Appeal of and for Canadians (1951) 29 Can Bar Rev 1038.
[4] *Reference re Supreme Court Act, ss 5 and 6,* 2014 SCC 21, [2014] 1 SCR 433 at paras 87 and 101 [*Supreme Court Act Reference*].

Collectively, these stories capture the broad themes that have characterized modern discourse on the Court – power and purpose, politics and people. The stories reflect and shape understandings of what is thought to be meaningful about the Court in the present and future of Canada's constitutional order. For those engaged in Canadian constitutional culture, they are likely familiar, whether as a source of critique or an explanation of reality. Their familiarity is facilitated by how they fit with the themes and assumptions of more expansive accounts of the constitution and law. The stories told in this chapter will inevitably nod toward these themes and assumptions, in particular we will see reflections of the bijurality of Canadian constitutionalism, of the Court's ultimate authority in the hierarchy of institutions with authority to interpret the constitution, and of the adjudicative character of constitutional disputes. But before exploring those assumptions in greater detail, we must start with the stories about the Supreme Court, to which I now turn.

I. THE SIGNIFICANCE OF THE COURT

The evolution of the Supreme Court

Today's Supreme Court is thought to be powerful and strong - one of the "most important institutions in Canada" and "near the centre of the stage of Canadian public life".[5] But its

[5] Florian Sauvageau, David Schneiderman, & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006) at 8 and Peter McCormick, *Supreme At Last: The Evolution of the Supreme Court of Canada* (Toronto: Lormier, 2000) at 3 [McCormick, *Supreme At Last*]. For similar descriptions, see also Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 3 [Monahan, *Politics and the Constitution*]; Frank Iacobucci, "The Supreme Court of Canada: Its History, Powers and Responsibilities" (2002) J App Pr & Pro 27 at 39; Susan Delacourt, "The Media and the Supreme Court of Canada" in Hugh Mellon & Martin Westmacott, eds, *Political Dispute and Judicial Review: Assessing the Work of the Supreme Court of Canada* (Scarborough, ON: Nelson, 2000) 31; Emmett Macfarlane, *Governing from*

institutional biography tells a story of transformation. The power and strength of the Court are the end of the story; a century of anonymity and captivity is its beginning.[6] According to the literature, the modern significance of the Court emerged incrementally.

The first moment in the Court's evolution was its creation in the late 19th century after several years of opposition, primarily from Quebec.[7] The Court was established by federal statute pursuant to Parliament's authority to "provide for the constitution, maintenance, and organization of a general court of appeal for Canada", and to establish "any additional courts for the better administration of the laws of Canada".[8] Opposition continued after the Court started its work, with bills calling for its abolition introduced every year from 1879 to 1882 and proposals to exclude provincial matters from its jurisdiction each year from 1883 to 1886.[9]

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the Bench: The Supreme Court of Canada and the Judicial Role (Vancouver: UBC Press, 2013) at 39 [Macfarlane, *Governing*].

[6] Before settling on the title "The Captive Court", Ian Bushnell considered naming his book "The Anonymous Lawmakers": Bushnell, *supra* note 3 at xii. Chief Justice Lamer, as he then was, describes this shift by juxtaposing the Court's first hearing day on 17 January 1876 (for which a "transcript of the day's proceedings states starkly: 'There being no business to dispose of, the Court rose'") with hearings today (at which there are "television crews swarming over the lobby of the courthouse, demonstrators picketing on the steps, and newspapers routinely reporting the Court's latest judgments on the front page"): The Right Honourable Antonio Lamer, "A Brief History of the Court" in *The Supreme Court of Canada and Its Justices 1875-2000: A Commemorative Book* (Ottawa: Dundurn Group and the Supreme Court of Canada in cooperation with Public Works and Government Services Canada, 2000) 11 at 11. For contemporary assessments of the Court's early years, see generally Bushnell, *supra,* note 3 and McCormick, *Supreme At Last, ibid.* On aspects of these early years that speak to this juxtaposition, also e.g. Peter McCormick & Ian Greene, *Judges & Judging: Inside the Canadian Judicial System* (Toronto: James Lormier & Co, 1990) at 89; Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2003) at 6; Monahan, *Politics and the Constitution, ibid* at 3; James G Snell & Frederick Vaughan. *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 17-8, 50-1, 171-8; Isabelle Gournay & France Vanlaethem, "The Supreme Court Building" in *The Supreme Court of Canada and its Justices, 1875-2000* (Ottawa: The Dundurn Group and Public Works and Government Services Canada, 2000) 195 at 197; Roger Bilodeau, "Supreme Court of Canada: structure, status and challenges" (2010) 36:3 Commonwealth Law Building 421 at 426; R Blake Brown, "The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff" (2002) 47 McGill LJ 559 at 564-575.

[7] Snell & Vaughan, *ibid;* Bushnell, *supra* note 3; Iacobucci, *supra* note 5; Lamer, *ibid; Supreme Court Act Reference, supra* note 4 at para 79.

[8] *Constitution Act, 1867,* (UK), 30 & 31 Vict, c 3, s 101, reprinted in RSC 1985, Appendix, No 5.

[9] Snell & Vaughan, *supra* note 6 at 32; Bushnell, *supra* note 3.

An early turning point in the Court's institutional life is said to be the abolition of appeals to the Judicial Committee of the Privy Council.[10] Previous attempts to preclude or truncate appeals to the Privy Council had been unsuccessful but growing support for the Court in the mid-20th century created the legal and political conditions necessary for abolition.[11] With the end of appeals to the Privy Council, the Supreme Court was "re-born" as "supreme in law as well as in name".[12] The Court inherited the Privy Council's role as the "ultimate judicial authority over all legal disputes in Canada",[13] rendering the Court "a key matter of interest to both Parliament and the provinces".[14] That said, the story admits that while the end of appeals to the Privy Council was a necessary condition for the Court's legal supremacy, it was not sufficient for attaining political significance. It took several decades after 1949 for the Court to "take advantage of its new stature" and "earn the respect and trust of Canadians".[15]

The dominant narrative places the second turning point in the 1970s, the Court's "watershed decade".[16] During this era, Prime Minister Pierre Trudeau pursued his vision of the Court as a scholarly institution, able to confront the constitutional dilemmas of his ambitions, and

[10] Macfarlane, *Governing, supra* note 5 at 40-41; McCormick & Greene, *supra* note 6 at 191-2. Snell & Vaughan, *supra* note 6 at 191; Lamer, *supra* note 5 at 21; Bushnell, *supra* note 3 at xii; Adam Dodek, *The Canadian Constitution* (Toronto: Dundurn, 2013) at 120-21.
[11] Lamer, *supra* note 5 at 21; Snell & Vaughan, *supra* note 6 at 125-7, 191-4; Brown, *supra* note 6 at 584; McCormick & Greene, *supra* note 6 at 192; McCormick, *Supreme at Last, supra* note 5.
[12] McCormick & Greene, *supra* note 6 at 192.
[13] *Supreme Court Act Reference, supra* note 4 at para 82 and more generally, paras 81-84.
[14] *Supreme Court Act Reference, supra* note 4 at para 85.
[15] Snell & Vaughan, *supra* note 6 at 195, 196-213, 214-232; Patrick J Monahan, "The Supreme Court of Canada in the 21st Century" (2001) 80 Can Bar Rev 374 at 375 [Monahan, "21st Century"], citing Peter H Russell, "The Political Role of the Supreme Court of Canada in its First Century" (1975) 53 Can Bar Rev 576; Bushnell, *supra* note 3 at 380; Peter McCormick, "Selecting the Supremes: Appointment of Judges to the Supreme Court of Canada" (2005) 7:1 J App Prac & Process 1 at 8-9 [McCormick, "Selecting the Supremes"].
[16] McCormick, "Selecting the Supremes", *ibid* at 10. See also the account of the changes in the 1970s in Macfarlane, *Governing, supra* note 5 at 42-43.

demonstrate "inspired leadership" as a creative law-maker.[17] The Prime Minister appointed judges with credentials that corresponded to his vision - appellate-level judicial experience, engagement in the academic dimensions of law, and non-partisan public service – with Justice Laskin as his archetype.[18] Further, the *Supreme Court Act* was amended. The Court would now hear cases not because they met a monetary threshold but because they presented matters of "public importance".[19] With this legislative reform, the Court is said to have acquired control over its docket, and became a true supreme court, responsible for the sound and just evolution of Canadian law.[20] The Court was now truly "essential under the Constitution's architecture" as the "final, independent judicial arbiter of disputes over federal-provincial jurisdiction" and the "exclusive ultimate" word on public and provincial civil law across the country.[21]

The conventional narrative tells of a final turning point in the Court's trajectory towards public prominence: patriation of the Constitution of Canada and, more specifically, the entrenchment of the *Canadian Charter of Rights and Freedoms* and the principle of constitutional supremacy. The enactment of the *Charter* is said to have finally "catapulted [the Court] into a prominence

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[17] Snell & Vaughan, *supra* note 6 at 216-217; 236-238; Bushnell, *supra* note 3 at 385; Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005) at 365-384 [Girard, *Bora Laskin*].

[18] McCormick, "Selecting the Supremes", *supra* note 15 at 10; Benjamin Alarie & Andrew Greene, "Policy Preference Change & Appointments to the Supreme Court of Canada" (2009) 47:1 Osgoode Hall LJ at 6; Philip Girard, *Bora Laskin, ibid* at 6-11, 365-366, 369-384; Snell & Vaughan, *supra* note 6 at 223, 231, 236, 255; Lorne Sossin, "In Search of 'Bora's Head'", Book Review of *Bora Laskin: Bringing Law to Life* by Philip Girard and of *The Laskin Legacy: Essays in Commemoration of Chief Justice Bora Laskin* by Neil Finkelstein & Constance Backhouse, eds, (2009) 59 UTLJ 251 [Sossin, "Bora's Head"]; Ian Binnie, "Laskin's Legacy to the Supreme Court" in Neil Finskelstein & Constance Backhouse, eds, *The Laskin Legacy: Essays in Commemoration of Chief Justice Bora Laskin* (Toronto: Irwin Law, 2007) 51. As Girard observes, "[i]f Laskin had not existed in 1970, Trudeau would have had to invent him": Girard, *Bora Laskin, ibid* at 369.

[19] *Supreme Court Act,* RSC 1985, c S-26, s 40(1).

[20] Lamer, *supra* note 6 at 25; Bushnell, *supra* note 3 at 404-407; Snell & Vaughan, *supra* note 6 at 233, 238-9; Balcome, Randall PH, Edward J McBride & Dawn A Russell. *Supreme Court of Canada Decision-Making: The Benchmarks of Rand, Kerwin and Martland* (Toronto: Carswell, 1990) at 243-244; McCormick & Greene, *supra* note 6 at 194-196; For a contemporaneous account see Bora Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (1975) 53 Can Bar Rev 469.

[21] *Supreme Court Act Reference, supra* note 4 at paras 83-84, 86, 88.

unsurpassed in its previous history".[22] The Court, as Canada's highest court, became the ultimate guardian of the constitution.[23]

In the institutional biography of the Court, the change marked by the *Charter* is often narrated in terms of a new – emphatically political – dimension of the Court's work. Thus, persistent historical calls for creativity and gumption by the Supreme Court in the dominant narrative now sit alongside both criticisms and celebrations of that creativity in the *Charter* context. For some, *Charter* adjudication has represented a break with expectations of judicial neutrality and objectivity, and thus had to be explained as idiosyncratic and subjective. But others have doubted the extent of the *Charter*'s transformative effect on the Court's power and decision-making processes. On this view, the *Charter* did not change the Court's institutional role – the Court has always supervised the constitutional boundaries of state action and had to balance interests, policies and values in the process.[24] Rather, disputes under the *Charter* expanded "the extent to which people notice what it is that courts do" and let the Court's use of, and contribution to, public policy "out of the closet".[25] The Court was thus thrust into the center of public discourse not because of a break with tradition

[22] Snell & Vaughan, *supra* note 6 at 252. Bushnell, *supra* note 3 at 437; *Vriend v* Canada, [19987] 2 SCR 493 at para 131 [*Vriend*], per Iacobucci J, citing Chief Justice Brian Dickson, "Keynote Address" in The Cambridge Lectures (1985) at 3-4; Chief Justice Beverly McLachlin, "The Charter: A New Role for the Judiciary?" (1991) XXIX: 3 Alta L Rev 540 at 541 [McLachlin, "A New Role"]; McCormick & Greene, *supra* note 6 at 196-7.

[23] *Vriend, ibid*; *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381, 2004 SCC 66 [*NAPE*]; McLachlin, "A New Role", *ibid* at 541. Peter W Hogg, "The Law-Making Role of the Supreme Court of Canada: Rapporteurs's Synthesis" (2001) 80 Can Bar Rev 17 [Hogg, "Synthesis"]. For a convenient source of development on these points, see the contributions to the symposium celebrating the Court's 125th anniversary, for which Professor Hogg was the rapporteur, published in (2001) 80: 1 Can Bar Rev.

[24] Kent Roach, "Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislature" (2001) 80 Can Bar Rev 481 [Roach, "Common Law Dialogues"]; Lewis N Klar, "Judicial Activism in Private Law" (2001) 80 Can Bar Rev 215.

[25] Justice Rosalie Silberman Abella, "The Judicial Role in the Development of the Law: The Impact of the Charter" in Joseph F Fletcher, *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999) 268 at 271-272.

but because the *Charter* served as a framework for translating particular value and policy debates into legal disputes to be resolved by the judicial system.

We will return to the *Charter* and its implications for the Court in Part II. At this juncture, we can simply notice that regardless of the measure of the transformation brought by the *Charter* for the life of the Court in fact, understandings and assessments of the Court became intimately bound to understandings and assessments of the *Charter,* and its successes and failures.[26] These enduring controversies are important; they facilitate reflection on foundational principles in Canadian public life – democratic freedoms and obligations, proportionality, liberty, sovereignty, and so on. And yet, we should be asking, as this dissertation aims to do, what is at stake in perpetuating the eclipsing effect of conceiving, and forming our expectations, of the Court through the frame of rights adjudication under the *Charter.*

The Supreme Court Act Reference

[26] See e.g. Patrick J Monahan & Andrew Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 Sup Ct L Rev 69; John Whyte, "On Not Standing for Notwithstanding" (1990) 28 Alta L Rev 347; Peter H Russell, "The Charter and Canadian Democracy" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the* Canadian Charter of Rights and Freedoms (Vancouver, UBC Press, 2009) 287 [Russell, "Canadian Democracy"] [Kelly & Manfredi, *Contested Constitutionalism*]; Claire Beckton & A Wayne MacKay, Research Coordinators, *The Courts and the Charter* (Toronto: University of Toronto Press and Supply and Services Canada, 1985); Andrew Petter & Allan C Hutchinson, "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*" (1988) UTLJ 278; Bushnell, *supra* note 3 at 481-482; Philip Slayton, *Mighty Judgment: How the Supreme Court Runs Your Life* (Toronto: Allen Lane, 2011); FL Morton & Rainer Knopff, *The Charter Revolution & The Court Party* (Peterborough, ON: Broadview Press, 2000); Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Revised, Updated and Expanded Edition (Toronto: Thompson Educational Publishing, 1994); Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010) [*Not Quite Supreme*]; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed (Oxford: Oxford University Press, 2001) [*Paradox*]; James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005).

The *Supreme Court Act Reference* is a distinctive moment in the biography of the Court's institutional life. It signals another pivotal moment – that of constitutional entrenchment – and gives constitutional status to the conventional account of the Court's evolution within the constitution of Canada. It is also the leading case on the character and place of the Court within the architecture of Canada's constitutional order and the interpretation of the amending procedure in relation to Court reform, to which we will turn in Chapter 4. For each of these reasons, the *Reference* warrants some attention here.

The constitutional forces and facts operating in the *Reference* have been described as a "perfect storm of law and politics".[27] In October 2013, Justice Nadon was sworn in as the newest member of the Supreme Court of Canada. His appointment was swiftly challenged; a reference ensued. The issue driving the *Reference* was whether Justice Nadon met the statutory eligibility criteria for appointment to the Supreme Court.

The *Supreme Court Act* provides that any current or former judge of a provincial superior court is eligible for appointment to the Court.[28] Anyone with ten years of membership in a provincial bar is also eligible.[29] Yet three seats on the Court's bench are reserved for judges of Quebec. These seats are the subject of section 6 of the *Act*. Section 6 provides that "at least three" judges must be appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec" or "from among the advocates" of Quebec. Herein lay the problem. At the time of his appointment, Justice Nadon was a judge of the Federal Court of Appeal. He had spent his judicial

[27] Carissima Mathen, "The Shadow of Absurdity and the Challenge of Easy Cases: Looking Back on the *Supreme Court Act Reference*" (2015) 71 SCLR (2d) 161 at 162 [Mathen, "Shadow"].
[28] *Supreme Court Act, supra* note 19, s 5.
[29] *Supreme Court Act, supra* note 19, s 5.

career in the Federal Court system, not in the courts of Quebec. That said, before being appointed to the bench, Justice Nadon had been a member of the Barreau du Québec for more than ten years. The legal question, therefore, was whether former membership status satisfied the statutory eligibility criteria for appointment to a Supreme Court seat reserved for judges of Quebec.

A majority of the Court held that it did not; current membership was required. According to the majority opinion, section 6 was intended to ensure sufficient civil law expertise on the Court, as well as sufficient representation of Quebec's legal traditions and social values. Section 6 was also intended to cultivate and enhance the Court's legitimacy by inspiring confidence among the people of Quebec.[30] While Parliament could have pursued these aims differently, it chose to do so by requiring current bar membership for appointees from Quebec. As a consequence, judges of the Federal Court and the Federal Court of Appeal, including Justice Nadon, are ineligible for the seats on the Court reserved for judges of Quebec.

The *Reference* dealt with a second issue, this one a constitutional question. The issue was whether Parliament could unilaterally amend the *Supreme Court Act* to provide that former members of provincial bars were eligible for appointment, including former members of the Quebec bar.[31] By the time the *Reference* was heard, the *Supreme Court Act* had already been amended to include sections 5.1 and 6.1, which make the necessary changes to the eligibility criteria for appointment.[32]

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[30] *Supreme Court Act Reference, supra* note 4 at paras 56, 59.

[31] More precisely, the second reference question asked: "Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No 2*?"

[32] Section 5.1 provides, "For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province". Section 6.1 provides, "For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if,

On its face, the constitutional issue appeared straightforward. Section 101 of the *Constitution Act, 1867* authorizes Parliament to create, maintain and organize a general court of appeal for the country and to establish additional courts for the better administration of the laws of Canada.[33] This constitutional authority empowers Parliament to create and configure the Supreme Court however it pleases. But, still looking only to the text of the *Constitution Acts, 1867 and 1982,* the simplicity of this argument was confounded by the constitutional amending procedures, set out in Part V of the *Constitution Act, 1982*. The procedures provide that amendments to the Constitution of Canada in relation to the "composition of the Supreme Court" require unanimous consent of both houses of Parliament and the provinces, and that amendments in relation to the "Supreme Court of Canada" trigger the 7/50 rule.[34] The question then was: Do sections 5.1 and 6.1 amend the Constitution of Canada such that they cannot be enacted by Parliament alone?

A majority of the Court concluded that Parliament had the constitutional authority to enact section 5.1, as it was truly declaratory and within the scope of Parliament's jurisdiction under section 101. Section 6.1, however, was of a different character. The majority concluded that section 6.1 changed the *Act* such that a new group of people – former members of the Barreau du Québec – would be eligible for appointment to the Supreme Court. We will take a closer look at this conclusion in Chapter 4, but here it is enough to note the outcome, namely that section 6.1 of the *Supreme Court Act* was a constitutional amendment in relation to the composition of the Supreme Court. It could

at any time, they were an advocate of at least 10 years standing at the bar of that Province": *Supreme Court Act, supra* note 19, ss 5.1, 6.1.

[33] *Constitution Act, 1867, supra* note 8, s 101.

[34] *Constitution Act, 1982*, ss 41(d), 42(1)(d), being Schedule B to the *Canada Act, 1982* (UK), 1982 c 11.

therefore be implemented only by resolution of both houses of Parliament and all the provincial legislatures.

In order to answer the constitutional question at stake in the *Reference*, the Court had to determine the constitutional status of the Supreme Court. Of particular concern was the constitutional status of the eligibility criteria set out in sections 5 and 6 of the *Supreme Court Act.* If the eligibility criteria codified in section 6 were entrenched within the Constitution of Canada, then section 6.1 would constitute a constitutional amendment and therefore be beyond Parliament's unilateral authority.[35] It was here, in assessing the Court's current constitutional status, that the judges told a story about the Supreme Court's evolution within the constitutional order of Canada. More precisely, it is here that the majority told the modern conventional narrative about the evolution of the Court, the same story as told above, and from that narrative, concluded that the Court is a "foundational premise" of the Constitution of Canada,[36] its essence protected from unilateral legislative reform by Part V.

Unsurprisingly, given the issues at stake, when chronicling the four turning points in the institutional life of the Court, the majority emphasized the provincial interests that are implicated in the existence and design of the Court, with a focus on the interests of Quebec. With respect to the original creation of the Court, the majority noted the opposition expressed by Quebec and explained that the consensus needed to establish the Court was reached only with "the guarantee

[35] Justice Moldaver did not address the second reference question; it was unnecessary given his conclusion on the first. In *obiter*, Moldaver J agreed that Quebec's entitlement to three Supreme Court judges was constitutionally entrenched and protected from unilateral change by section 41(d) of the *Constitution Act, 1982*. That said, Moldaver would not agree that the eligibility requirements are similarly entrenched. "Put simply", he said, "I am not convinced that any and all changes to the eligibility requirements will necessarily come within 'the composition of the Supreme Court of Canada' in s. 41(*d*)": *Supreme Court Act, supra* note 4 at para 115.
[36] *Supreme Court Act Reference, supra* note 4 at para 89.

that a significant proportion of the [Court's] judges would be drawn from institutions linked to Quebec civil law and culture".[37] This agreement reflected the bijural character of Canada's constitution, ensuring that both the common and civil law traditions would be represented on the Court.[38] The majority explained bijural representation as a matter of competence – guaranteeing the requisite mix of expertise – and a matter of legitimacy – enhancing the confidence of Quebec in the Court.[39]

Then, with the abolition of appeals to the Privy Council, the majority reasoned, the Court assumed a "vital" institutional role within the structure of Canada's federal system.[40] "Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of the legal systems within each province and, more broadly to the development of a unified and coherent legal system.[41]

According to the majority in the *Reference,* the Court's "essential" constitutional status crystallized with the legislative reforms of 1975. The shift from court of correction to ultimate supervisory court rendered the Court "an institution whose continued existence and functioning engaged the interests of both Parliament and the provinces".[42] This essential status was "confirmed" and "enhanced", the majority explained, with the enactment of the *Constitution Act, 1982.*[43] The judiciary became the interpreter and remedial arm of the *Charter*, exercising these roles within

[37] *Supreme Court Act Reference, supra* note 4 at para 93 and, more generally, paras 77-81.
[38] *Supreme Court Act Reference, supra* note 4 at para 104.
[39] *Supreme Court Act Reference, supra* note 4 at para 104.
[40] *Supreme Court Act Reference supra* note 4 at para 85.
[41] *Supreme Court Act Reference supra* note 4 at para 85.
[42] *Supreme Court Act Reference, supra* note 4 at para 76.
[43] *Supreme Court Act Reference, supra* note 4 at para 88.

Canada's constitutional democracy. The judiciary was imbued with the role of "guardian of the constitution", rendering the Supreme Court a "foundational premise of the constitution".[44]

The majority emphasized the real and symbolic effect of the amending procedures, which provided that reform of the constitution in relation to the Supreme Court and its composition was possible only with federal and provincial consent.[45] This was, the majority contended, a reflection and manifestation of the Court's status as indispensable in the architecture of Canada's constitution.[46]

For the majority, the moral of the historical account was that the Supreme Court of Canada is now a "constitutionally essential institution".[47] The Canadian constitution necessarily contemplates a supreme court that is independent, bijural, and serves as the country's final, exclusive, general court of appeal, in all matters of provincial and public law, including constitutional interpretation.[48] It followed, the majority noted, that Parliament is no longer simply authorized to establish a supreme court under section 101, a power that would arguably allow Parliament to dismantle the Court if it so chose. Rather, the trajectory of constitutional history in Canada entails that Parliament is now *obligated* to preserve and defend the constitutional core of the Court.[49] Parliament alone can thus legislate for the purposes of "routine" maintenance of the Court under section 101, but it cannot unilaterally alter the configuration of the Court or its "fundamental nature and role".[50] Any "substantive change" to the Court's existence or key features requires the consent of Parliament

[44] *Supreme Court Act Reference, supra* note 4 at para 89.
[45] *Supreme Court Act Reference supra* note 4 at paras 90-94.
[46] *Supreme Court Act Reference, supra* note 4 at para 100.
[47] *Supreme Court Act Reference supra* note 4 at para 87.
[48] *Supreme Court Act Reference supra* note 4 at para 94.
[49] *Supreme Court Act Reference supra* note 4 at para 101.
[50] *Reference re Senate Reform,* 2014 SCC 32, [2014] 1 SCR 704 at para 48 [*Senate Reform Reference*].

and either a substantial segment or all of the provincial legislatures.[51] We will return to the implications of these conclusions for the future of Court reform in Chapter 4.

The untold story of the evolution of the Court

After the *Reference*, the evolutionary account of how the Court rose to its current legal and political significance is a story with legal force. On the current state of the law, the Court and its key features – at a minimum, its jurisdiction, composition, and independence - are entrenched in the Constitution of Canada; the constitution cannot be imagined without them.[52] The conventional narrative, and its account of the pivotal moments in the Court's history, stands as the legal justification for this conclusion.

The conventional account provides a relatively tidy account of the Court's institutional life, giving the impression that the trajectory of the Court through the march of constitutional time has been linear and unavoidable. The Court is portrayed as a somewhat passive actor in this story, gaining authority by the legal and political developments unfolding around it.[53] But, as with the life of any social entity, each turning point in the narrative represents a series of advancements and regressions, successes and failures. These gaps have now been written out of the story as not constitutionally relevant. Such is the nature of storytelling and understanding, indeed of legal

[51] *Supreme Court Act Reference supra* note 4 at paras 90-106; *Constitution Act, 1982, supra* note 34, ss 41(d), 42(1)(d). Unanimous consent is required for all reform in relation to the "composition of the Supreme Court" pursuant to section 41(d) of the *Constitution Act, 1982*. Constitutional reform in relation to all other matters dealing with the Supreme Court are subject to the 7/50 rule under section 42(1)(d).
[52] *Supreme Court Act Reference, supra* note 4 at para 94.
[53] Contra Paul Daly, "A Supreme Court's Place in the Constitutional Order – Contrasting Recent Experiences in Canada and the United Kingdom" (2015) 41:1 Queen's LJ 1 and Erin Crandall, "DIY 101: The Constitutional Entrenchment of the Supreme Court of Canada" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 211 [Macfarlane, *Constitutional Amendment*].

reasoning too – we must always be making choices about relevance and weight. A risk arises, though, when it is forgotten that these choices – and what is at stake in them – are choices. The narratives crystallize, their contingency is camouflaged, and our energies might be directed away from other potentially important queries.[54] For example, when legal analysis is shown great deference and when the Court is positioned as the apex authority in constitutional interpretation, we risk forgetting that a judgment of the Court is not a panacea for social ills, but rather is an important but incomplete account of any social and political issue. Its impact is limited, and rightly so, as doctrinal and phenomenological effects are distinct. Our realities are richer and more complicated than a judgment can accommodate and the questions posed by our realities are not often best conditioned by the forces of Supreme Court litigation. A judgment contributes as an offering to be invoked, rather than determinative of social experience. When the *Supreme Court Act Reference* is taken as complete, we risk stifling inquiry into the moments in the Court's history that have not been deemed transformative, but perhaps should be, and we create the conditions for erecting blinders that impede our understanding and assessment in the future. For example, the choice to focus on the civil law and common law traditions in the development of the Court might discourage us from asking about the imperatives for the Court's institutional structure and morality that flow from the place of Indigenous legal traditions in constitutionalism in Canada. And accepting the Court's status as the highest constitutional interpreter might distract us from identifying or exercising our own agency, as well as recognizing the contributions of other decision-makers, in analyzing problems and devising solutions as we live out our constitutional

[54] For examples of authors who have investigated this contingency in relation to the conventional narratives about the Court, see Brown, *supra* note 6, who challenges a conventional interpretation of history, and Jean-Guy Belley, "What Legal Culture for the Twenty-First Century?" translated by Nicholas Kasirer (2011) 26:2 CJLS 237, who explores how assessments of the Court's role and significance are tethered to the legal culture that the Court – and the assessors - inhabit.

lives. These risks, and others, along with the extent to which they should be managed and overcome are explored in Chapters 2 and 3.

II. THE ROLES OF THE COURT

Part I recounts the conventional narrative about the evolution of the Court's modern significance, a status understood to be built on a historical shedding of timidity and a recent expansion of formal power and legitimacy. We shift now to accounts of the role of the Court in the constitutional life of the country. In other words, given that the Court is significant, what do we expect it to do?

The Legal Framework

The Court is a general court of appeal for Canada and established for the better administration of the laws of Canada.[55] Its status as Canada's exclusive, final, judicial, appellate body[56] - as the "ultimate resolver of legal disputes, the authority beyond which there is no further (legal or judicial) appeal as to which of the two parties prevails in the immediate case"[57] - is protected by statute and the constitution.[58]

[55] *Supreme Court Act, supra* note 19, s 3.
[56] *Supreme Court Act, supra* note 19, ss 3, 35, 52.
[57] Peter McCormick, "Reforming the Supreme Court: The One-Court Problem and the Two-Court Solution" in Nadia Verelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal & Kingston: McGill-Queen's University Press, 2013) 191 [McCormick, "One-Court Problem"].
[58] *Supreme Court Act, supra* note 19, ss 3, 35, 52. See e.g. Joseph F Fletcher & Paul Howe, "Public Opinion and Canada's Courts" in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 255 [Howe & Russell, *Judicial Power*].

The Court hears cases involving matters of "public importance" and those that ought to be decided by the Court because they raise important issues of law or mixed law and fact.[59] The Court also hears certain classes of cases as of right.[60] Further, it issues advisory opinions on questions referred to it by the Governor in Council or on appeal from a reference to a province's final court.[61]

A review of the text of the *Supreme Court Act* does not, of course, tell us much about the life of the Court. The narrative of the roles and functions of the Court is richer, a compilation of legal boundaries, institutional culture, role moralities, experiences, and expectations, each conditioning the others. A formalistic reading of the *Act* fails to capture the meaning behind the statutory text or the meaning that attaches to exercises of the Court's authority. A narrative of the Court's roles should be richer, then, weaving expectations and boundaries set by the constitutional and statutory framework along with values, principles, and experiences.

Looking to the literature, we find a prominent narrative about the Court's roles. It discloses a struggle to define the power relationship between the Court, the legislatures, and the executive and to delimit the role of the Court in Canada's post-patriation constitutional order. In this period, three metaphors – umpire, guardian, and dialogue – tell much of the story.

The Court as constitutional umpire and guardian

[59] *Supreme Court Act, supra* note 19, ss 40(1), 43(3).
[60] See e.g. *Supreme Court Act, supra* note 19, ss 35.1, 36; *Criminal Code of Canada,* RSC 1985, c C-46, ss 691(1)(a), 691(2)(a)(b).
[61] *Supreme Court Act, supra* note 19 at s 53. This also applies to appeals from provincial references: *Supreme Court Act, supra* note 19 at s 36.

According to the current literature, in another constitutional era, before enactment of the *Charter,* the Court was known, first and foremost, as the umpire of federalism.[62] This is no longer the case. While the notion of umpire is still present in conventional accounts,[63] federalism has waned as the defining frame for the Court's constitutional identity.[64] As umpire or referee, the Court has been understood to enforce the legal rules of intergovernmental relations, determining when legislative action steps out of bounds. As umpire, the Court embodies the virtues of neutrality between the parties and loyalty to the "game".[65] The Court as umpire shuns claims of judicial imperialism, as the players – and not their referee – are most important.[66] Juxtaposing this image of the judge, who sits above the fray of policy interests and personal ideology, with the image of the judge in rights adjudication, forced to confront questions of morality and proportionality, is a rhetorical tool for *Charter* critics.

Within the narrative, the umpire metaphor seems to ascribe a role to the Court that sits comfortably with Canadian federalism. Political power in Canada is divided between two orders of government, and the courts referee the boundary between them.[67] This image of federalism is clean and simple, but also idealized. The overlapping authority and opportunity for joint action imagined within cooperative federalism, along with the potential duties of intergovernmental regard that

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[62] Donna Greschner, "The Supreme Court, Federalism and Metaphors of Moderation" (2000) 79 Can Bar Rev 47 at 59.
[63] For references to these metaphors in the case law, see e.g. *Re Anti-Inflation Act,* [1976] 2 SCR 373 at 405 (guardian), *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 (guardian) at paras 35, 38, 71; *R v Lippé*, [1991] 2 SCR 114 (umpire) at 137; *NAPE, supra* note 23 at paras 105, 116 (referee).
[64] Greschner, *supra* note 62 at 59. See also Patrick J Monahan, "The Supreme Court of Canada and Canadian Federalism, 1996-2001" in Pierre Thibault, Benoît Pelletier, & Louis Perret, *Essays in Honour of Gérald-A. Beaudoin: The Challenges of Constitutionalism* (Cowansville, QC: Les Éditions Yvon Blais, 2002) 353 [Monahan, "Canadian Federalism"] and AW MacKay, "The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?" (2001) 80 Can Bar Rev 241.
[65] Greschner, *supra* note 62 at 61.
[66] Greschner, *supra* note 62 at 61.
[67] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 56 [*Quebec Secession Reference*]; *NAPE, supra* note 23 at para. 116.

might flow from cooperative action, blur the boundaries that must be refereed.[68] Further, as is discussed in Chapters 2 and 3, conceptions of federalism in Canada may need to shift in order to accommodate the realities of Indigenous self-government and meaningful markers of identity and diversity that do not track the political provincial-federal divide.[69]

But without these conceptual shifts, the elegance of the prevailing umpire metaphor is helpful in articulating a well-entrenched critique of the Court on federalism grounds, namely concerns about bias.[70] The argument is that, with few restrictions, one party to every division of powers dispute – the federal government – chose the referees. This is a function of the process by which judges are appointed to the Court.[71] Yet those referees have a very real (and ongoing) role in identifying, articulating and creating the rules by which federalism disputes are analyzed and resolved. This is a function of the nature of the Court's law-making capacity.[72] Any concerns about the independence of the Court demand the utmost care and attention. Procedural configurations that cultivate or facilitate the infiltration of real or apprehended bias must be remedied immediately. The need also emerges, in the context of conceptualizing the Court, to ensure that the requisite

[68] See e.g. the differing approaches to cooperative federalism in the majority and dissenting opinions in *Quebec (AG) v Canada (AG),* 2015 SCC 14, [2015] 1 SCR 693.
[69] Roderick A Macdonald, "Kaleidoscopic Federalism" in Jean-François Gaudreault-DesBiens & Fabien Gélinas, eds, *Le federalism dans tous ses états: gouvernance, identité et méthodologie* (Cowansville, QC: Éditions Yvon Blais, 2005) 261; John Borrows, *Canada's Indigenous Constitution* (Toronto : University of Toronto Press, 2010) at 188-191 [Borrows, *Canada's Indigenous Constitution*].
[70] Eugénie Brouillet & Yves Tanguay, "The Legitimacy of Constitutional Arbitration in a Multinational Federative System: The Case of the Supreme Court of Canada" in Nadia Verelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal & Kingston: McGill-Queen's University Press, 2013) 125 [Verelli, *Democratic Dilemma*]
[71] *Supreme Court Act, supra* note 19, s 4(2).
[72] On the law-making role of judges, see Greschner, *supra* note 62 at 62, B Laskin, "The Role and Function of Final Appellate Courts: The Supreme Court of Canada" (1975) 53 Can bar Rev 468; GV La Forest, "Judicial Lawmaking, Creativity and Constraints" in Rebecca Johnson et al, eds, *Gérard V La Forest at the Supreme Court of Canada, 1985-1997* (Winnipeg: Canadian Legal History Project, 2000) 3; Abella, *supra* note 25 at 270. Not all, though, support the shift away from thinking of judges as "law-interpreters" rather than "law-makers": see e.g. Morton & Knopff, *supra* note 26.

distance is maintained between the metaphorical and the real. Without a doubt, the judicial appointment process must be designed and executed in a way that preserves and aspires to the highest ideals of judicial independence. But we should be cautious to deploy the umpire metaphor in a way that overemphasizes the effect of executive power without first accounting for the potentially tempering effects of other constitutional values, cultural forces, and institutional commitments of the Court, which are steeped in the values of the rule of law, including independence, impartiality, procedural fairness, and a culture of justification.

As already mentioned, the conventional account provides that the umpire metaphor no longer resonates as deeply in understandings of the Court's role. While it has been transplanted into the *Charter* context to some degree,[73] the umpire metaphor has ceded its prominence to notions of the Court as constitutional guardian.[74] The guardian metaphor is intended to capture the Court's responsibility to protect its charge – the constitution - from the harm of improper government interference. The literature discloses competing views about the Court serving as constitutional guardian, views that are polarized but which confirm the force of the metaphor in the modern understandings of the Court. Supporters of the use of the metaphor contend that the Court acquired this role when political actors formally empowered the courts to redress *Charter* violations and to declare unconstitutional laws invalid.[75] These tasks entail judicial scrutiny of legislative and

[73] See e.g. *NAPE, supra* note 23 at para 116 and Beverley McLachlin, "The *Charter* 25 Years Later: The Good, The Bad, and the Challenges" (2007) 45:2 Osgoode Hall LJ 365 at 369. Greschner, *supra* note 62 advocates for the use of the umpire metaphor to describe the Court's role across constitutional issues.
[74] *Vriend, supra* note 22 at para. 56; *NAPE, supra* note 23 at para. 105.
[75] *Canadian Charter of Rights and Freedoms,* s 24(1), Part I of the *Constitution Act, 1982, supra* note 34; *Constitution Act, 1982, supra* note 34, s 52(1). The courts were all but guaranteed a role in constitutional amendment in light of the structure and language of Part V of the *Constitution Act, 1982*: see Kate Glover, "Structure, Substance, and Spirit: Lessons from the *Senate Reform Reference*" (2014) 67 SCLR (2d) 221 at 254; Adam Dodek, "Uncovering the Wall Surrounding the Castle of the Constitution: Judicial Interpretation of Part V of the Constitution Act, 1982" in Macfarlane, *Constitutional Amendment, supra* note 53, 42 at 43.

executive action and inaction, a duty the courts cannot abdicate.[76] On this view, judicial review under the *Charter* does not amount to improper usurpation of legislative or executive authority, but rather fulfillment of the Court's constitutional mandate. It is an expression of constitutionalism and the rule of law, a democratic role intended to uphold the values entrenched within the constitution.

The critique of the Court's role as guardian has been extensive. The critique is systemic, applicable to the judiciary as a whole, but often framed with reference to the judgments and attitudes of the Supreme Court. The conventional account provides a host of challenges from the left. Critics challenged the Court's early claims that *Charter* standards were "objective and manageable",[77] arguing that this approach denied the politics at stake in *Charter* interpretation and precluded the Court from either participating in analysis of its role or assuming a role sensitive to the relevant policy dynamics.[78] It was also argued that the *Charter* constructed barriers to accessing remedies (and therefore rights). The Court, as the *Charter*'s final judicial interpreter, was said to be party to the resulting alienation and exclusion.[79] Additionally, the Court's authority over *Charter* interpretation was said to amplify the regressive aspects of the *Charter*. The conservatism was twofold: first, official *Charter* interpretation fell to the judiciary, a traditionally conservative group committed to incremental change; second, the *Charter* positioned the state as the enemy of

[76] *Vriend, supra* note 23 at paras. 135-6; *RJR-MacDonald Inc v Canada (AG)*, [1999] 3 SCR 199, per McLachlin J (as she then was) cited with approval in *NAPE*, *supra* note 22 at para. 103; The Honourable Bertha Wilson, "We Didn't Volunteer" in Howe & Russell, *Judicial Power, supra* note 58, 73; Lorraine Weinrib, "The Activist Constitution" in Howe & Russell, *Judicial Power, supra* note 58, 80.
[77] *Reference re s 94(2) of Motor Vehicle Act (British Columbia),* [1985] 2 SCR 486 at para 23.
[78] Petter, *The Politics of the Charter, supra* note 26 at 50-76; Mandel, *supra* note 26.
[79] Petter, *The Politics of the Charter, supra* note 26 at 17-49; Allan C Hutchinson, *Waiting for CORAF: A critique of law and rights* (Toronto: University of Toronto Press, 1995).

freedom, thereby alienating those who rely on government intervention in order to have and exercise freedom.[80]

After 1990, the narrative about the Court's role continued to reflect concerns about the undemocratic effects of the *Charter* and judicial interpretation. However, concerns from the right became more prominent and an active period of debate ensued,[81] even infiltrating popular discourse through the media and political platforms.[82] The debate unfolded within political frames concerned with which branch of government has the last word over law, the constitution, and policy – parliamentary supremacy versus judicial supremacy, activism versus deference, dialogue versus monologue, original intent versus contextual interpretation, strong versus weak judicial review. The critics claimed that constitutional supremacy is, in effect, judicial supremacy, and that "safeguards" against the Court's power, such as sections 1 and 33 of the *Charter*, are rendered hollow due to the Court's authority over section 1 assessments and section 33's political unavailability.[83] Further, they argued, any invocation of section 33 affirms the Court's supremacy over constitutional interpretation, which is undemocratic in its denial of legislative authority. Others argued that pursuant to the *Charter*, unelected judges can (and do) overrule the actions of unelected representatives, thereby thwarting the will of the people.[84] This "judicial activism", as

[80] Petter & Hutchinson, *supra* note 26.
[81] According to Justice Iacobucci and Arbour, for a majority of the Court, pointing to work by Kent Roach, Christopher Manfredi, Ted Morton, Rainier Knopff, and Andrew Petter, in light of how the *Charter* "changed the nature of our constitutional structure", it is "unsurprising" that "concerns about the limits of the judicial role have animated much of the *Charter* jurisprudence and commentary surrounding it: *Doucet-Boudreau v Nova Scotia (Minister of Education),* 2003 SCC 62, [2003] 2 SCR 3 at para 35 [*Doucet-Boudreau*].
[82] Sauvageau, Schneiderman & Taras, *supra* note 5 at 25. See also Delacourt, *supra* note 5.
[83] Manfredi, *Paradox, supra* note 26.
[84] As Iacobucci J has noted, "it seems that hardly a day goes by without some comment or criticism to the effect that under the *Charter* courts are wrongfully usurping the role of the legislatures": *Vriend, supra* note 22 at para. 130.

the story goes, is undemocratic insofar as it is anti-majoritarian, but also "in the more serious sense of eroding the habits and temperament of representative democracy".[85]

Dialogue Theory

Responses to these critiques start with another metaphor and what has come to be known as 'dialogue theory'.[86] This theory provides that concerns about the counter-majoritarian difficulty (that is, unelected judges overruling legislative action) are alleviated by Canada's weak form of judicial review.[87] On this account, the Court and the legislature have complementary roles. The legislature responds to social problems, and the courts, imbued with interpretive authority over the constitution, determine whether the legislative choices are within the constitutional framework.[88] When the Court holds that legislative choices are inconsistent with the *Charter,* it reminds the legislature and executive of considerations that should be accounted for. The political branches can then respond with new legislation or an invocation of the notwithstanding clause (when available). Because the legislative and executive branches can (and, according to Hogg *et al*, usually do) respond to the Court's judgments with legislative action, the institutions are in dialogue with each other.[89] This dialogue is democratic, according to its proponents, because it, first, acts as an accountability mechanism by which the courts and legislatures review each other's work

[85] Morton & Knopff, *supra* note 26 at 149.
[86] According to Kent Roach, "[t]alk of dialogue between courts and the legislatures is so common, it risks becoming a cliché": Kent Roach, "Common Law Dialogues", *supra* note 24 at 487.
[87] Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited – Or "Much Ado About Metaphors" (2007) 45 Osgoode Hall LJ 1; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) [Roach, *Supreme Court on Trial*].
[88] *RJR-MacDonald Inc v Canada (AG)*, [1999] 3 SCR 199, per McLachlin J (as she then was) cited with approval in *NAPE*, *supra* note 23 at para 103 and *Doucet-Boudreau, supra* note 81 at para 36.
[89] Hogg & Bushell, *supra* note 87; Hogg, Bushell, Thornton & Wright, *supra* note 87.

and, second, upholds the Canadian conception of democracy, which aims to manifest and cultivate more than a commitment to majority rule.[90]

The introduction of dialogue theory established a new baseline for critics. Some contended that even if the Court is the constitutional guardian and even if it is theoretically engaged in dialogue, the legislative character of its approach to constitutional interpretation and remedies upsets Canada's democratic order and has a disproportionate impact on policy-making.[91] Others contested the capture of the metaphor. Scholars argued that 'dialogue' misrepresents reality – the Court performs a monologue or ventriloquism by constraining legislative responses.[92] They also contended that the dialogue signaled by the metaphor is, in practice, an "elite and stilted conversation between the judicial and legislative or executive branches of government [which] is an entirely impoverished performance of democracy…[and] an empty echo of what should be a more resounding hubbub".[93] Critics also pointed to the absence of a justification for judicial review as a flaw of dialogue theory.[94] Invoking versions of coordinate constitutional construction, others argue that cases like *Mills*[95] and *Hall*[96] establish that, contrary to dialogue theory, the Court does

[90] Vriend, *supra* note 22 at paras 138-143. These values include respect for human dignity, commitment to social justice and equality, accommodation of diversity, faith in participatory institutions and the rule of law: *R v Oakes*, [1986] 1 SCR 103 at 136; *Quebec Secession Reference, supra* note 67 at paras 64, 67.
[91] *Vriend, supra* note 22, per Major J (dissent) and *Doucet-Boudreau, supra* note 81, per Major, Binnie, LeBel and Deschamps JJ (dissent); Andrew Petter, "Twenty Years of *Charter* Justification: From Liberal Legalism to Dubious Dialogue" (2003) 52 UNBLJ 187 [Petter, "Twenty Years"]; Andrew Petter, "Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn't Such a Good Thing After All" (2007) 45 Osgoode Hall LJ 147 [Petter, "Too Seriously"]; Grant Huscroft, "Constitutionalism from the Top Down" (2007) 45 Osgoode Hall LJ 91 [Huscroft, "Top Down"]; Morton & Knopff, *supra* note 26.
[92] FL Morton, "Dialogue or Monologue" in Paul Howe & Peter H Russell, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 111 [Morton, "Dialogue"]; Christopher P Manfredi & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall LJ 513 [Manfredi & Kelly, "Six Degrees"].
[93] Allan C Hutchinson, "Looking for the Good Judge: Merit and Ideology" in Verrelli, *Democratic Dilemma, supra* note 70, 99.
[94] Petter, "Twenty Years", *supra* note 91.
[95] *R v Mills,* [1999] 3 SCR 668 [*Mills*].
[96] *R v Hall,* [2002] 3 SCR 309 [*Hall*].

not have the last word on constitutional interpretation. Rather, the legislature is entitled to disagree with the Court's constitutional interpretations and to act accordingly.[97] Some others - a minority within the literature - follow up on dialogue theory's claim that concerns about judicial supremacy and activism exaggerate the Court's threat to democracy.[98] These commentators aim to overcome analytical myopathy within the dominant discourse by reorienting the discussion to other democratic concerns – the centralization of control over the federal government and policy in the Prime Minister's Office, "executive domination of Parliament", bureaucratic governance with the *Charter* through the Department of Justice, and the "stunted" *Charter*-based debates in the House of Commons.[99]

The voluminous commentary addressing the legitimacy and limitations of the Court's role as guardian of constitutional rights and its authority of judicial review under the *Charter* renders these issues an unavoidable part of the contemporary narrative about the Court. The Court participated in the debates and reinforced the narrative, as well as the baseline for critics, in some of its decisions.[100] Moreover, the narrative interrogates principles of fundamental significance to defining the Court's role in Canadian democracy, including constitutionalism, institutional authority, legitimacy, and social justice. Past concerns about paltry theorization of the Court's role

[97] Baker, *Not Quite Supreme, supra* note 26; Manfredi, *Judicial Power, supra* note 26; Huscroft, "Top Down", *supra* note 91. For other explanations and concerns about aspects of coordinate construction, see Kent Roach, *The Supreme Court on Trial, supra* note 87; Hogg, Bushell Thornton, & Wright, *supra* note 87; Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 Osgoode Hall LJ 169 ["Next Decade"]; Carissima Mathen, "Constitutional Dialogue in Canada and the United States" (2003) 14 NJCL 403.
[98] See e.g. Peter H Russell, "Canadian Democracy", *supra* note 26 at 290-297; Petter, "Too Seriously", *supra* note 91.
[99] Russell, "Canadian Democracy", *supra* note 26 at 298-300; Kelly, *Governing with the Charter, supra* note 26; Janet L Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002).
[100] See e.g. *Mills, supra* note 95; *Vriend, supra* note 22; *Bell Express Vu Limited v Rex,* [2002] 2 SCR 559.

as umpire in federalism's high era[101] ceded to an overwhelming drive to articulate the Court's role within political theories of institutional action and interaction.

The limits of metaphors

The analysis of the Court's institutional roles is, it seems, telling a story primarily about politics,[102] a theme that echoes in the vast expanse of *Charter* discourse.[103] The analysis is comparative, as it seeks to locate the Court in relation to other government actors, whether legislative, executive, bureaucratic, or administrative, in pursuit of maximizing democracy. On its own, this part of the narrative might be read as suggesting that the Court's constitutional role is primarily political – politics pursued through legal channels. A different reading understands the narrative as one that embraces the differences in public expectations of judges and legislators, while also accepting that the institutions of law are simultaneously, and inherently, political institutions.[104] On either reading, the narrative seems to take for granted the intertwining of law, politics and judicial decision-making, but still maintain that law and politics are conceptually distinct, a conclusion that is not always clear in the substantive claims. Ultimately, the narrative about the Court's role has been dialogic in and of itself. It is characterized by ongoing cycles of role assertion, critique,

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[101] Monahan, *Politics and the Constitution, supra* note 5; Greschner, *supra* note 62.

[102] The analysis of the Court's political dimensions rarely acknowledges that "politics" is not a uniform term. It can encompass: (1) "the art and science of government" (e.g. What is the Court's role in Canadian government? What does the Court's jurisprudence say about how political processes are carried out?); (2) "the policy-forming activities of government" (e.g. Where does Court reform fall on the government's policy agenda? Should policy interests be pursued and debated in the political or judicial forum? What impact do the Court's judgments or roles have on social policy? Do policy considerations play a role in judicial decision-making?); (3) commitment to a particular set of ideas or principles (e.g. How do partisan politics influence the appointment process? Can a Prime Minister predict how a judge will decide future cases? Does ideology play a role in judicial decision-making?); and (4) activities concerned with the acquisition, exercise or relations of power in an organization (e.g. How does the collegial decision-making process unfold? Do female judges make a difference? What is the role of the Chief Justice? How does the Court function as an institution?).

[103] Monahan, *Politics and the Constitution, supra* note 5.

[104] See e.g. Macfarlane, *Governing, supra* note 5.

response, and revision. Supporters of the guardian metaphor and the way in which the Court strives to realize this role point to the Court's constitutional duties and its championing of minority voices in the face of majoritarian. Critics converge on the themes of judicial overstepping and Court power. The general consensus seems to be that the roles and responsibilities of elected officials should be revived and amplified, whether simply as a collective good or in order to reduce the Court's political power either in real terms or, at least, in emphasis. This is a theme to which we will return in Chapters 2 and 3.

The contemporary narratives about the Court's roles, whether read in legal or political terms, point to inadequacies of the contours of the dialogue debate.[105] Metaphors are prominent in the narrative about the Court and useful in conceptualizing what the Court does and what it should aspire to.[106] But, on its own terms, the dialogue metaphor contains an internal discomfort. A dialogue, in its ideal form, should be an interaction of equals. The institutional dialogue contemplated by the metaphor strives, it seems, to capture this equality – both the courts and Parliament have a role in bringing the constitution to life. And yet, the equality imagined by the metaphor does not address one of the primary legislative concerns, which is with who has authority specifically over constitutional meaning. The dialogue metaphor does not fully embrace the possibility of horizontal relationships between constitutional interpreters. The Court retains final interpretive authority to which the legislatures are subject. The shared project captured by dialogue theory is not a shared project of interpretation, at least not a sharing amongst equals. The balance of power over

[105] Kent Roach suggests a number of avenues for advancing the dialogue debate in Roach, "Next Decade", *supra* note 97. This is not to say that the use of metaphors to think through the roles of the Court should be abandoned. Greschner, *supra* note 62 at 76 notes, "No one can avoid using metaphors. They are central to cognitive processes, and judicial reasoning is no exception. Taking metaphors too far is dangerous, but decisions devoid of metaphor would not only be boring – they would be bereft of humanity".
[106] See e.g. Greschner, *supra* note 62 at 54-55.

implementation may fall to the legislatures, but the Court sits at the apex of the interpretive pyramid.

Underlying the narratives about the primary metaphors used to describe the courts' roles is another instability. That is, the dialogue metaphor sits uncomfortably with the notion that the Court is either constitutional guardian or referee. On the one hand, a guardian (the Court) is obliged to shield its beneficiary (constitutional rights) from harm (improper government action). Positioning the Court as the constitutional guardian entails an adversarial and hierarchical relationship between the Court and other government actors, a relationship at odds with a dialogue between equals,[107] although consistent with commitments to judicial supremacy. On the other hand, a referee or umpire is to be dispassionate in its enforcement of the rules. Yet the expectation of a referee's detachment is inconsistent with both the direct engagement required of a participant in a dialogue and the value judgments and law-making required of a constitutional decision-maker. Ultimately, the deeply divided claims about the nature of Court's role calls for a searching interrogation of whether contemporary descriptions, both metaphorical and literal, adequately capture the range of expectations and aspirations attached to – and hoped for - the Court. Scholars have started this pursuit, invoking dance partner[108] and facilitator,[109] as well as non-metaphorical questions about the educative and constitutional court-type roles of supreme courts.[110] Following up on these inquiries is a theme pursued in Chapter 3.

[107] Greschner, *supra* note 62 at 54-55.
[108] Shauna Van Praagh, "Identity's Importance: Reflections of – and on – Diversity" (2001) 80 Can Bar Rev 605.
[109] Robert Schertzer, *The Judicial Role in a Diverse Federation: Lessons from the Supreme Court of Canada* (Toronto: University of Toronto Press, 2016). For a more critical understanding of facilitator, see Wade Wright, "Courts as Facilitators of Intergovernmental Dialogue: Cooperative Federalism and Judicial Review" (2016) 72 SCLR (2d) 365.
[110] Christopher L Eisgruber, "Is the Supreme Court an Educative Institution?" (1992) 67 NYU L Rev 961; Jamal Greene, "The Supreme Court as a Constitutional Court" (2014) 128 Harv L Rev 124.

As a final observation, the contemporary narratives about the Court's roles risk overemphasizing the *Charter* jurisdiction of the Court and the *Charter* dimensions of the constitution.[111] Such emphasis was important in the years after patriation and will continue to be, perhaps particularly in the context of judicial review of delegated action. But it goes without saying that the flourishing of Canada's constitutional order raises questions about, and imperatives for, the roles of the Court that extend well beyond the concerns and opportunities raised by *Charter*. Pressing issues of the day call for greater attention to, for example, the implications of Indigenous legal traditions on the architecture of the constitution and the public institutions that act within it, the nature of the types of disputes that can be – and that we want to be – answered by the Court, and the contribution that a judgment of the Supreme Court makes to conversations on the country's social and political realities. These examples are somewhat a call to return to the basics, to take stock of the calibrations of authority and hope that we attach to a single institution – a very significant one – and to ask, as a measure of the present and in anticipation of the future, whether a recalibration is warranted.

III. THE JUDGES OF THE COURT

[111] Many commentators lament, for example, the persistence of "judicial activism" as a defining analytical theme: see e.g. Roach, *The Supreme Court on Trial, supra* note 87; Kelly, *Governing with the Charter, supra* note 26; Adam M Dodek, "Chief Justice Lamer and Policy Design at the Supreme Court of Canada" in Adam Dodek & Daniel Jutras, eds, *The Sacred Fire: The Legacy of Antonio Lamer* (Markham, ON: LexisNexis, 2009) 93 at 94; Chief Justice Beverley McLachlin, "Courts, Legislatures, and Executives in the Post-*Charter* Era" in FL Morton, ed, *Law, Politics and the Judicial Process in Canada,* 3d ed (Calgary: University of Calgary Press, 2009) 617. The term has many meanings, often deployed inconsistently, and it has deteriorated as a catch-all label for the flaws of a maligned judgment. For examples of studies that inquire into the Court's roles outside the *Charter* context, see Wright, *supra* note 109, Schertzer, *supra* note 109, and, in a different way, Vanessa MacDonnell, "The Constitution as Framework for Governance" (2013) 63 UTLJ 624.

Parts I and II of this chapter presented accounts of the role and significance of the Supreme Court in Canada's constitutional life. They tell stories of interpretive and institutional power struggles waged on the boundary between law and politics. In this Part, I continue to add to the framework of how the Court is understood today and continue to engage with the themes of authority and institutional interaction. However, unlike in the preceding subsection, the orienting figure in this part is the institution of judge rather than court.

This Part focuses on two areas that have been of particular interest in the study of the contemporary Court – the appointment process and judicial biography. These two issues are related, but their study has tended not to intertwine. The focus in the appointments context tends to be 'how do public officials see judges?' and 'what do public officials want to see in judges?' rather than the reciprocal (and more biographical) question, 'what does a judge see?'.[112]

The appointment procedure

The conventional accounts about the process of appointing judges to the Court disclose concerns about the scope of executive discretion. The legal framework governing the appointment process is lean. The *Supreme Court Act* provides that judges of the Supreme Court are appointed by the

[112] For elaboration of the themes captured in each of these questions, see Roderick A Macdonald, "Authors, Arbiters, Oracles, Performers" in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) 233 [Macdonald, "Authors, Arbiters"] and Roderick A Macdonald, "Should Judges Be Legal Pluralists?" (Speech delivered at the Canadian Judicial Council Conference, Hull, QC, 19 November 1995), Canadian Judicial Council, *Aspects of Equality: Rendering Justice* (Ottawa: Canadian Judicial Council, 1995) 229 [Macdonald, "Should Judges"]. These themes are also addressed in Chapter 3 and in the Conclusion. See also the opinions in the *Supreme Court Act Reference, supra* note 4 and *Reference re section 98 of the Constitution Act, 1867*, 2014 QCCA 2365 for case studies in which questions of appointment, eligibility, and biography intersect.

Governor in Council.[113] Convention directs the Prime Minister to recommend the appointee to Cabinet. The remaining steps in the process are matters of executive policy.[114]

The literature is rich with accounts of the processes that have been followed to appoint judges of the Supreme Court over the last two decades. Peter Russell has described the Canadian method of procedural design since 2000 as a "stumblebum" approach.[115] He means that reform of the appointment process has been implemented by successive federal governments, announced via government press release, and enforceable only through political channels.[116] This account is accepted throughout the literature as accurate. As many have recounted, in 2004, for the first time, the federal government announced its protocol for appointing judges to the Supreme Court.[117] Over the next ten years, this protocol was revised on an interim basis (2004), revised on (what was intended to be) a permanent basis (2005), disrupted by an election (2005-2006), revised by a new government (2006), abandoned (2008), revived and consistently followed (2011, 2012) and abandoned again. In the days leading up to the submission of this dissertation, the current Liberal

[113] *Supreme Court Act, supra* note 19, s 4(2).
[114] See e.g. Adam Dodek, "Reforming the Supreme Court Appointment Process, 2004-2014: A Ten Year Democratic Audit" (2014) 67 SCLR (2d) 111.
[115] Elizabeth Thompson, "Reform needed to Supreme Court of Canada Appointments" Law Times (12 Jan 2009) <www.lawtimesnews.com/200901124453/Headline-News/Reform-needed-to-SCC-appointments>.
[116] Thompson, *ibid.*
[117] According to the Minister, the government's protocol constituted a "comprehensive consultation process", which was shaped by two themes - the Court's role in constitutional democracy and "exemplary excellence" – and that the final selection accounted for the judge's merit (professional capacity and personal character), societal diversity, the Court's integrity, judicial independence, transparency, and the value of provincial and Parliamentary input: Irwin Cotler, Evidence to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 37th Parl, 3d Sess, (March 20, 2004) at 1105-1110 [Cotler, "Evidence"]. See also Irwin Cotler, "An Unknown But Not a Secret Process" (2004) 27:2 Canadian Parliamentary Review 13 ["Unknown"]; Irwin Cotler, "The Supreme Court Appointment Process: Chronology, Context and Reform" (2008) 58 UNB LJ 131 ["Chronology"]; Carissima Mathen, "Choices and Controversy: Judicial Appointments in Canada" (2008) 58 UNB LJ 52 at 57.

government announced the process it will use to appoint judges to the Supreme Court, a process that differs markedly from those of the past.[118]

The political facts of recent appointments to the Supreme Court recounted in the narrative confirm the accuracy of the "stumblebum" label. This approach to procedural design is possible in light of Canada's tradition of appointing judges to the Court via uncodified protocols and administrative discretion. This approach is lauded in some circles for creating the conditions in which the process could be easily changed from a process of absolute secrecy to one that with enhanced transparency, consultation, and the participation of public representatives. That said, the conventional narrative about the appointment process is a story primarily about procedural deficits.

Procedural deficits in Supreme Court appointments

There are two conventional narratives about the Supreme Court appointment process, each defined by a procedural deficit of primary concern, one federal, the other democratic. The narratives – and the critiques that they bestow upon the appointment process – also divide along political and chronological lines.

The story of the first era – the era focused on federalism deficits – starts from concerns about the Prime Minister's discretion over appointments to the Court. The main claim is that exclusive federal executive power over appointments fails to account for the most basic building blocks of Canada's constitutional structure, namely the horizontal distribution of power between central and

[118] Prime Minister of Canada, News Release, "Prime Minister Announces New Supreme Court of Canada Judicial Appointments Process" (2 August 2016), online: Prime Minister of Canada <www.pm.gc.ca>.

provincial orders of government, respect for regional input, and the promotion of provincial autonomy in those spheres most suited to local decision-making.[119] Critics argue that failing to legally guarantee provincial input in the Supreme Court appointment process denies each province's vested interest in the Court's composition. Moreover, it fails to account for the valuable insight that provincial actors and citizens have into the region's judicial candidates, and the demands of independence attendant upon the umpire role.[120]

In the decades surrounding patriation, the articulation and elaboration of the federalism deficit monopolized concerns about the Supreme Court appointment process in most of Canada. This captivation with federalism aligned with the national political climate, preoccupied as it was by mega-constitutional politics and negotiations over patriating Canada's constitutional package, securing a constitutional amendment formula, and constitutional recognition of the distinct identity of Quebec.[121] Amidst the deeply-held claims of representation and national identity that were implicated in these constitutional negotiations, it is easy to see why the Court, with its capacity for centralization and its supervisory role in intergovernmental disputes, was a contested site.

Calls for procedural reform concentrated on formalizing modes of provincial participation in selecting the judges of the Supreme Court,[122] though they were unsuccessful.[123] Commentators lamented the perpetuation of the *status quo* - a discretionary federal appointment process - that

[119] See generally Ron Graham, *The Last Act: Pierre Trudeau, the Gang of Eight, and the Fight for Canada* (Toronto: Allen Lane, 2011). See also Erin Crandall, "Intergovernmental Relations and the Supreme Court of Canada: The Changing Place of the Provinces in Judicial Selection Reform" in Verelli, *Democratic Dilemma*, *supra* note 70, 71 [Crandall, "Intergovernmental Relations"].
[120] See e.g. Brouillet & Tanguay, *supra* note 70.
[121] Crandall, "Intergovernmental Relations", *supra* note 119.
[122] See e.g. the chronology set out in Jonathan Aiello, "The Supreme Court of Canada: A Chronology of Change" in Verelli, *supra* note 70, 277.
[123] See generally Graham, *supra* note 119; Crandall, "Intergovernmental Relations", *supra* note 119.

withstood a generation of widespread dissatisfaction with the appointment process and the upheaval and politics of twenty appointments to the Court between 1970 and 1992.[124]

The literature describes a second era of concern with the Supreme Court appointment process, an era preoccupied with the democratic deficits of the process. This era, which persists today, crystallized in the early years of the 21st century. As the story goes, after a decade of civic recuperation from constitutional fatigue (including five years without any new appointments to the Court) and with political rhetoric being channeled through Paul Martin's platform of democratic renewal, the issue of the appointment process returned to the political agenda. This time, Peter Russell's observation that Canada is "the only constitutional democracy in the world in which the leader of government has an unfettered discretion to decide who will sit on the country's highest court" has been a touchstone, a starting point.[125] The critique is that the Prime Minister's appointment power is, in effect, untrammeled, and this creates conditions ripe for procedural and partisan abuse of the judicial appointment system. It is widely accepted that this jeopardizes the Court's legitimacy.[126] As Russell explains, the Canadian concentration of power in Supreme Court appointments is "incompatible with constitutional democracy" because it contradicts the primary values that the Court is intended to uphold - the rule of law, democracy and federalism.[127] The

[124] See e.g. Canadian Bar Association, "The Appointment of Judges in Canada" (McKelvey Report) (1985). Between 1970 and 1992 (inclusive), Justices Laskin, Dickson, Beetz, de Grandpré, Estey, Pratte, McIntyre, Chouinard, Lamer, Wilson, Le Dain, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson, Iacobucci and Major were appointed to the Court.
[125] Peter Russell, Evidence to House of Commons Standing Committee on Justice, Human Rights, Public Safety, and Emergency Preparedness, 37th Parl, 3d Sess, (23 March 2004) at 1130 [Russell, "Evidence"].
[126] See e.g. Ziegel, Jacob. "A New Era in the Selection of Supreme Court Judges?" (2006) 44:3 Osgoode Hall LJ 547 at 550 [Ziegel, "New Era"]; House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Report on Improving the Supreme Court of Canada Appointment Process* (May 2004) (Chair: Derek Lee).
[127] Russell, Evidence, *supra* note 125 at 1130; Lorne Sossin, "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability" (2008) 58 UNB LJ 11 [Sossin, "Aspirations"].

deficits - failures of transparency and oversight - are said to contravene the principles of liberal democratic governance, taint the Court's legitimacy, impair confidence in its institutional independence, and undermine appearances of judicial impartiality.[128]

The failures of democracy that Russell and others have identified re-oriented much of the second era discourse on the appointment process and inspired calls for reform aimed at defending and repairing Canada's commitment to constitutional democracy. Within this discourse, concerns about the lack of provincial participation and the centralizing effects of federal discretion have been displaced, and the focus is on protecting judicial independence, overcoming procedural opacity, supervising executive discretion, and bolstering the governing legal framework.

The literature discloses widespread agreement that the reforms introduced over the past decade are insufficient to address the democratic deficits. While some laud the public questioning of judicial nominees as a positive development *vis-à-vis* civic education, transparency and deterrence of unjustified appointments, critics note that the parliamentarians who ask questions of the nominee have no effective authority or influence over the outcome of the appointment process, have little time to prepare, and are too timid and constrained in their questioning. Many scholars are skeptical about the hearings, arguing that they serve as a decoy for meaningful public participation and do not alleviate concerns about executive discretion.[129]

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[128] See e.g. FC DeCoste, "The Jurisprudence of 'Canada's Fundamental Values' and Appointment to the Supreme Court of Canada" in Verrelli, *Democratic Dilemma, supra* note 70, 87; Jacob Zeigel, Evidence to House of Commons Standing Committee on Justice, Human Rights, Public Safety, and Emergency Preparedness, 37th Parl, 3d Sess, (23 March 2004) at 1116 [Ziegel, "Evidence"]; Patrick Monahan, Evidence to House of Commons Standing Committee on Justice, Human Rights, Public Safety, and Emergency Preparedness, 37th Parl, 3d Sess, (27 April 2004) at 1530 [Monahan, Evidence].

[129] The implementation of a public hearing for judicial nominees has been – and remains - controversial. For a variety of views, see e.g. Peter W Hogg, "Appointment of Thomas A. Cromwell to the Supreme Court of Canada" in Verrelli, *Democratic Dilemma, supra* note 70, 13. Allan C Hutchinson, "Looking for the Good Judge: Merit and Ideology" in

The new process announced by the current Liberal government responds to these concerns. It maintains hearings, but in modified form. Under the new protocol, an Advisory Board has been established to identify candidates for appointment to the Court and to provide a short list of three to five names to the Minister of Justice. While the Advisory Board is undertaking its work, the Minister of Justice will appear before the House of Commons Standing Committee on Justice and Human Rights ("Standing Committee") to explain the process that is to guide the Advisory Board in its work. After the Prime Minister has chosen his nominee, the Minister of Justice and the Chairperson of the Advisory Board will appear before the Standing Committee to explain why the nominee was selected. The nominee will then appear before members of the Standing Committee, the Senate Committee on Legal and Constitutional Affairs, and representatives from all parties with seats in the House of Commons to answer questions, with the purpose of becoming acquainted with the nominee.[130] Only time will tell how this multi-stage protocol plays out in practice, but as a matter of procedural design, the latest stage in Canada's "stumblebum approach" is responsive to many of the concerns about opacity and a lack of accountability that have long attracted attention in the literature.

Other procedural issues and aspirations

Verelli, *Democratic Dilemma, supra* 70; Russell, Evidence, *supra* note 125 at 1145; Ziegel, Evidence, *supra* note 128; FL Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition" in Kate Malleson & Peter H Russell, eds, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) 56; Ian Greene, "Democracy, Judicial Independence, and Judicial Selection for Federally Appointed Judges" (2008) 58 UNB LJ 105; Emmett Macfarlane, "Why public hearings with Supreme Court nominees should mean something", online: MacLeans <www.macleans.ca>; Edward Ratushny, "Confirmation Hearings for Supreme Court of Canada Appointments: *Not* a Good Idea!" in Pierre Thibault, Benoît Pelletier & Louis Perret, eds, *Essays in Honour of Gérald-A. Beaudoin: The Challenges of Constitutionalism* (Cowansville, QC: Éditions Yvon Blais, 2002) 395.

[130] Prime Minister of Canada, *supra* note 118.

The way a problem is framed bears on the solutions that are considered. A conventional account of the Supreme Court appointment process that is framed in terms of democratic and federalism deficits will lead to reforms that remedy the identified deficiencies, such as bolstering public hearings and enhancing provincial consultation. But framing the problem in terms of impoverishments can draw us away from an approach to design that aims to realize constitutional aspirations rather than address procedural gaps.[131] Moreover failing to look beyond the conventional frames of democracy and federalism, can discourage us from considering the ways in which other constitutional principles and values should inform the appointment process.

One specific example is rooted in the value of pluralism. We should ask how the process of appointing judges to the Supreme Court reflects the imperatives that flow not just from the fact of bijurality in Canadian constitutionalism, but rather from the position of Indigenous legal traditions in the constitutional order of Canada. This question is addressed in Chapters 2 and 3. Accordingly, here we can consider another example. In recent decades, calls for reform have been preoccupied with concerns about federalism and democracy. That focus has neglected insights that can be drawn from other constitutional principles, including the rule of law. A rule of law analysis directs our gaze to the core principles governing public decision-making, namely reasonableness and fairness. Indeed, as commentators and executive actors implement and assess the new appointment process, these core principles, well-developed in administrative law, offer a substantive basis for the argument that those who appoint the judges of the Court should be required to publicly justify

[131] Sossin comments on this theme, counseling a change of focus from democratic deficits to democratic aspirations: Sossin, "Aspirations", *supra* note 127. See also Lorne Sossin, "Should Canada Have a Representative Supreme Court?" in Verelli, *Democratic Dilemma, supra* note 70, 27.

their choice, with meaningful and responsive reasons. The principles of administrative law provide that when making decisions of moment, public officials should, in the name of both procedural fairness and substantive merit, provide reasons worthy of the decision being made.[132] The selection of a judge for the Supreme Court is of utmost public significance. Those who select the judges should, therefore, provide reasons explaining why they chose a particular judge and how they worked through the "complicated relationship between geographic representation, professional accomplishment, knowledge and analytic ability, demographic background, bilingual capacities, personal attributes and temperament, and experience".[133] The new process, which has seen the release of the criteria to be used to assess candidates for appointment and which requires that the Minister of Justice and the Chairperson of the Advisory Board appear before a committee of parliamentarians, may meet this standard, either in whole or in part.

The design of an appointment process is a statement not only about who is best suited to make appointment decisions, but also about the type of knowledge that is relevant to assessing an individual's merit and legal excellence. The dominant narrative often frames both its starting point (i.e. the deficits) and its critique (i.e. proposals for reform) in the terms of the constitutional politics of the day, focusing on the roles of political elites and legal experts in the appointment process. There is a messaging implicit in this framing, one about who holds the requisite knowledge to identify a judge of 'merit' or 'excellence' and what the requisite knowledge might be. In the conventional accounts, the knowledge contemplated in both the status quo and the proposed reforms is, for the most part, the knowledge held by political and legal officials in elite institutional

[132] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 43.
[133] Lorne Sossin, "The Supreme Court's long road to transparency and inclusiveness", (9 August 2016) Policy Options, online: <http://policyoptions.irpp.org>.

roles. The message sent by the history of the appointment process and much of the commentary is that a judge's merit is best defined, identified and assessed primarily by a select number of elite politicians and lawyers, in consultation with each other. Such an understanding of knowledge, merit, and consultation is unlikely to cultivate diversification in material terms or an approach to appointments that is deeply sensitive to the aspirations of diversification.

A judicial appointment to the Supreme Court of Canada invites an individual to take up a public office, an office demanding a commitment to the constitution's highest ideals of humility, judgment, responsibility, and sensitivity. It asks the country to call upon its most meritorious jurists to serve. The process used to make those calls must be consistent with the constitutional principles underlying the roles of the Court and its significance in Canada's public life. The process of identifying and appointing those jurists should therefore manifest the institutional morality that the constitution demands. It should, in both process and outcome, live up to its status as a symbol and statement of Canada's aspirations for itself.[134] A more robust inquiry into these aspirations and their implications is taken up throughout the remaining chapters of this dissertation.

Judicial lives and legacies

This final section is of a somewhat different character than the other parts of this chapter. It chronicles the development of interest in the judges of the Court as much as it recounts what those interests have been. It does this by examining the narratives that emerge from biographies of the

[134] Sossin, "Aspirations", *supra* note 127.

Supreme Court judges as well as commentary on the exercise of Supreme Court biography in Canada. Supreme Court biography is relatively new in Canada,[135] as is the study of it.

The first biographical monograph of a judge of the Supreme Court was published in 1984.[136] Eight have been published since.[137] While this biographical record is supplemented by other sources, such as legacy collections about the Court's former judges,[138] oral histories of individuals with links to the Court,[139] and institutional histories of the Court,[140], the biographical record about the Court's judges is sparse.[141] It tells the life story of eight of the Court's judges - Justices Ritchie, Duff, Rand, Hall, McIntyre, Laskin, Dickson, and Wilson, including three Chief Justices and one female judges.

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[135] David R Williams, "Legal Biography in Canada: A New Field to Plough" (1980) 14 Law Society Gazette 329 [Williams, "Plough"].

[136] David R Williams, *Duff: A Life in the Law* (Vancouver: UBC Press for The Osgoode Society for Canadian Legal History, 1984) [Williams, *Duff*].

[137] Williams, *Duff, ibid.;* Dennis Gruending, *Emmett Hall: Establishment Radical,* Revised and Updated ed (Markham: Fitzhenry & Whiteside, 2005). Gordon Bale, *Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review* (Ottawa: Carleton University Press for The Supreme Court of Canada Historical Society, 1991); WH McConnell, *William R McIntyre: Paladin of the Common Law* (Montreal: McGill-Queen's University Press, 2000); Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2002); Sharpe & Roach, *supra* note 6; Frederick Vaughan, *Aggressive in Pursuit: The Life of Justice Emmett Hall* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2004); Girard, *Bora Laskin, supra* note 17; W Kaplan, *Canadian Maverick: The Life and Times of Ivan C Rand* (Toronto: University of Toronto Press, 2009).

[138] There are many of these collections. For a small selection, see e.g. DeLloyd J Guth, ed, *Brian Dickson at the Supreme Court of Canada 1973-1990* (Winnipeg: Canadian Legal History Project for The Supreme Court of Canada Historical Society, 1998) [Guth, *Dickson*]; Kim Brooks, ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009) [Brooks, "Wilson"]; Jamie Cameron, ed, *Reflections on the Legacy of Justice Bertha Wilson* (Markham: LexisNexis, 2008); Elizabeth Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004); *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989); Neil Finkelstein & Constance Backhouse, eds, *The Laskin Legacy: Essays in Commemoration of Chief Justice Laskin* (Toronto: Irwin Law, 2007); *Mélanges Jean Beetz* (Montreal: Éditions Thémis, 1995); Adam Dodek & Daniel Jutras, eds, *The Sacred Fire: The Legacy of Antonio Lamer* (Markham, LexisNexis, 2009); Rebecca Johnson et al, eds, *Gérard V La Forest at the Supreme Court of Canada 1985-1997* (Winnipeg: Canadian Legal History Project for The Supreme Court of Canada Historical Society, 2000); Michel Morin et al, eds, *Responsibility, Fraternity and Sustainability in Law: In Memory of the Honourable Charles Doherty Gonthier* (Markham: LexisNexis, 2012); Patrick J Monahan & Sandra A Forbes, eds, *Peter Cory at the Supreme Court of Canada 1989-1999* (Winnipeg: Canadian Legal History Project for The Supreme Court of Canada Historical Society, 2001).

[139] See e.g. the Osgoode Society for Canadian Legal History, online: <www.osgoodesociety.ca>.

[140] See e.g. Snell & Vaughan, *supra* note 6; Bushnell, *The Captive Court, supra* note 3.

[141] Philip Girard, "Judging Lives: Judicial Biography From Hale to Holmes" (2003) 7 Aust J Legal History 87 [Girard, "Judging Lives"]; Kaplan, *Rand, supra* note 137 at xiv.

Given the recent emergence of the field, there has been little opportunity for a conventional narrative to emerge about Supreme Court judicial biography. That said, because the field continues to grow, an inquiry into contemporary understandings of the Court would be lacking without an exploration of Supreme Court biography to date. Such an exploration reveals some burgeoning trends and common themes.

As a start, the literature discloses a belief that the judges of the Supreme Court are a subject worthy of study today, although this was not always the case. As has been noted, for much of the Court's history, there was "virtually no modern Canadian judicial biography".[142] Canadian judges, including the Court's judges, were seen to be "largely marginal figures and their rulings rarely became part of the national conversation".[143] Girard articulates the view that "…Canadian judicial biography at the Supreme Court level has not flourished in part for entirely justifiable reasons: the members of that court who, since 1875, have made any significant impact on the law or whose lives have possessed sufficient historical interest to engage the attention of a biographer can be counted on two hands".[144] Indeed, this is said to fit with the institutional history of the Court, which, as described above, was also thought to be unworthy or uninteresting as a subject of study for much of its institutional life. [145] One strand of thinking suggests that most of the judges who have sat on the Court are still not worthy of study. As Dyzenhaus notes, the growing number of

[142] Kaplan, *supra* note 137 at xiv. See also Gruending, *supra* note 137 at Preface; Girard, *Bora Laskin*, *supra* note 17 at 5; David Dyzenhaus, Book Review of *Canadian Maverick: The Life and Times of Ivan C Rand* by William Kaplan, (2011) 61 UTLJ 521 [Dyzenhaus, "Book Review"].
[143] Kaplan, *supra* note 137 at xiv. See also Gruending, *supra* note 137 at Preface; Girard, *Bora Laskin*, *supra* note 17 at 5; Dyzenhaus, *ibid.*
[144] Girard, "Judging Lives", *supra* note 141 at 100. See similar sentiment in Dyzenhaus, Book Review, *supra* note 142.
[145] Girard, "Judging Judges", *supra* note 141 at 97-101.

judicial biographies requires explanation given that most judges' lives are no more noteworthy than anyone else's and few judges have had a truly significant impact on the law.[146]

Yet, this lack of interest in the lives of the judges has ebbed, it seems, ceding to the belief that the judges' lives and legacies are important subjects of study.[147] A strong current in the literature provides that the evolution of interest in the judges of the Court tracks the turning points in the evolution of the significance of the Court itself. In particular, a link is drawn between the growth of Supreme Court biography and the expansion of the Court's power in the *Charter* era. The general claim is that as the Court became more powerful under the *Charter* and as constitutional interpretation was deemed a contextual and purposive exercise, the people behind those decisions came to hold considerable social power and therefore merit greater attention. According to William Kaplan, biographer of Ivan Rand, because of the *Charter,* "[what] judges say governs. Who they are and where they come from now matter a great deal".[148] This led to an interest in the people who "populate the bench, especially the membership of the Supreme Court of Canada".[149] "Almost overnight", Kaplan explained, "judicial biography proliferated".[150]

Girard echoes this view, noting that lack of interest in the Court's judges "began to change rapidly in 1982 with the adoption of the *Canadian Charter of Rights and Freedoms,* which thrust upon the Supreme Court a wide-ranging power of constitutional review of legislation" dealing with some of the most important issues in people's lives:

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[146] Dyzenhaus, *supra* note 142.
[147] Bushnell, *supra* note 3 at 481, 482; Girard, *Bora Laskin, supra* note 17 at 5; Balcome, McBride & Russell, *supra* note 20 at 2. According to Ian Bushnell, writing in 1992, "[n]othing could be more important in a study of the functioning of the Supreme Court than a look at the judges themselves": Bushnell, *supra* note 3 at xii.
[148] Kaplan, *supra* note 137 at xiv.
[149] Kaplan, *supra* note 137 at xiv.
[150] Kaplan, *supra* note 137 at xiv.

> The Supreme Court has [now] been obliged to rule on issues touching the lives of millions – from the accessibility of abortion services, the validity of fund control measures, the nature of surviving aboriginal claims in many parts of the country, and the recognition to be afforded same-sex relationships, to issues truly fundamental to the national character, such as the permissibility of Sunday shopping. And not surprisingly, the biographical train has leapt ahead…[151]

The belief that the *Charter* boosted judicial power and therefore boosted interest in the Court's judges is a common theme in the four biographies that tell of the lives of judges who have served on the Court during the *Charter* era. Four biographies are admittedly not a sample from which meaningful conclusions can be drawn. However, within each of these volumes, the *Charter* is formative in the biographer's framing of the judge's life. Each biographer of a *Charter* era judge contends that a substantive objective of the work is to show that the judge responded to the *Charter*'s transformative effects in a principled and laudable way.[152] Girard, for example, explains that his biography of Justice Laskin aims to persuade the reader that Justice Laskin made a "signal contribution" to Canadian law and society in two ways: first, he "articulated, popularized, and symbolized a new rights-oriented discourse in post-war Canada" and, second, he helped prepare the Canadian judiciary for the "challenge of a fundamental constitutional reform".[153] Similarly, Anderson notes that in her biography of Justice Wilson, she aimed to show that while Justice

[151] Girard, "Judging Lives", *supra* note 141 at 100. See also Gruending, *supra* note 137 at 141.
[152] Each biographer aims to reveal the virtues of the way in which his or her biographical subject confronted the transformative era, whether by way of compassion (Sharpe & Roach, *supra* note 6 at 5), social consciousness (Sharpe & Roach, *supra* note 6; Girard, *Bora Laskin*, *supra* note 17; Anderson, *supra* note 137), principled flexibility (Anderson, *supra* note 137), or continuity with common law principles and interpretation methods (McConnell, *supra* note 137).
[153] Girard, *Bora Laskin, supra* note 17 at 5.

Wilson's Supreme Court tenure witnessed an "unprecedented change in Canadian political and legal history", Justice Wilson responded by "help[ing] to create a shifting Canadian consensus about justice, about fairness, and about reciprocal rights and responsibilities".[154] Sharpe & Roach highlight the Court's and the law's *Charter*-induced transformation during Justice Dickson's tenure, arguing that "Brian Dickson was the leading figure in this transformation".[155] And McConnell explains that the objective of his biography of Justice McIntyre was to examine his life, opinions and legal craftsmanship in an effort to show "how one important jurist, at a pivotal time in Canadian legal history, assessed the advantages and disadvantages of the new legal order [that was ushered in with the *Charter*]".[156]

As the field of Supreme Court biography continues to expand, it will be of note whether the *Charter* and post-patriation constitutional interpretation become further entrenched as metrics by which to assess the contributions of judges as worthy biographical subjects. As noted above, the *Charter* and constitutional interpretation have become so entrenched in the biography of the Court itself. It may be that dominant currents in the institutional biography are so forceful, especially in a legal culture enamoured by the Court, that biographers will be unable to resist reinforcing those currents in chronicling the lives of Supreme Court judges.

The commentary on Supreme Court biography in Canada, and the biographies themselves, give rise to a final observation, namely that much is missing from Supreme Court judicial biography and the commentary on it. The field would benefit from continued self-reflection in order to assist

[154] Anderson, *supra* note 137 at xvii.
[155] Sharpe & Roach, *supra* note 6 at 5.
[156] McConnell, *supra* note 137 at viii.

biographers and readers in discerning the parameters and purposes of good Supreme Court biography. This would be even more helpful alongside continued efforts to strengthen scholarly inquiry into the purposes and methods of Supreme Court biography in Canada, both in and of itself and within the broader frame of interdisciplinary legal scholarship. The starting point may be in a deeper inquiry into three sets of foundational questions about the study of lives and legacies at the Court.[157]

First, questions about objectives and epistemological value. What are the objectives of Supreme Court biography, generally and in the Canadian context? What do we hope to learn from the study of lives and legacies about the judges (individually and institutionally), about other personnel who interact with the Court, about the Court itself, about the law and about the society in which we live? What contributions to knowledge should Supreme Court biographies strive for? What are their limits? Where does biographical research fit into the broader category of legal scholarship?

Second, questions about subjects, form, methods, and sources. Who are the proper subjects of a Supreme Court biography? What are the different forms that this biographical research can take?[158] How can biographical research be done well? On what bases can judges' lives be framed and assessed? To what extent is biography an interdisciplinary or multidisciplinary exercise? What sources are relevant?

[157] Not all biographies should pursue the same goals or have the same form. The traditions of biography, including legal biography, are neither uniform nor unidimensional. There is a recognition of plurality: James L Clifford, ed, *Biography as an Art: Selected Criticism 1560-1960* (New York: Oxford University Press, 1962) at xvii. See also R Gwynedd Parry, "Is legal biography really legal scholarship?" (2010) 30:2 Legal Studies 208 at 210.
[158] See e.g. Richard A Posner, "Judicial Biography" (1995) 70 NYU L Rev 502.

Third, questions about education and support. What are the implications of these questions and answers for legal education? What should law faculties do, if anything, to cultivate future biographical researchers as well as a discerning audience for biographical research? How can and should would-be biographers be trained? How can and should biographical research be supported substantively, institutionally, financially, and so on?

These questions are not exhaustive, but the study of them would offer biographers a framework within which to refine their goals and situate their work in conversation with other communities of scholarship.[159] The biographies might also be the orienting point for a new community of ideas, serving as a starting point for further study. At its best, a biography is a thick presentation and interpretation of the biographical subject's life, as well as a careful analysis of connections, assessments and/or myths that link the particular (the subject's life, private) and the general (theory, context, public).[160] A single study of a life cannot be definitive or exhaustive; individuals, judges or otherwise, are simply more complex than a singular interpretation can capture. Cameron's observation at the outset of an edited collection on the legacy of Bertha Wilson applies across the board: "The reflections we offer in this collection are not definitive: Justice Wilson's place in history will be understood in different ways, at different points and places in time, by different commentators".[161] A biographical contribution will always allow for reassessment by commentators with different or new information and different perspectives of ideology, history,

[159] The exercise of answering these questions could be facilitated by comparative analyses: see Girard, "Judging Lives", *supra* note 141.
[160] Ray Monk, "Life without Theory: Biography as an Exemplar of Philosophical Understanding" (2007) 28:3 Poetics Today 527 at 567; Nigel Hamilton, *Biography: A Brief History* (Cambridge, MA: Harvard University Press, 2007) at 283.
[161] Cameron, *supra* note 138.

theory, and so on.[162] Such reinterpretations and critiques must continue if the study of judicial lives can constitute a meaningful scholarly way of learning about the Court and its many dimensions. Accordingly, while the existing biographies about judges of Canada's Supreme Court are only the start of biographical inquiry into the judges and the Court as a whole, they are also only the start the biographical inquiry into the life and legacy of each individual judge.

CONCLUSION

This chapter is not an empirical guide to what the modern Supreme Court does or a normative account of what it should do. Rather, this Chapter enquires into the ways in which the Court is understood in contemporary constitutional discourse. It is not an exposé of the Court's institutional life, but rather a study of what is often said about it. It sets out narratives about the Court that are prominent in the literature. These narratives tell of the significance, roles, and judges of the Court. They speak to the questions that are asked about the Court, the answers that are often given, and the people involved in the conversation. Collectively, they establish a framework of ideas about what is believed to be important about the Court.

[162] See, for instance, Brown's re-interpretation of Williams' account of Chief Justice Lyman Duff as Canada's "most distinguished jurist": Brown, *supra* note 6. Brown argues that Chief Justice Duff's reputation as Canada's greatest jurist was manufactured by lawyers and academics who supported the abolition of Canadian appeals to the Judicial Committee of the Privy Council. Moreover, multiple authors challenge the claim in Anderson's biography of Bertha Wilson that Wilson was not a feminist and that allegations of Wilson's feminist judicial activism were misguided. See e.g. Christine Boyle, "The Role of the Judiciary in the Work of Madame Justice Wilson" (1992) 15:1 Dal LJ 241; Mary Jane Mossman 'Contextualizing' Bertha Wilson: Wilson as a Woman in Law in Mid-20th Century Canada" (2008) 41 Sup Ct L Rev 2d 22; Constance Backhouse, "Justice Bertha Wilson and the Politics of Feminism" in Cameron, *Wilson, supra* note 138, 33; Beverly Baines, "But Was She a Feminist Judge?" in Brooks, *supra* note 138, 211.

According to the dominant accounts, the Court is a powerful national institution. It is constitutionally essential and its core features are protected against formal unilateral reform. It referees disputes about the division of powers and remedies unjustified incursions of constitutional rights. Its judgments reach deeply into the legal and political psyche of the country. And its judges are important, powerful, and interesting. Their lives are worthy of study; their biographies speak to the experiences they bring to their decision-making and the legacies they leave. They should, however, be appointed in ways that are more consistent with the magnitude of their role and with the aspirations of democracy and federalism that animate the constitutional architecture.

These narratives serve a purpose. They fit the Court into broader understandings of the Canadian legal system and constitutional landscape. In doing so, they provide touchstones for understanding how the Court works within broader social and legal frameworks. Every story is based on presuppositions about the world. This implicit work is necessary in order for the stories to make sense to an audience. The stories that we tell about the Supreme Court, whether they are about its significance, its roles, or its judges, reflect and reinforce certain beliefs about law and the constitution. Without these implicit beliefs, it would be difficult to fit understandings of the Court and its work into broader narratives about the Canadian legal system, for example, or public debates about constitutionally-protected rights. When the narratives fit into broader currents of constitutionalism, the narratives make sense and the broader understandings remain intact. Both the narratives and the more general understandings acquire stability in the reciprocity.

The subsequent chapters of this dissertation inquire into the assumptions that underlie the conventional narratives about the Supreme Court. In the next chapter, I identify some of the

assumptions that are particularly prominent in the conventional accounts. The discussion above has already gestured to some of these assumptions – the bijural character of the constitutional order in Canada, the hierarchy of institutions engaged in constitutional interpretation and the Court's apex position, and the adjudicative character of constitutional disputes. I show that these assumptions are consistent with prominent themes in Anglo-American legal theory, which focus on state actors, including judges, and coherent systems when making claims about the nature of law. I then argue that these assumptions require modification because they do not speak to meaningful parts of the Canadian public legal order. With this foundation, Chapters 3 and 4 go on to show how understandings of the Court shift when they are informed by a constitutional outlook that is attentive to the architectural dimensions of the constitution and a more pluralist account of law. As the subsequent chapters show, these shifts offer lessons not only about the Court, but also about Canada's constitutional order.

2 Canada's Constitutional Order

The preceding chapter recounted multiple prominent narratives about the Supreme Court. Those narratives are the starting point for the analysis in the chapters that remain. This chapter focuses on assumptions about law and the constitution that are reflected in these narratives. It identifies and contests aspects of these assumptions, suggesting some ways in which they do not adequately attend to meaningful features of Canadian constitutionalism. The next chapter will then explore the implications of this thickened constitutional account for stories that we tell about the Supreme Court.

This chapter has two primary objectives. First, it aims to deepen the analysis of the conventional narratives by uncovering the assumptions about law and the constitution that underpin them. In many ways, the narratives paint a rich constitutional picture. The story of the evolving significance of the Court, for example, captures both the inheritances that the constitution embraces and the adaptation of the constitution as a living tree. Inheritance is found in the legal traditions and cultural values that have been constants in the design of the Court; adaptation is reflected in the renovations that have rearranged the architecture of the constitution – and the Court's place within it – in the unfolding of Canada's history. Also, the constitution that is imagined in the existing narratives is both written and unwritten, one that bears witness to the normative force of both constitutional text, principle, practice, and structure. Further, it is a constitutional order in which relationships between the state and citizen and between groups are often contested and fraught, but also one in which these contests can be managed, channeled and settled by adjudicative and

legislative institutions designed for that purpose. And it is a constitution that attends to means as well as ends, where procedure and framework are as vital as outcome and principle.

And yet, there are aspects of this constitutional picture that stand apart from the richness; they seem wanting when held up to the light of Canadian constitutionalism. The picture has impoverishments, pockets of misunderstanding and gloss, and areas that are thin and flat where they should be thick and textured. This chapter explores these thin spots, revealing their foundations and exploring their impact on the way we think about the Court. In particular, this chapter focuses on understandings of interpretive authority, the nature of constitutional disputes, and the legal traditions that inform the constitution.

As its second objective, this chapter aims to thicken the parts of the constitutional vision that leave us wanting. Drawing on examples from public law jurisprudence and scholarship, as well as lessons from constitutional text and structure, this chapter explores how the assumptions about the constitution that underlie the conventional narratives neglect or distract from important elements of Canadian constitutional life.

This chapter pursues these aims in three parts. Part I explores the issue of constitutional interpretation. It looks to the institutions and individuals who interpret the constitution and explores conceptions of authority in circumstances of interpretive pluralism. The conventional accounts presuppose a fixed hierarchy of legitimate interpreters, with the Supreme Court as the final and most authoritative voice. These accounts are consistent with well-established currents of thought in Anglo-American legal theory, especially a tendency towards judge-centricity and

commitments to monism and centralism. However, this image of a hierarchy neglects some flattening and shifting dimensions of the framework of institutions that engage in constitutional interpretation, dimensions that are drawn out in the administrative realm and in the operation of *stare decisis* between provincial superior and appellate courts and the Supreme Court. Further, it neglects uncertainties about the normative impact of Supreme Court judgments in the lives of individuals, who must navigate a range of normative forces and webs of meaning when making decisions in their everyday lives.

Part II explores the nature of constitutional disputes. The conventional accounts disclose an appreciation of the agonistic dimensions of the constitution in trying to make sense of the status and roles of the Court in Canadian public life. But this appreciation of agonism does not go far enough. The agonistic dimensions of the constitution of Canada require that closer attention be paid to the types of constitutional disputes that come before the Court, and the expectations that should attach when the Court is confronted with different types of disputes. Here, I consider constitutional cases in which the principles and tensions at stake are irreconcilable, wondering when there is value in allowing the disputing parties – rather than the courts - the opportunity to devise their own strategies for how to forge a productive relationship despite continued disagreement.

Part III examines the legal traditions that underlie the conventional accounts. These accounts tend to be committed to dualism, focusing on the civil and common law traditions and the provincial-federal constituencies of Canadian federalism as the defining pluralities of the constitution. This Part argues that this understanding of the constitution neglects the place of Indigenous legal

traditions and governance in constitutionalism in Canada, a neglect that diminishes understandings of the constitution, the Court, and the Indigenous law.

I. CONSTITUTIONAL INTERPRETATION

The conventional narratives tend to assume the appeal, if not the reality, of judicial supremacy in disputes over constitutional interpretation. An image emerges, of a vertical hierarchy of constitutional interpreters with the Court at the apex, its judgments as "definitive".[1] The hierarchy is usually relatively stable, held in place by a commitment to constitutional supremacy and the rule of law. Within this hierarchy, the Court is often a keeper or the source of constitutional meaning. The Court is a manifestation of constitutionalism, and symbol of the rule of law, an institution deeply infused in, and perhaps fused with, the conception of constitutionalism in Canadian legal culture. In this constitutional vision, an inquiry into constitutional meaning starts, and more problematically too often ends, with an inquiry into the pronouncements of the Court.

The suggestion of judicial interpretive supremacy is found throughout the conventional narratives about the Court. As was discussed in Chapter 1, it is a core concern of the counter-majoritarian difficulty[2] and has been at the heart of much debate about judicial review in Canadian

[1] 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) 42 at 58 [Dodek, "Wall"] [Macfarlane, *Amendment*]. See also discussion in Emmett Macfarlane, *Governing from the Bench*: *The Supreme Court of Canada and the Judicial Role* (Toronto: University of Toronto Press, 2013) at 160-172 [Macfarlane, *Governing*] and Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 4 and 17-38.
[2] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).

constitutional law and politics since the adoption of the *Charter* in 1982.[3] In the *Charter* era, the root of the critique of judicial review, from both the left and the right, has been the grant of interpretive power it bestowed upon the judiciary. Scholars on the left have expressed concerns about the judicial disciplining of social policy debates and the perpetuation of inequity that flows through the conservative forces of the common law.[4] Scholars on the right have been concerned with judicial incursions into the majoritarian foundations of democracy. On both sides, claims have been framed in terms of judicial activism, the judicialization of politics, and the politicization of the judiciary. Also on both sides, critics have challenged the adequacy of dialogue theory to respond to the risks that attach to the authoritative reach of the Court under the *Charter*. These critics invoke the metaphors of monologue and ventriloquism as more accurate than dialogue,[5] reinforcing the image of the Court at the top of the constitution's interpretive hierarchy. And while the dialogue metaphor was intended to alleviate concerns about judicial power in the context of *Charter* review, even the proponents of dialogue seem to agree that the Court, through its holdings and remedies in *Charter* cases, sets the legal boundaries within which legislative responses are then crafted.[6] The metaphor of dialogue, so prominent (some would say eclipsing) in Canadian constitutional theory in the *Charter* era, therefore ultimately serves to reinforce rather than temper the starting point of its critics, namely the final, authoritative status of interpretations of the *Charter* by the Supreme Court.

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[3] See e.g. FL Morton, "Dialogue or Monologue?" in Paul Howe and Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal and Kingston: McGill-Queen's University Press, 2001) 111.

[4] See e.g. Allan C Hutchinson & Andrew Petter. "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 UTLJ 278. Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada*, Rev'd, Updated and Expanded Ed (Toronto: Thomson Educational Publishing, 1994).

[5] See e.g. Morton, *supra* note 3; Christopher Manfredi & James Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell (1999) 37:3 OHLJ 513 ["Six Degrees"].

[6] See e.g. Peter W Hogg & Allison A Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75.

The majority of the Court in the *Supreme Court Act Reference* also reinforced the narrative hook of an interpretive hierarchy in *Charter* cases. The *Charter*, the majority explained, bestowed responsibility for interpreting its guarantees and remedying its breach to the courts.[7] It followed, given the Supreme Court's status at the top of the judicial pyramid, that the *Charter* marked a moment of metamorphosis in the institutional life of the Court, transforming it from the umpire of political interests in the division of powers context into the "guardian" of the Constitution of Canada.[8] As guardian and highest judicial body, the word of the Court on the meaning of the *Charter* is decisive, at least until it changes its mind on the issue.[9]

As the narratives of the Court's significance, roles, and judges recounted in Chapter 1 establish, the purchase of conceptions of a hierarchy in constitutional interpretation has been particularly distracting in the *Charter* era. The *Charter*, ripe with values and open textured language, and with conceptions of proportionality and reasonableness that call out for balancing and calibration, seeded a terrain on which the boundaries between constitutional law and constitutional politics were seen to be at their fuzziest. The Court, in its role as the top "court of competent jurisdiction" to grant remedies in the event of a breach of the *Charter*, was necessarily implicated in charting those boundaries and, ultimately, in their dismantling.

But in the post-patriation era, the Court's position at the top of the interpretive hierarchy is not constrained to *Charter* matters alone. The reach of the hierarchy image, and the Court's apex

[7] *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCC 433 at para 89 [*Supreme Court Act Reference*].
[8] *Ibid.*
[9] On the nature of *stare decisis* in *Charter* cases, see *Canada (Attorney General) v. Bedford,* 2013 SCC 72, [2013] 3 S.C.R. 1101 [*Bedford*] and *Carter v Canada (AG)*, 2016 SCC 4 [*Carter*].

position in it, now extends deeply into Canadian constitutional culture, spanning different types of constitutional questions. The majority in the *Supreme Court Act Reference*, for instance, invoked the image of the Court as the authoritative and final voice in interpretive disputes over both the *Charter* and the division of powers. In describing the significance of the Court's role in constitutional interpretation, the majority indicated that the architecture of Canada's constitution cannot be imagined without a supreme court; its position at the top of the interpretive hierarchy is inevitable in the culture of the rule of law in Canada. The majority explained that an independent, impartial, and authoritative judicial arbiter is both "implicit" in a federal system (umpire) and a "necessary corollary" of the entrenchment of the *Charter* and the supremacy clause in section 52(1) of the *Constitution Act, 1982* (guardian).[10] The Court is, according to the majority, institutionally supreme and therefore an arbiter embedded within the logic of Canadian constitutionalism; it is, in other words, "a foundational premise of the Constitution".[11]

The equality of significance attributed to the Court in the two primary types of constitutional disputes – those involving the *Charter* and the division of powers – is consistent with the claim that the *Charter* did not cause a rupture in the nature of judicial review in Canada. Rather, it extended the border between lawful and unlawful exercises of state power that must be "refereed" by the courts beyond the limits set by the division of powers and into the realm of human rights.[12] The interpretive exercises under sections 91 and 92 of the *Constitution Act, 1867* and the *Charter*

[10] *Supreme Court Act Reference, supra* note 7 at paras 83, 85, 89.
[11] *Supreme Court Act Reference, supra* note 7 at para 89.
[12] *Newfoundland (Treasury Board) v. NAPE* [2004] 3 S.C.R. 381, 2004 SCC 66 at para 116 [*NAPE*]. See also Abella, Rosalie Silberman. "The Judicial Role in the Development of the Law: The Impact of the *Charter*" in Joseph F Fletcher, ed, *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999) 268.

are, on this view, contiguous in character and the Court's position in the interpretive hierarchy remained effectively unchanged before and after the adoption of the *Charter*.

The implications of the *Charter* for the narrative of interpretive supremacy can also be explained in a way that better captures the shift provoked by the *Charter*, a shift that did not reposition the Court in the hierarchy of constitutional interpretation but which rather blended the political and legal constitutions in a way that altered the character of the hierarchy and, as a result, expanded the reach of judicial power. As Berger explains, before adoption of the *Charter,* "the role of the courts in constitutional matters was one of sustaining the political".[13] That is, the judicial role in constitutional disputes was to fill the legal needs of the political actors, leaving the merits of policy – the core of the constitution - to be sorted out in the political realm. The courts were not "interpreting the governing truths of a constitutional text but, rather, using the constitution as a device in arbitrating as between political powers within the state".[14] That is, "[t]he courts were curating the political compact of confederation in a manner that left substantive matters to legislative will".[15] When the Supreme Court of Canada opined in constitutional cases, then, it was "attempting to strike a balance as between provincial and federal legislative bodies, interpreting and applying the political bargain struck among provinces in the formation of the country. Substantive matters were left to political institutions with the courts umpiring the contest when the two sides wrestled over jurisdiction".[16] The nature of judicial decision-making under the *Charter* changed this role. Under the *Charter,* "[r]ather than curating or sustaining the political, the Court's

[13] Benjamin L Berger, "Children of two logics: A way into Canadian constitutional culture" (2013) 11:2 Int'l J Con Law 319 at 328.
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*

voice in constitutional matters would now involve limiting or containing the political".[17] The courts would now discipline the particular with the universal, taking up the role, familiar in the American experience but new to the Canadian, of the "the high priests of constitutionalism".[18] This amounted to the legal regulation of the political will, the hierarchy of legal interpretation prevailing over the exercises of constitutional power in the political realm. "With this shift, the ultimate word on substantive matters of policy would be spoken by courts in the idiom of rights and proportional limitations on rights…. Canadian courts were thus placed in the position of oracles of reason-based universals and, in this way, became part of a global conversation of constitutional courts".[19]

The enactment of the *Charter* may not have shifted the interpretive authority of the Court; its position remained stable. However, when we think through the analytical consequences of the introduction of the *Charter* and see the shift in constitutional logic from the universal to the particular, we then begin to see that the reach of the Court's authority was extended with the *Charter*. The cloth of the universal was draped over the interpretive hierarchy as a whole, clothing both the legal and political dimensions of constitutional questions in judicial creations.

The contemporary narratives about the power and role of the Court suggest that there is no going back from the shift triggered by the *Charter.* According to the narratives, the status of the Court as the ultimate interpretive voice now transcends the *Charter* context, extending not only into the particulars of the division of powers but also into other domains of constitutional concern.

[17] *Ibid* at 330.
[18] *Ibid* at 330.
[19] *Ibid* at 330.

Consider an example – the role of the Court in processes of formal constitutional amendment. The image of the Supreme Court as the paramount interpreter of the constitution comes out in the account of formal constitutional amendment in Canada and the interpretation of Part V of the *Constitution Act, 1982*. Litigation about the meaning of Part V was always inevitable in a legal culture that positions the courts as the authoritative interpreter of the constitution; its broad categories and multiple procedures were open-ended from the beginning.[20] In a close analysis of the interpretive challenges of Part V, Dodek observes the inevitability of the courts' involvement in interpreting Canada's amending procedure. "The drafters…clearly underestimated the complexity of Part V", Dodek contends, "thus leaving the courts with much work to do to unravel its intricacies".[21] Dodek invokes an illustrative metaphor proposed by Scott, that of a Rubik's Cube. Whereas Scott deployed the metaphor only in relation to the special amending procedure set out in section 43, contending that it is a "Rubik's Cube without the instruction manual",[22] Dodek goes further, noting that the "analogy could be extended to all of Part V: it is complicated, and its interlocking parts affect one another".[23] But Dodek also troubles the adequacy of the metaphor, an inadequacy that highlights the Supreme Court's role in overcoming the complexity of Part V. Dodek suggests that the radical uncertainty that attaches to Part V is alleviated only with the Supreme Court's intervention. "With a Rubik's Cube", Dodek writes, "we know its exact

[20] I note this inevitability in "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*" (2014) 67 SCLR (2d) 221 at 254. Cases involving the interpretation of Part V include: *Hogan v Newfoundland (AG)*, 2000 NFCA 12, leave to appeal refused [2000] SCCA No 191; *Supreme Court Act Reference, supra* note 7; *Reference re Senate Reform,* 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reform Reference*]. See also *OPSEU v Ontario (AG),* [1987] 2 SCR 2 [*OPSEU*] and the *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*], which were not decided under Part V, but which deal with the parameters of Part V and the obligations on political actors in processes of constitutional amendment.
[21] Dodek, "Wall", *supra* note 1 at 43.
[22] Stephen A Scott "The Canadian Constitutional Amendment Process" (1982) 45:4 Law and Contemporary Problems 276.
[23] Dodek, "Wall", *supra* note 1 at 43.

parameters; with Part V, we do not. With a Rubik's Cube, we know when we have 'got it right'; with Part V, we do not, until the Supreme Court of Canada confirms it".[24]

Macfarlane agrees with Dodek's assessment that the Court is "a major player in constitutional amendment".[25] "The Court", Macfarlane notes, "by virtue of its power of interpretation, perhaps has a stronger hand than any other actor in the Canadian political system to amend the Constitution".[26] He attributes this power to, first, "the extent to which judicial interpretation effectively can amount to judicial amendment of the Constitution".[27] Pointing to the constitutional living tree and the willingness of the Court to leave the door of section 7 of the *Charter* open to the possibility of positive economic rights as an example, Macfarlane argues that there is "a strong case [to] be made that every time the Court has decided to entrench some aspect of what it identified as falling within the constitutional architecture or a provision of a statute that, until that point, had been regarded as ordinary legislation, it has amended the Constitution itself".[28] Second, Macfarlane attributes the power of the Court to the normative effect of its judgments on political actors involved in constitutional amendment. For example, the decision of the Court in the *Patriation Reference* "helped to shape the events leading to entrenchment of a domestic amending

[24] Dodek, *supra* note 1 at 43.
[25] Emmett Macfarlane, "Conclusion" in Macfarlane, *Amendment, supra* note 1, 290 at 297 [Macfarlane, "Conclusion"].
[26] *Ibid* at 298.
[27] *Ibid* at 298.
[28] *Ibid* at 297-8.

formula".[29] Further, the Court "has begun to develop guidelines around the use of the amending procedures"[30] that have "significant power to affect the future of constitutional change".[31]

The narrative of the Court positions it as the most authoritative interpreter of the constitution; other interpreters – superior courts, legislatures, and executive decision-makers – fall in line behind it. The Court enjoys this position not only in *Charter* disputes, but also in cases about the division of powers and the amending procedure. There is nothing intrinsically problematic with a hierarchy of public institutions responsible for interpreting the constitution or positioning a supreme court at the top of that hierarchy. Indeed, a strong, respected supreme court, as the Supreme Court of Canada is, is a vital part of the democratic constitutional order. One of the aims of a constitutional project is to cultivate and maintain public institutions that have – and are worthy of having – the respect of the citizens within that constitutional order. But a mischief arises when the authority of the Court is treated as the end of the inquiry into the meaning of the constitution, rather than just one part of it. That is, a mischief lies in the incompleteness of the hierarchical account of the sources and interpreters of constitutional meaning.

The true mischief lies in the implications of the incomplete account. It signals that the courts, and ultimately the Supreme Court, are the primary site for establishing constitutional meaning and

[29] *Ibid* at 297.
[30] *Ibid* at 297. This assessment of the authority of the holdings of the Court in the constitutional amendment context points to yet another context that showcases judicial supremacy in matters of constitutional interpretation that is not intrinsically tied to the *Charter*, namely, advisory cases referred or appealed to the Court: see e.g. *Supreme Court Act Reference, supra* note 7; *Senate Reform Reference, supra* note 20.
[31] *Ibid* at 298.

resolving constitutional disputes. This kind of court-centricity gives the impression that constitutional meaning, legitimacy, authority, and implementation are grounded in judicial interpretation rather than in the effective action of government and the lived experience of citizens. In some ways and with further implications that will be drawn out below, this does not accord with the nature of Canadian constitutionalism.

Centralism, monism, and judge-centricity

The Court is not the ultimate interpreter of the constitution, but assuming that it is fits within the bigger picture of legal theory. In "The Constitution as an Institution", Karl Llewellyn identifies the framework of modern constitutional theory in America as resting on a number of propositions.[32] First, the text of the constitutional document is the "primary source of information as to what [the] Constitution comes to".[33] Second, the constitutional judgments of the Supreme Court "*interpret* and *apply*" the document.[34] And, third, following from the first and second, the "next best source[s] of information as to what the Constitution is", after the text, are the judgments of the Supreme Court.[35]

Llewellyn establishes the descriptive and functional inadequacies of this orthodoxy, but he also concedes its merits. Among other things, the configuration imagined in this constitutional theory offers a practical advantage: "There is a single designated authority to determine, in the ordinary

[32] Karl N Llewellyn, "The Constitution as an Institution" (1934) 34:1 Col L Rev 1.
[33] *Ibid* at 3.
[34] *Ibid* at 3 [emphasis in original].
[35] *Ibid* at 4.

pinch, what is permitted by the Constitution and what is not".[36] Llewellyn explains that this configuration "does not remove all doubt" because "often the oracle has not spoken" and "often its pronouncements are more authoritative than lucid".[37] But, the oracle – the Supreme Court – does reduce the scope of doubt. Moreover, Llewellyn contends, this configuration offers an esthetic advantage, namely the opportunity to know just what the Constitution means. "It 'means' – under that theory – what the Supreme Court says it means, and neither more nor less."[38] Doubt still exists in some circumstances, but "much is gained for the theorist. And much for practice as well: for by thrusting the bridge of 'meaning' between the words and new events, it becomes possible to remodel to some extent the going Constitution without departing openly either from the words of the consecrated Document or from a theory almost as sacred as Itself".[39]

The dominant narratives set out in Chapter 1 suggest that Llewlleyn's account of constitutional orthodoxy resonates in the Canadian context. More precisely, it is seen in the assumption of the Court's supremacy in constitutional interpretation. Looking behind these beliefs about the constitution and the supreme court, both Llewellyn's account and the assumptions underlying the Canadian narratives align with two broad currents of twentieth century Anglo-American legal theory – a tendency towards judge-centricity and a commitment to legal centralism.

A tendency towards judge-centricity

In this section, I offer short narrative snapshots of the work of three influential scholars and one

[36] *Ibid* at 5.
[37] *Ibid* at 5.
[38] *Ibid* at 5.
[39] *Ibid* at 5.

(loosely-defined) collective of jurists to chronicle ways in which theorists in the 19th and 20th centuries grappled with the judicial function when seeking to understand the nature of law. As moments in the history of ideas,[40] these snapshots provide insight into the emergence of a preoccupation with judges in modern Anglo-American legal theory.

The first shot is of John Austin, a 19th century legal theorist who sought to define the boundaries of positive law.[41] Austin's method was taxonomic. He deconstructed law into its foundational concepts (for example, law, morality, duty, right, sovereign, command, duty, sanction), searching for a well-defined concept of law within the morass of rules governing human conduct.[42] Austin understood law in terms of commands by a political authority: law is the command of a sovereign to political inferiors backed by a threat of force. The sovereign obeys no-one; the inferiors habitually obey the sovereign. On this model, what counts as law is determined empirically, as a matter of fact. The core of law is its institutional pedigree (a social fact), not its theoretical or metaphysical foundations.[43] For Austin, law is distinct from other norms when the criteria for law-making – command, sovereign, sanction - are met.

The preoccupation of Austinian theory with commands and their political source justified its focus on institutions of law-making (command-giving). These institutions include the courts, which, for

[40] Helpful compilations that provide more complete accounts of the development of Anglo-American legal thought in the 19th and 20th centuries are: Paul Groarke, *Legal Theories: A Historical Introduction to Philosophy of Law* (Oxford: Oxford University Press, 2013); Gerald J Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (New York: Springer, 2011); and Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002).
[41] John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (London: Weidenfeld and Nicolson, 1954 (first published 1832 and 1863 respectively)).
[42] Austin distinguished positive law, divine law, and positive morality from a fourth category, 'laws metaphorical': *ibid* at 171-176.
[43] Groarke, *supra* note 40 at 122; Edgar Bodenheimer, *Jurisprudence* (New York: McGraw-Hill Book Company, 1940) at 268.

Austin, were "highly beneficial" and "absolutely necessary".[44] In *The Province of Jurisprudence Determined*, Austin explains that courts translate the sovereign's commands into the everyday, offering specificity and guidance. By giving form to the sovereign's general commands in particular cases, judges compensate for failures of the sovereign to respond to pressing social problems.[45] On the Austinian model, the court's translation function does not jeopardize the legislative supremacy of the sovereign. The power of the sovereign is safe-guarded by a principle of authorization that provides that whatever the sovereign permits, it commands. On this logic, judge-made law is, in essence, a sovereign command that is promulgated at the moment the sovereign acquiesces (overtly or implicitly) to the court's judgment.[46] The sovereign's monopoly over the policy agenda is thus preserved despite the judges' role in particular, localized disputes because the validity of judge-made law ends where importations of standards of morality, justice or equity began.

Late into the nineteenth century, Austin's command theory had hold of legal thought in England and much of the Commonwealth. It fit with the general juristic temperament of the time and with conceptions of the judicial role in a system of parliamentary supremacy.[47] Indeed, the institutional deference that Austinian judges owed to the political sovereign and the expectation that judges "enforce the *law of the land*"[48] are ideals that still shape debates about judicial roles and status *vis-à-vis* political officials. For instance, these ideals are reflected in questions and answers given at the hearings for judicial nominees to the Supreme Court, those about the role of the judge to apply

[44] Austin, *supra* note 41 at 191.
[45] Austin, *supra* note 41 at 191.
[46] Austin, *supra* note 41 at 32.
[47] Postema, *supra* note 40 at 29-31; Groarke, *supra* note 40 at 132-133; Edward McWhinney, "English Legal Philosophy and Canadian Legal Philosophy" (1957) 4 McGill LJ 213. Indeed, it remained entrenched in the British legal culture until Hart's neo-Austinian jurisprudence at mid-century: Postema, *supra* note 40 at 29-31.
[48] Austin, *supra* note 41 at 190 [emphasis in original].

the law rather than create it.[49] Further, they resonate in modern debates in the political science literature on judicial decision-making, as scholars undertake careful empirical analyses of judicial behavior in the Court using metrics of attitudinal and ideological decision-making.[50] And further still, these themes form the dividing line between invocations of and opposition to formalist understandings of law and decision-making.[51]

Despite the influence and resonance of Austin's jurisprudence, by the end of the 19th century in the United States, the juridical pendulum was swinging. Christopher Langdell had transformed his scientific understanding of law into a pedagogical case method and had set out to teach law as a coherent, rational system held together by inductive and deductive logic.[52] Also, Oliver Wendell Holmes, not yet a judge, had rejected Langdell's systemizing efforts and pronounced that "[t]he life of the law has not been logic: it has been experience"[53] and "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law".[54]

Holmes and Langdell went on to become heroes and anti-heroes to many, but the work of John Chipman Gray, a colleague of Langdell's and a friend of Holmes, best captures the jurisprudential

[49] See e.g. the question of Ms Bateman and the response of Mr. Justice Nadon in Transcript, Ad Hoc Committee on the Appointment of Supreme Court of Canada Judges (2 Oct 2013), online: Department of Justice < http://www.justice.gc.ca.html> at 1505 and 1510 ["Committee Transcript, Nadon"]; see the question and remarks of Mr Justice Moldaver, Madam Justice Karakatsanis and Mr Goguen in Transcript, Ad Hoc Committee on the Appointment of Supreme Court of Canada Judges (19 Oct 2011), online: Department of Justice < http://www.justice.gc.ca.html> at 1615 and 1800 ["Committee Transcript, Moldaver & Karakatsanis"].

[50] See e.g. CL Ostberg & Matthew E Wetstein. *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007); Donald R Songer et al. *Law, Ideology and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 2012). For a study that aims to move beyond the more common American categories, see Macfarlane, *Governing*, *supra,* note 1.

[51] See e.g. Richard A Posner, *Reflections on Judging* (Cambridge, MA: Harvard University Press, 2013).

[52] CC Langdell, *Selection of Cases on the Law of Contracts, Vol I, 2d ed* (Boston: Little, Brown & Co, 1879) at viii.

[53] Oliver Wendell Holmes, "Book Notices: *A Selection of Cases on the Law of Contracts, with a Summary of the Topics Covered by the Cases (A Summary of the Law of Contracts)* by CC Langdell (1979)" in (1880) 14 American L Rev 233 at 234 ["Book Notices"].

[54] Oliver Wendell Holmes, "The Path of Law" (1897) 10 Harv L Rev 457 ["Path"].

turning point around the turn of the twentieth century. As Gray's work pivoted legal theory towards its judge-centricity, it is the subject of the second snapshot.

Gray's work bridged jurisprudential generations. It constructed a version of legal positivism out of Austin's analytical method and Holmes' claim that law is fundamentally an activity of the courts. Gray agreed with Austin's separation thesis and rejection of metaphysics. He agreed that law is a complex social fact rather than an ideal.[55] Further, Gray agreed with Austin's state-centric sources thesis. For both Gray and Austin, law was at the mercy of the state and because state officials controlled the sources of law, citizens were at the mercy of the law.[56] Yet, Gray rejected Austin's premise that the political sovereign was the most important legal actor. Gray favoured the Holmesian judge. Gray's reasoning was straightforward: (1) The state identifies the sources of law on which judges can rely (e.g. statutes, precedent, custom, morality, and equity). (2) Judges have the final say over what those sources mean. (3) Therefore, as long as judges rely on authorized sources, the law is "co-terminous" with what courts say.[57]

Gray's jurisprudence linked the nature of law to judicial decision-making. At the heart of his jurisprudence was a skepticism about political control over judges. For Gray, judges did not make law either at the command of the sovereign or by discovering a pre-existing or metaphysical ideal. Rather, judicial decision-making was an exercise of personal judgment that entailed weighing legal, policy, customary and professional factors. Law therefore was the product of judicial free will and discretion, as exercised within the limits of state-sanctioned sources.[58]

[55] John Chipman Gray, *Nature and Sources of Law* (Gloucester, Mass: 1972) at 94-101.
[56] *Ibid* at 84-89.
[57] *Ibid* at 84-101.
[58] *Ibid* at 84-85.

After Gray, the Anglo-American landscape of legal theory was heavy with interest in, and commitments to, judges. Gray's claims that the nature of law is rooted in judicial decisions and that interpretive authority vests legal supremacy in the judicial branch influenced subsequent generations of Anglo-American theorists.[59] Of course, the transformative moment marked by Gray's work should not be over-estimated. Ultimately, Gray's understanding of the nature of law was a modified version of Austin's top-down positivism. For both Gray and Austin, law was a set of explicit rules laid down in canonical form by an official state actor. Austin and Gray simply disagreed about the identity of that actor – the sovereign or the courts.

This brings us to a third snapshot, that of legal realism. In the era between the two world wars, the jurists associated with legal realism tended to fold theories of judicial action into theories of the nature of law.[60] They were united by what they rejected: the moralism of natural law, the conceptualism of a doctrinal science of law,[61] and legal formalism.[62] Of particular relevance is the

[59] Even though Gray's influence is often eclipsed by the grandeur of Holmes, many have noted his contribution: see e.g. Postema, *supra* note 40 at 86; William W Fisher III, Morton J Horwitz & Thomas A Reed, eds, *American Legal Realism* (Oxford: Oxford University Press, 1993) at 7; W Friedmann, *Legal Theory* (London: Stevens & Sons, 1944) at 142-143, 184-185; Martin P Golding, "Jurisprudence and Legal Philosophy in Twentieth-Century America – Major Themes and Developments" (1986) 36 J Legal Educ 441 at 447; Carrington, Paul. "Hail! Langdell!" (1995) Law & Social Inquiry 691.

[60] Those associated with realism did not converge on a single set of beliefs. See e.g. Karl Llewellyn, "Some Realism about Realism – Responding to Dean Pound" (1931) 44 Harv L Rev 1222 at 1233-34, 1256 ["Realism about Realism"]; Karl Llewellyn, *The Common Law Tradition in Deciding Appeals* (Boston: Little Brown, 1960) [*Common Law*]; Bodenheimer, *supra* note 43 at 310; Friedmann, *supra* note 59 at 185-189; Fisher, Horwitz & Reed, *supra* note 59 at xi-xv. Because of the varying beliefs and interests of the legal realists, any generalizations about their beliefs and objectives should be articulated and read with caution.

[61] This phrasing draws from Richard F Devlin, "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27 Queen's LJ 161 at 176.

[62] Legal formalism had two components – a theory of the nature of law and a theory of judicial decision-making. The former provides that law is a comprehensive, complete, logically ordered, and rationally determinate system. The latter provides that judges reason mechanically, using deductive and inductive logic, to discover the correct legal answer to the issue in dispute. The latter is possible because of the former. On the two components of formalism, see e.g. Brian Z Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press, 2010) at 13-63 and Brian Leiter, "Positivism, Formalism, Realism" (1999) Columbia L Rev 1138 at 1145-1146. Postema and Tamanaha argue that the idealized version of legal formalism was a straw man wholly created

realist critique of formalism, a critique rooted in a belief in the judge as the centre of law.[63]

Legal realism posits law as embedded within the larger social system, striving towards social objectives and influenced by a spectrum of external forces. In the realist tradition, a concern with rules, which was the concern of formalism, diverted attention from the real questions about law: what actually happens in the legal system and how do law and society intersect?[64] According to realism, the answer to the latter question is found in the courts. That is, law and society intersect in large measure in the area of contact between individuals and legal officials, most commonly, judges.

Legal realism further challenged commitments to formalism, questioning its capacity to account for the realities of judicial decision-making. Formalism did not provide guidance for resolving interpretive disputes over open-textured standards such as natural justice or reasonableness and did not address how law accommodates the changing needs and values of modern society. Most fundamentally, the realists discounted the formalist belief in law's determinacy. With an empirical outlook, the realists argued that written judgments confirmed that judges relied on rules only as justificatory tools, not as a determinant of judicial outcomes.[65] Rather, judicial decision-making was laden with discretion.

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by its critics. On the relationship between conceptions of law and judicial interpretation, see Brian Bix, "Legal Reasoning, the Rule of Law and Legal Theory" in Peter Cane, ed, *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Hart Publishing, 2010) 281; Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 45-86.

[63] Groarke, *supra* note 40 at 162-3.

[64] Broadly speaking, there were two main streams of legal realism, the psychological focus of Jerome Frank (e.g. Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930) and the sociological focus of Karl Llewellyn (e.g. Karl Llewellyn, "A Realistic Jurisprudence - the Next Step" (1930) 30 Columbia L Rev 431 ["Next Step"] and Karl N Llewellyn, "Some Realism about Realism - Responding to Dean Pound" (1931) 44 Harv L Rev 1222) ["Realism about Realism].

[65] *Ibid*.

These observations led to two foundational claims associated with legal realism. First, judicial behaviour is at the centre of law. Second, the law is, in the Holmesian tradition, comprised of expert predictions of what judges will decide ("probable law") and real manifestations of judicial behaviour (i.e. "actual law").[66] Ultimately, legal realism posits no clear boundary between their insights into adjudication and their definitional claims about the nature of law; the indeterminacy of law entails judicial discretion and the fact of judicial discretion supports the predictive theory of law.

The realist critique of formalism resonated in Canada. Canadian legal scholarship of the 1930s reflected derivative and indigenous expressions of the sociological and realist movements.[67] As in the United States, formalism did not sit comfortably with Canada's constitutional configuration. A formalist system of constitutional judicial review, especially one operating alongside a written constitution that constrained the government's capacity to freely implement social policy through legislation, undermined avenues for social progress through law.[68] Moreover, frustration with judicial commitments to formalism was at the heart of critiques of Supreme Court reasoning and

[66] *Ibid* at 46-47; Llewellyn, "Next Step", *supra* note 64 at 448.

[67] These movements were imported to Canada through Canadian graduate students who studied in American law faculties and through Canadian legal scholars who were "familiar with and impressed by American intellectual developments of the period": McWhinney, *supra* note 47; Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: SSHRC, 1983) at 63-64 ["*Law & Learning*"]. These ideas were also home-grown by virtue of the "protest" movement against Privy Council decisions in Canadian cases: McWhinney, *supra* note 47. See also Brown, R Blake. "The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff" (2002) 47 McGill LJ 559; Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992). *Law & Learning* notes that the Canadian Bar Review, the University of Toronto Law Journal, and the work of the Rowell-Sirois Commission were early twentieth century sources of realist-like perspectives on developments in Canadian law: *infra* at 63-64. Devlin contends that legal realism did not appear in Canada until the 1980s and 1990s: "Jurisprudence for Judges", *supra* note 61 at 178.

[68] McWhinney, *supra* note 47 at 216-217; Groarke, *supra* note 40 at 3-4, 133.

the Privy Council's authority in pre-World War II Canada.[69] As a result, a legal theory that explained and legitimated a more pragmatic, contextual and active approach to judicial decision-making was attractive to many.[70]

Legal realism did not unseat formalism from accounts of law. Today, appointees to the Supreme Court still invoke the language of formalism in their selection hearings;[71] scholars still describe formalism as a way of understanding law and legal reasoning;[72] and Justice Posner continues to try to dispel the myth of formalism in his books about judicial reasoning.[73] But realism has had a heavy hand in shaping the agenda of post-realist jurisprudence.[74] It confronted questions that subsequent generations of jurists have sought to answer: How do judges decide? And how should they?[75] Moreover, they share responsibility for the fetishization of judges in twentieth century Anglo-American jurisprudence. In the post-realist world, judges are one decision-maker amongst many, as they must be in light of the complex administrative and bureaucratic liberal state, but they tend to be seen as the first amongst equals.[76]

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[69] Frustration with the *Persons Case* is a prime example: see Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Right for Legal Personhood* (Toronto: University of Toronto Press, 2007). See also McWhinney, *supra* note 47 at 216-217. For a descriptive account, see Bushnell, *supra* note 68 at 243-262.
[70] McWhinney, *supra* note 47 at 216-217; Groarke, *supra* note 40 at 3-4, chapters 7 and 9.
[71] See note 49, *supra.*
[72] In political science, see e.g. Ostberg & Wetstein, *supra* note 50 at 7-9; Songer et al, *supra* note 50 at 45-47; Macfarlane, *Governing, supra* note 1 at 17-21. Ostberg & Wetstein contend that advocates of the legal model are largely affiliated with law schools (7). Songer et al acknowledge that "[m]any scholars believe that such a pure, legalistic approach cannot exist in appellate courts" (46). Macfarlane tempers his use of the term, using it to refer to the belief that judging is based on legal factors such as precedent, textual legal sources, and rules (18).
[73] Posner, *supra* note 51. Tamanaha makes this point in *Beyond the Divide, supra* note 62 at chapter 10.
[74] On the impact of the realists generally, Devlin points out that "realism became coupled with a certain vision of what a good society might look like – that is, with liberalism": Devlin, "Jurisprudence for Judges", *supra* note 61 at 178. Indeed, going forward, realism set the agenda for judges as law-makers and critical legal scholarship in various forms: see e.g. Postema, *supra* note 40 at 81-2 and FC DeCoste, "From Formalism to Feminism: Seventy-Five Years of Theory in the Legal Academy" (1996) 35 Alta L Rev 189.
[75] Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (London: Verso, 1996) at 106-107.
[76] *Ibid.*

This brings us to the fourth and final snapshot, that of H.L.A. Hart. Although the judge does not sit at the centre of Hart's conception of law, a place reserved for the rule of recognition, Hart's jurisprudence deeply integrates and interrogates the judicial function and decision-making.[77] Hart contended that the indeterminacy of law in cases outside the core of settled meaning of legal language was inevitable and entailed that decision-makers exercise discretion.[78] For Hart, discretion was an "intellectual virtue",[79] a matter of practical wisdom, discernment and judgment, not arbitrary choice or preference.[80] And legal discretion conveyed particular responsibilities on those who held public offices. As Hart explained, discretion existed in the "intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious".[81] On Hart's understanding of judicial discretion, then, adjudication is a matter of judgement.[82] Admittedly, Hart did not develop a fully-articulated account of judicial decision-making,[83] but the judicial role and reasoning were a prominent frame through which Hart

[77] This was at least partly a matter of necessity: Hart was seeking a middle road between the excesses of the theories of formalism and realism (HLA Hart, *The Concept of Law, 2d ed (Oxford: Oxford University Press, 1997)* at 147 [Hart, *Concept of Law*]), both of which had defined the preceding era and had posited a direct relationship between law and judicial decision-making (HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) at 25 [Hart, *Essays*]). Moreover, Hart had to respond to allegations that his commitments to positivism and his focus on rules were equivalent to formalism. Accordingly, to craft his "concept of law" without dealing with how it played out for judicial reasoning would have been out of step with preoccupations of the time.

[78] On the inevitability of indeterminacy and the need for discretion, see Hart, HLA, "Discretion" (2013) 127:2 Harv L Rev 652 at 661ff. Hart's essay "Discretion" was written with respect to legal reasoning generally, with some specific mention of judges. But, by the time of writing *Concept of Law*, his discussion of discretion was framed primarily in terms of judicial decision-making. As Shaw notes, "Hart was not concerned with discretion in courts alone; he was aware that discretion arises not just in statutory or constitutional interpretation, but also in many other settings. Although it would become clear that the role of judges was of special concern for Hart (as it was for the process theorists), he warned against focusing too much on one kind of example at the outset": Geoffrey C. Shaw, "H.L.A. Hart's Lost Essay: Discretion and the Legal Process School" (2013) 127 Harv L Rev 666 at 697.

[79] Hart, "Discretion", *ibid* at 656.

[80] Hart, "Discretion", *ibid* at 656-657.

[81] Hart, "Discretion", *ibid* at 658, as well as 657, 661, and 665.

[82] Hart, "Discretion", *ibid* at 661.

[83] Hart later expressed regret for his cursory treatment of adjudication and legal reasoning in *The Concept of Law:* Hart, *Concept of Law, supra* note 77 at 259.

both alone and with his two primary interlocutors – Lon Fuller and Ronald Dworkin – advanced thinking (and disagreement) about the nature of law.

These four snapshots from the course of twentieth century Anglo-American legal philosophy give a sense of the prominent role that the judicial function has played in modern accounts of law. Noticing this prominent role helps to make sense of the assumptions that underlie the conventional accounts of the Court, as it forms a common backdrop. It forms an orthodoxy that encourages the phenomenon of Court-watching and preoccupations with the legal and political dimensions of the Court's judges, judgments and processes of judicial decision-making. When the standard account of law privileges courts and judges as the keepers of law and when 'what is law?' is answered with reference to the questions 'what do judges say?' and 'how did they decide?', judges naturally become a focus of legal theorists and jurists naturally become preoccupied with locating judges' philosophies of decision-making on the spectrum of jurisprudential theory. Further, supreme courts and supreme court judges - the most powerful courts and judges - became the stars of law. What the Supreme Court identifies as law, is law and what the Court has not yet decided exists in a legal vacuum.

Legal Centralism

I noted at the beginning of this section that the constitutional outlook underlying the conventional narratives of the Court aligns with two broad currents of Anglo-American legal theory in the twentieth century. The first was a tendency towards judge-centricity, which I explained with reference to four historical snapshots. The second is a commitment to legal centralism, to which I

now turn.[84]

Centralism is the belief that the institutions of the political state are the source of law.[85] It presupposes that the "formalized, institutional, definitional criterion for law" is located in, or is synonymous with, the action of state institutions.[86] Centralism is one of the features of what Greenberg calls "the standard account of law" and what Macdonald refers to as "state legal positivism". For Macdonald, state legal positivism is an umbrella term that captures several foundational beliefs that make up the "tenets of [modern legal] orthodoxy".[87] Macdonald has described these beliefs as: monism, centralism, prescriptivism, positivism, and chirographism.[88] For the purposes of this dissertation, centralism – and the way in which it is tethered to monism in modern constitutionalism – is the focus. As it focuses our attention on the role of state actors, coherence, singularity, and authority, centralism provides a useful frame for seeing the assumptions underlying the conventional narratives, and for identifying and assessing their

[84] Relying on labels in academic writing and storytelling is common but not always useful. The labels can be loaded or reductionist terms and may be applied in ambiguous, inconsistent or misleading ways (Randall PH Balcome, Edward J McBride, & Dawn A Russell, *Supreme Court of Canada Decision-Making: The Benchmarks of Rand, Kerwin and Martland* (Agincourt, ON: Carswell, 1990) at 12-15). Moreover, when authors rely too heavily on the work done by labels, they may be asking or assuming too much of their readers or, perhaps more dangerously, they may be failing to ask enough of themselves. (I am grateful to Tom McMorrow for noting this last point). Yet, labels can be helpful if accompanied by "careful justification or explanation" (Balcome, McBride & Russell, *infra* at 15). In such cases, the labels can serve as convenient shorthands. This is how I invoke the labels of the so-called standard account of law. Ultimately, my point in this section – that legal orthodoxy rests on contingent assumptions about the nature of law that should be argued for rather than taken for granted – does not turn on the labels themselves, but rather on the concepts and explanations that the labels are intended to signify.

[85] Roderick A Macdonald, "Pluralistic Human Rights? Universal Human Wrongs?" in René Provost & Colleen Sheppard, eds, Dialogues on Human Rights and Legal Pluralism (Dordrecht, The Netherlands: Springer, 2013) 15 at 23-25 [Macdonald, "Pluralistic Human Rights"].

[86] Martha-Marie Kleinhans & Roderick A Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS 25 at 29.

[87] Roderick A Macdonald, "Custom Made – For a Non-chirographic Critical Legal Pluralism" (2011) 26:2 CJLS 301 at 309 [Macdonald, "Custom Made"].

[88] See e.g. Roderick A Macdonald, "Here, There … Everywhere": Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden" in Lynne Castonguay & Nicholas Kasirer, eds, *Étudier et enseigner le droit: heir, aujourd'hui et demain* (Cowansville, QC: Les Éditions Yvon Blais, 2006) 381 at 409; Macdonald, "Pluralistic Human Rights", *supra* note 85 at 23-25; Roderick A Macdonald & David Sandomierski, "Against Nomopolies" (2006) 57:4 Northern Ireland Legal Quarterly 610.

shortcomings.

On the standard account of law, the combination of monism and centralism ensures the monopoly of the state legal order as *the* legal order. Monism is the belief that all legal normativity fits within a single coherent whole.[89] It invokes an institutionalized vision of law, such that, within any particular territory, one normative order prevails.[90] A commitment to monism underpins the compulsion to harmonize legal rules across areas of law and jurisdictions, reconcile parts of the constitution that seem to be at odds, and spread *Charter* values across Canadian law. Monism also informs descriptions of the core of the Court's institutional purpose, which is to supervise "the development of a unified and coherent Canadian legal system".[91] Indeed, the conception of a hierarchy of interpreters, with one at the apex, aligns with both the numerical and coherence dimensions of monism.

A commitment to monism is not necessarily a denial of the multiple legal systems, traditions or laws applicable in a given situation. Rather, it is the belief that, within a single space, one legal order defines the field and stakes its supremacy.[92] There is, in other words, a *winner* among the competing normative orders. From the perspective of monism, within a defined territory, one normative order sets the terms within which the others operate. When monism is combined with

[89] Monism might a poorly chosen signifier for the commitment it is intended to capture. While monism grasps the numerical dimension of this commitment, it does not apprehend the reconciliatory or homogenizing quality that is operating at the same time. That is, monism is the belief that legal normativity fits within a single whole, but also a coherent whole. It is the coherence dimension that the label 'monism' does not immediately conjure. This dimension will be discussed further below in relation to its opposite, as reflected in the Canadian constitutional order, agonism.
[90] Macdonald, "Pluralistic Human Rights?", *supra* note 85.
[91] *Supreme Court Act Reference, supra* note 7.
[92] Kleinhans & Macdonald, *supra* note 86.

centralism, the defining legal system is the law of the political state.[93]

A tendency towards monism and centralism entails that the institutional and procedural artefacts of the state are thought to be characteristic of what law is and what it means.[94] Constitutions, statutes, regulations, and judicial decisions are "the law" and the official personnel of the state are the actors and experts who matter - and whose opinions matter - most in law. These actors mediate the gap between the law and the individual – their interpretations of law are authoritative, their legal decisions are enforceable, and their access to law is direct.[95] This centralist commitment is at work throughout the conventional narratives, but is emphatic in conceptions of the hierarchy of institutions that have the authority to interpret the constitution. The eligible institutions are those of the state – the courts, the legislatures, and the executive.

Commitments to judge-centricity, centralism, and monism support the assumption that the Supreme Court sits at the top of the interpretive hierarchy in Canada's constitutional order. In a nutshell, a commitment to monism encourages the finding of an interpretive hierarchy in the legal order; coherence and singularity support the emergence of a primary site of power. A commitment to centralism directs our attention to state law as the governing legal order and to state actors as those with an interpretive role in the hierarchy. And a tendency towards judge-centricity supports the notion that judges and, ultimately the Supreme Court, are at the top of the hierarchy.

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[93] A form of monism can also be a feature of pluralist hypotheses of law. This seems to be the claim of Jeremy Webber's analysis of the "prophetic mode" and "essential harmony" in Macdonald's critical legal pluralism in "Rod Macdonald's Society of Friends" in Richard Janda, Rosalie Jukier, & Daniel Jutras, *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (Montreal & Kingston: McGill-Queen's University Press, 2015) 190 [Webber, "Society of Friends"].

[94] Macdonald, "Here, There", *supra* note 88 at 409.

[95] For a similar description of the Court and its role in a positivist theory of constitutional interpretation, see Sujit Choudhry & Robert Howse, "Constitutional Theory and the Quebec Secession Reference (2000) XIII:2 Can JL & Jur 143 at 156.

The interpreters of the constitution

The institutional framework of Canada's constitutional order and the nature of constitutional interpretation is more complicated than images of an interpretive hierarchy and judicial supremacy convey. In this section, I explore two dimensions of Canadian constitutionalism that interrupt the conventional account of the interpretive hierarchy and the Court's position at its apex: the horizontal and shifting character of the institutional frameworks within which the Supreme Court operates and the multiplicity of normative forces that operate in daily life.

The notion of a hierarchical relationship between the courts and the legislatures has been challenged by theories of dialogue, as well as by Hiebert's relational approach[96] and Baker's theory of coordinate interpretation.[97] Under the relational approach, neither Parliament nor the Supreme Court has the final word on *Charter* matters, as each institution reflects on the judgment of the other in ensuring that legislation is consistent with the *Charter.*[98] Coordinate interpretation falls further along the spectrum of interpretive theories, getting greater distance from judicial supremacy than the relational approach. Coordinate theory contends that constitutional meaning emerges over time rather than in an instant or at a single institutional site.[99] "Coordinate interpretation", Baker explains, "means that each branch of government – executive, legislative, and judicial – is entitled and obligated to exercise its constitutional powers in accordance with its

[96] Janet Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal & Kingston: McGill-Queen's University Press, 2002).
[97] Baker, *supra* note 1.
[98] Hiebert, *supra* note 96.
[99] Baker, *supra* note 1 at 4-5.

own interpretation of what the constitution entails".[100] It "rejects the constitutional superiority of any institution", favouring an approach to interpretation in which "any institution's interpretation, asserted with 'pertinacious adherence', might prevail".[101] Baker proposes a form of modest coordination for Canada that "reconcile[s] the Court's role as the leading constitutional interpreter with a limited legislative role in shaping constitutional rights".[102] On this view, legislative resistance to a judicial interpretation is consistent with the separation of powers and democratic ideals, if (1) the legislative action "does not interfere with the formal judicial power of settling the case before the bench", (2) "it preserves the Court's leading (but informal) role in settling constitutional controversies", and (3) there is a "compelling reason" to support the view that "legislative participation will enhance the outcome of constitutional settlements".[103]

The relational approach and coordinate interpretation are important as they draw attention to shortcomings of accounts of judicial supremacy in constitutional interpretation, in particular to the under-inclusivity of understandings of the actors and modes of constitutional interpretation. Moreover, they start from the interpretive plurality that unfolds in the Canadian constitutional sphere and aim to theorize that plurality in light of foundational constitutional values – democracy, the separation of powers, rights, and legitimacy. This dissertation shares these interests and starting point, but it focuses on different aspects of interpretive plurality, in particular, deference and normativity. These two legal concepts add nuance to the claim of interpretive supremacy for the Court.

[100] Baker, *supra* note 1 at 4.
[101] Baker, *supra* note 1 at 112.
[102] Baker, *supra* note 1 at 117.
[103] Baker, *supra* note 1 at 117-8.

A shared project of constitutional interpretation

The image of a fixed vertical hierarchy obscures the horizontal and shifting dimensions of the network of official actors and institutions that are engaged in constitutional interpretation and implementation in Canada. We see these dimensions of the institutional network in the administrative sphere and within the court system through the operation of *stare decisis*.

It is trite to point out the spread of administrative decision-makers exercising delegated and prerogative powers in Canadian governance. Administrative decision-makers engage widely with the obligations and values of the constitution as they execute their mandates. They are, for example, bound to act in accordance with the *Charter*[104] and must exercise their discretion in ways that are infused with *Charter* values and substantive commitments to proportionality.[105] Those officials who are empowered to decide questions of law are correlatively empowered to answer the constitutional questions that arise within the scope of that mandate and grant remedies under section 24(1) of the *Charter*, unless such authority has been clearly revoked.[106] Moreover, administrative actors are on the front lines of interpreting and implementing constitutional rights and obligations in their interactions with the public, from the exercise of police power to the issuance of a passport to the termination of public service employment.[107]

[104] *Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038.
[105] *Doré v Barreau du Québec,* 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]; *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*].
[106] *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, [2003] 2 SCR 504*; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504; *R v Conway,* 2010 SCC 22, 1 SCR 765 [*Conway*].
[107] See e.g. Vanessa MacDonnell, "The Civil Servant's Role in the Implementation of Constitutional Rights" (2015) 13:2 Intl J Constitutional L 383 [MacDonnell, "Civil Servant"].

Cataloguing the reach of constitutionalism in the everyday operations and decisions of the administrative state tracks the growth of the administrative state and highlights the outward spread of institutions that interpret and implement the constitution. It is no secret that theorists, legislators, and judges in Canada have long struggled with the relationship between the courts and administrative decision-makers, striving to capture and explain the balance of power that best accords with the demands of the rule of law and democracy in the administrative state. One way to conceive of the relationship aligns with the vertical hierarchy and judicial supremacy images discussed above. This conception reflects a Diceyan understanding of administrative law in which the courts engage in "command-and-control" oversight of administrative decision-makers in the name of the rule of law. On this view, cataloguing the reach of constitutionalism in the administrative state, read through the lens of judicial supremacy, constitutes a record of the expanding base of decision-makers that the Supreme Court ultimately supervises, by virtue of judicial review on a correctness standard.

The gaze of the orthodox view is narrow, encouraged by a formal conception of the rule of law and the separation of powers to focus on legislatures and the courts,[108] and to develop an account of executive decision-making shaped by the frame of judicial review. Liston describes the "reality" that the narrow gaze fails to see in terms of a misunderstanding of the democratic rule of law within

[108] On this formality, see David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's LJ 445 [Dyzenhaus, "Fundamental Values"] and Liston, Mary. "Governments in Miniature: The Rule of Law in the Administrative State" in Lorne Sossin & Colleen M Flood, eds, *Administrative law in context*, 2nd edition ed (Toronto: Emond Montgomery Publications, 2013) 39. Dyzenhaus explains that a formalistic constitutionalism "depends on the application of the categories of the rigid doctrine of the separation of powers" (474). These categories are relied on by Lamer CJ in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 [*Cooper*], citing Justice Dickson in *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455: "'the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy" (para 10).

the Canadian constitutional order. In this reality, "the rule of law recognizes that all branches of government have a duty to realize a rule-of-law state and that all branches can fail to do so in distinctive ways. The multiplicity of institutional environments, however, means that the rule of law will require different responsibilities and restraints for different institutional actors and practices".[109]

There are two dimensions to what is missing from this narrow, vertical model. First, the narrow gaze contributes to an account of institutional relationships that neglects or obscures how the Canadian culture of the rule of law legitimates the "sharing of public power" among institutions, rather than a top-down approach. Canadian constitutionalism is an ongoing project, an endeavor of working towards, and working through, aspirations and assertions. Within this culture of constitutionalism, institutional relationships – whether conceived in terms of the separation of powers or shared authority - are adapted to the body of constitutional experience, seeking a framework that "serves the project"[110] and offers a "framework through which Canada's national life might persist and, if lucky, flourish".[111] The courts, legislatures, and the wide range of executive actors fall within this framework of public actors, necessarily sharing authority over interpretation and implementation of the constitution. The shared project of pursuing and upholding rule of law values breaks down the judicial monopoly on interpretation,[112] legitimizing constitutional interpretation by non-judicial actors, who then must be held to the "high standards

[109] Liston, *ibid* at 82.
[110] Dyzenhaus, "Fundamental Values", *supra* note 108 at 451.
[111] Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 260 [Webber, *Contextual Constitution*].
[112] Jurisprudentially, this move away from a judicial monopoly is advocated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]; *Cooper, supra* note 108 (per McLachlin J (as she then was), *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

of the rule of law".[113] Put in other words, fundamental values – human rights, judicial independence , democracy – infuse and condition the exercise of public power, whether that power is exercised by judges, legislators, or executive decision-makers. This sharing entails the "blurring the lines of separation between the powers" and as such is at odds with the strict understanding of judicial supremacy.[114]

Within Canada's constitutional order, administrative decision-makers are active participants in this shared project. They are directly engaged in determining and operationalizing the meaning and scope of fundamental values.[115] This role is not limited to overt instances of deciding constitutional questions or granting constitutional remedies, though that is part of it. Rather the role of administrative decision-makers in the determination and upholding of fundamental values is also manifest in the institutional morality of administrative action, which entails exercising public power as an expression of a mandate and culture infused with constitutional values.[116]

Second, the narrow gaze does not appreciate that the legitimacy and legality of administrative decision-makers as interpreters and implementers of the constitution is not grounded solely, or even primarily, in judicial review. This is an aspect of the first gap, as just described. The legitimacy and legality of administrative decision-making find roots in the ways in which such

[113] Dyzenhaus, "Fundamental Values", *supra* note 108 at 453.
[114] Dyzenhaus, "Fundamental Values", *supra* note 108 at 451.
[115] Dyzenhaus points to McLachlin J's (as she then was) conception of the rule of law in *Cooper* as an example of the democratic understanding because "in her view, if judges have such exclusive jurisdiction [over the *Charter*], then the *Charter* is put out of reach of the people whom it serves in part, as it is before tribunals rather than courts that most people are likely to contest their rights. This more expansive vision of constitutionalism goes hand in hand with a less exalted place for judges; they are not to be seen as a priestly caste with privileged access to a holy document": Dyzenhaus, "Fundamental Values", *supra* note 108 at 477.
[116] This is the spirit of the Court's decision in *Doré, supra* note 105 and of the majority opinion in *Loyola*, *supra* note 105 both of which build on the counsel of *Baker, supra* note 112; *Dunsmuir, supra* note 112; and *Conway, supra* note 106.

decision-making is performed by institutions that manifest and embrace rule of law values. But it finds another aspect in routes of accountability. Unlike the judicial supremacy model, Canada's democratic rule of law "facilitate[s] the creation of multiple routes for citizens (and non-citizens) to secure accountability for the use of public power".[117] These routes include judicial review, statutory appeals to a court, private law claims,[118] and claims for public law damages,[119] but also include a range of other mechanisms by which public officials are held to account, including "public inquiries, task forces, departmental investigations, special legislative officers, and ombudsmen",[120] as well specialized appeal tribunals,[121] "supertribunals" like the Tribunal administrative du Quebec,[122] powers of reconsideration,[123] and the media.

Noticing the blurred lines of the separation of powers within the shared constitutional project does some work to contest the purchase of judicial supremacy from conceptions of Canadian constitutionalism without compromising the democratic vision of the rule of law at the heart of the project. What matters most for the institutions involved in pursuing and upholding fundamental values is not where the institution falls within an institutional pyramid or hierarchy, but rather the quality and character of its practices of justification.[124] That said, the shared project of constitutionalism, and the institutional and interpretive pluralism that goes with it, can only go so far in breaking down notions of the judicial hierarchy if not accompanied by a commitment to

[117] Liston, *supra* note 108 at 82.
[118] Christie Ford, "Dogs and Tails: Remedies in Administrative Law" in Lorne Mitchell Sossin & Colleen M Flood, eds, *Administrative law in context*, 2nd edition ed (Toronto: Emond Montgomery Publications, 2013) 39 at 120-2.
[119] See e.g. *Paradis Honey Ltd. v. Canada*, 2015 FCA 89.
[120] Liston, *supra* note 108 at 82. See also Ford, *supra* note 118 at 100-122.
[121] See e.g. *Immigration and Refugee Protection Act,* SC 2001, c 27, s 62.
[122] *Administrative Justice Act,* RSQ c J-3, s 14. As Ford explains, this tribunal "hears 'proceedings' brought against almost all administrative tribunals and public bodies in [Quebec], including government departments, boards, commissions, municipalities, and healthcare bodies": Ford, *supra* note 118 at 101.
[123] See e.g. *Public Service Labour Relations Act,* SC 2003, c 22, s 43.
[124] Dyzenhaus, "Fundamental Values", *supra* note 108 at 502.

deference and respect between the institutions, including in the context of judicial review of administrative action. This deference cannot be one in which non-judicial decision-makers are measured against a judicial standard or in which non-judicial interpretations are expected to match the opinions of the courts. Rather, this deference must be one that is still deferential "even at its most intrusive" by focusing on the adequacy of the tribunal's reasons .[125]

This account of deference and decision-making in Canada's constitutional culture of democratic rule of law is not new but its realities have not trickled deeply into the institutional biography of the Supreme Court. The effect of this administrative law story on the hierarchy of constitutional interpreters and judicial supremacy is significant. The volume of interpretive decision-makers and the extent to which deference shapes the relationships between them is an example of how the network of institutions involved in constitutional interpretation is more horizontal than the vertical hierarchy suggests. Moreover, this inquiry into deference in the administrative sphere challenges the fixed character of the configuration of institutions engaged in interpretation. Influence, deference, and the power to establish the prevailing principle is a matter of institutionalized practices of justification and reason-giving that manifest in decisions in particular cases. "Ultimately, judges might have the final say as to the best interpretation of the law. But if that is the case, the authority of their decisions is not constituted by the fact that they spoke, nor by their unique access to the law. Rather, it is because they have entered into the justificatory exercise of reason-giving that the democratic vision regards as an essential component of the rule of law".[126]

[125] Dyzenhaus, "Fundamental Values", *supra* note 108 at 453. See also *Doré, supra* note 105 at para 35.
[126] Dyzenhaus, "Fundamental Values", *supra* note 108 at 501-2.

Before moving to the issue of normativity as another issue that is neglected in the assumptions underlying the conventional account of the Court, let me turn briefly to the judicial pyramid, the principle of *stare decisis* and the notion of hierarchy.

It goes without saying that all courts within the formal court structure in Canada are part of the shared project of constitutional interpretation. As such, judges of all courts uphold fundamental values in their decisions and are bound by them in taking up judicial office. The principle of *stare decisis* contributes to the rule of law by offering consistency, certainty, and predictability, as well as promoting incrementalism and growth within the development of the common law.[127] Further, a commitment to *stare decisis* promotes and demonstrates respect for the law, and the culture of justification and reason-giving that the democratic vision of the rule of law embodies.

However, the justification for adherence to *stare decisis* runs out in the culture of justification and reason-giving when the justification for the original decisions is destabilized. This might occur, for example, when a "new legal issue is raised" or when "there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'".[128]

In the recent case of *Carter*, a case dealing with the constitutionality of the criminal prohibition on physician-assisted suicide, the Supreme Court of British Columbia revisited the binding precedent, *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519. The trial judge justified her decision to revisit the holding in *Rodriguez* on the basis of developments in the legal conceptualization of

[127] *Carter, supra* note 9 at 44.
[128] *Carter, supra* note 9 at para 44. See also *Bedford supra* note 9 at 42.

section 7 of the *Charter* as well as different evidence on the social and legislative facts at play.[129] The revisiting was upheld by the Supreme Court, which held that "*stare decisis* is not a straightjacket that condemns the law to stasis".[130]

Just as the democratic rule of law of Canadian constitutionalism does not call for diminished respect of judicial review of administrative action, it does not call for diminished respect for the principle of *stare decisis*. But it does draw attention to the ways in which lower courts' approaches to *stare decisis* can serve as a mechanism for promoting the accountability of higher courts. This is found in an approach to *stare decisis* that allows for the revisiting of a binding precedent in limited, but defensible, circumstances that speak to the justifications and reasons given in the original decision. When a precedent is invoked in a way that is detached from the justification underlying it or when circumstances detach the justification from the holding of the precedent, the rule of law requires the lower court to determine the issue anew. While the circumstances in which these conditions are met will be rare, their possibility also inserts movement and flexibility into the configuration of the judicial pyramid. On this level, it is not as strict or fixed or steep in its verticality as is often imagined.

A more expansive understanding of constitutional structure resists the strict court-centric (and Supreme Court-centric) model of constitutional interpretation, which cultivates beliefs in judicial monopolies on constitutional interpretation and attributes ultimate authority to the Supreme Court. In the next chapter, I will explore in greater detail what implications this flatter, less hierarchical institutional network has for the significance of the Supreme Court when it comes to constitutional

[129] *Carter v Canada (AG)*, 2012 BCSC 886 at paras 924, 985.
[130] *Carter, supra* note 9 at para 44.

interpretation. But before moving on, it is of note that, this appreciation of the network of institutions engaged in constitutional interpretation does not (and should not) fully dismantle the traditional judicial pyramid. It does not undermine the Supreme Court's official position as the final general court of appeal for Canada. Rather, when we examine the context of Canadian public law more broadly, we see that the Court – and the court structure as a whole - exists and operates within a constitutional framework that is built out much more than it is built up. When the horizontal dimensions of Canada's constitutional architecture are accounted for, the links between institutions flatten and peak depending on the issue, circumstance, requisite expertise, and attitude of those who are, by operation of constitutional law, authorized to assume a hierarchical position. The relationships between institutions shift, as do the influence and authority that they exert over each other in any particular case.

Normativity

The preceding section identified a shortcoming of the image of judicial supremacy and hierarchy that underlies the conventional narratives of the Court, namely its neglect of the relationships between the courts and administrative actors, as well as between trial and appellate courts. This neglect facilitates an assessment of the Court's significance that is too fixed, steep, and hierarchical in a constitutional order that embraces some flexibility and horizontal shifts in relationships between decision-makers.

When we examine the Canadian public sphere more broadly, we see an institutional network that extends outward as well as upward, with a sprawl of interpretive institutions and offices that is

flatter than the hierarchy image suggests. And within the horizontal dimensions of the framework, the relationships between institutions flatten and peak as circumstances change. As between institutions, the relationships of influence and interaction are situational rather than fixed.

There is a final observation to make about the conventional image of a hierarchy of constitutional interpreters. This is an observation about how an inquiry into normativity also troubles the conventional accounts of judicial supremacy. The conventional accounts of judicial supremacy and the responses to them found in dialogue theory, the relational approach, coordinate constitutionalism, and genuine deference are theories about institutional legitimacy and legality rather than theories of legal normativity. But in the legal sphere, it is an easy move to assume that, or at least forget to consider whether, the decisions of the legal and legitimate decision-makers exert normative force in the lives of those who are intended to be governed by those decisions. The commitments to monism, centralism, and judge-centricity have tended to be accompanied by one further assumption - that normative force flows from formal, explicit, rules and through formal, official institutions.[131]

This understanding of normativity sometimes plays out in the dominant narrative about the Court as a "reverence for claims of authority based on expertise or on formal status" and as a belief that the pedigree of a judgment of the Court is sufficient justification for its invocation in decision-

[131] On this process of reification and the leap of logic embedded in it, see Adams, WA. "I Made A Promise to a Lady: Critical Legal Pluralism as Improvised Law in Buffy the Vampire Slayer" (2010) 6:1 Critical Studies in Improvisation, online: Critical Studies in Improvisation <http://www.criticalimprov.com>. Mark Greenberg's account of the "standard picture" in legal theory establishes that it is widely assumed that normativity is explained by official pronouncements and that the context of the norm is constituted by the content of the pronouncements: see Mark Greenberg, "The Moral Impact Theory of Law" (2014) 123:5 Yale LJ 1118 [Greenberg, "Moral Impact Theory"] and Mark Greenberg. "The Standard Picture and Its Discontents" in Leslie Green & Brian Leiter, eds, *Oxford Studies in Philosophy of Law*, Vol I (Oxford: Oxford University Press, 2011) 39 [Greenberg, "Standard Picture"].

making and dispute resolution.[132] We also see this assumption reflected in the dominant narrative about the Court as an assumption that the Court's judgments have normative force and that the content of the norm is determined by the content of the judgment.[133]

But neither the belief in judicial supremacy nor the account of law that underlies it explains the force, if any, of judicial opinions in human behaviour and in daily life. That is, an assumption of normative force overlooks the fact that the existence of a phenomenon says nothing about why humans act the way that they do and that there are many reasons why people might act in ways that appear to resist or comply with law.[134] To the extent that this assumption seems inherent or neutral in thinking about law, it is not because the nature of law is uncontroversial.[135] Rather, it likely reflects the current state of legal theory and the power of cognitive framing.[136]

In the ways in which they presuppose rather than inquire into the normative force of Supreme Court judgments in the lives of citizens, the constitutional ideas underlying the conventional

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[132] Roderick A Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press for the Law Commission of Canada and Queen's University School of Policy Studies, 2002) at 7 [Macdonald, *Everyday Law*].
[133] Greenberg, "Moral Impact Theory", *supra* note 131; Greenberg, "Standard Picture", *supra* note 131.
[134] Macdonald & Sandomierski, *supra* note 88 at 612.
[135] On the settled truth of law, see Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011) esp chapters 8 and 19.
[136] Cognitive framing refers to "the categories of thought and perception through which cognition takes place, including language, concepts, ideas and beliefs. [It] accompanies, enables, and shapes thought and perception, triggering responses, influencing actions and decisions. It is informed by social categories and is implanted and perpetuated through socialization. This is not a flaw of human reasoning but a condition of thought that entails that there is no unmediated perception": Tamanaha, *Beyond the Divide, supra* note 62 at 187. Tamanaha provides a helpful metaphor for cognitive framing in the context of judicial decision-making: "Think of cognitive frames as prescription sunglasses with different tints. Different judges have different prescriptions and different colors, which come in different shades of intensity. The lenses worn by all American judges share significant commonalities: that obtained from shared indoctrination into the legal tradition and shared indoctrination into the broader social community. These are legal conventions and social conventions, respectively, which shape meaning and interpretation. Because of these shared elements, despite having differently colored glasses and magnifications, judges often see much the same thing when looking at legal rules and fact situations. Owing to the differences in their respective cognitive lenses, however, they also sometimes perceive the law and facts at issue differently. Judges can be reminded, especially through exchanges with colleagues who disagree with their conclusions, that the glasses they wear have subtle effects on their perception, but for the most part they see through the lens without ever contemplating its influence" (188).

narratives does not establish a reason for investigating the judgments of the Supreme Court in relation to the complexities that flow from the many normative forces, both formal and informal, that inform the everyday life of an individual.[137] This is a loss. We are all touched and shaped by various "meaning-giving frameworks" when we "come before the bar of law."[138] These frameworks interact in deep ways as people and communities live out their lives, ensuring that "the constitutional rule of law is always in competition with other cultures, other compelling and rich ways of generating meaning and giving structure to experience."[139] Thus, presupposing the authority of judicial interpretations is a loss of opportunity to explore the ways in which the judgments of the Court play out in the lives and decisions of individuals.

Further, the assumption of normative force also represents a diminishment in understandings of constitutional interpretation and ultimately, the constitution. That is, presupposing judicial supremacy in matters of constitutional interpretation suggests that the constitution is imposed by judicial decree, that the constitution collapses into the jurisprudence of the Court, and that citizens, officials, and institutions lack meaningful interpretive agency in the constitutional realm. This misunderstands the structure of the constitutional order, which does not proceed "through the fiat of a closed set of founding fathers or their privileged successors", but rather "day by day", as a "body of experience", and with a network of institutions, which includes the Supreme Court, that "might be adapted to that experience, providing a framework through which Canada's national life

[137] For examples of scholars who have undertaken this investigation, see Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39:1 Queen's LJ 175 and Van Praagh, Shauna. "Identity's Importance: Reflections of - and on - Diversity" (2001) 80:1-2 Can Bar Rev 605.
[138] Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 172 [Berger, *Law's Religion*].
at 172.
[139] *Ibid*.

might persist and, if lucky, flourish".[140] In the next chapter, we turn to the implications of these observations for our expectations and assessments of the Court, its work, and its significance.

II. CONSTITUTIONAL DISPUTES

Conventional narratives about the Court engage deeply with tensions at play in Canadian constitutionalism. The competing claims of democracy, constitutionalism, and federalism, for example, are canvassed extensively in the literature on the significance and roles of the Court. And competing claims about representation and diversity along linguistic and regional lines, and increasingly along gender and cultural lines, are noticed and explored in the literature on appointments to the Court. But the conventional narratives also downplay the extent and character of disagreement and tension that is at stake within the Canadian constitutional order by focusing on the ways in which competing claims can be reconciled and disputes can be settled by the courts, especially the Supreme Court. We see this expectation of reconciliation and settlement in conceptions of the Court's roles - 'final arbiter', 'umpire', and 'guardian'.

A focus on a court's capacity to settle disputes is consistent with the judge-centricity that is discussed above, and may also be fueled by the tendency of legal scholars to offer solutions to the problems they identify[141] and the expectations that judicial reasoning can – and should - transform, manage, and overcome disputes through the channels of law. Moreover, analysis of the Court's role is important as it informs public expectations and articulates principles that orient the role

[140] Webber, *Contextual Constitution, supra* note 111 at 8, 260.
[141] On this compulsion and why it should be resisted, see Berger, *Law's Religion, supra* note 138. See also *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: SSHRC, 1983).

morality of judges as they deliberate on legal issues of public importance.[142] However, an assumption underlies the claims that the Court's role is to settle disputes and that disputes it hears about constitutional interpretation can be settled. These claims assume that legal disputes about constitutional interpretation can and should be resolved and more precisely, can and should be resolved through adjudication by courts.

The challenge presented by this assumption is its breadth. While many legal disputes over the meaning of the constitution are amenable to resolution through the channels of judicial reasoning and benefit from such a resolution, it is not the case for all such disputes. By assuming otherwise, the conventional accounts cannot do justice to cases in which the principles and tensions at stake are best left unreconciled by the courts. By establishing the appeal of judicial resolutions, the conventional narratives do not fully attend to the benefits that can flow for relationships and social order, in some cases, from the opportunity for disputing parties to devise strategies for productive relationships, even in the event of continued, perhaps enduring, disagreement.

These shortcomings of the conceptualizations of the constitutional disputes that come before the Court suggest an inattention to what Webber calls the "agonistic" dimensions of the constitution.[143] For Webber, the constitution of Canada is agonistic insofar as it can be usefully understood in terms of several discrete themes that "have never been fully rationalized" and that have "interacted – and continue to interact – over time".[144] The idea is that, alongside its collaborative, unifying,

[142] On the role morality of judges at the Supreme Court, see Macfarlane, *Governing, supra* note 1.
[143] On the agonistic dimensions of the Court see Webber, *Contextual Constitution, supra* note 111 and Jeremy Webber, "Section 35 and a Canada beyond Sovereignty" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 64 [Webber, "Section 35"]. And similarly, James Tully, *Strange multiplicity: Constitutionalism in an age of diversity* (New York: Cambridge University Press, 1995).
[144] Webber, *Contextual Constitution, supra* note 111 at 2.

and peaceable dimensions, the Canadian constitutional order is animated by unreconciled contending claims about purpose, legitimacy, jurisdiction, allegiance, authority, autonomy, and so on. These claims persist, forming a backdrop of "perennial disagreements" that are held in abeyance by Canadians' steadfast "ability to collaborate and live together".[145]

Agonistic constitutionalism is "a constitutionalism in which contending positions are seen to be essential to the society, animating it, and where these positions are not neatly contained within a comprehensive, overarching theory".[146] In one sense, an agonistic constitution is simply a living tree constitution, one that "proceed[s] day by day, not through the fiat of a closed set of founding fathers or their privileged successors".[147] But the agonistic character of a constitution is not exhausted by the living tree metaphor. It also speaks to a constitution's response to diversity and disagreement, namely to take them "as it finds [them]", to embrace rather than resist them.[148]

Despite its agonistic dimensions, the Constitution of Canada also has features of unification and aspiration. As discussed above, the Canadian constitution is animated by common values and themes. But it is the persistent debate about principle and the ongoing disagreement about the meaning and priority of those values and themes that is noticed in agonistic constitutionalism. This debate is the "normal condition of human communities, where we disagree over so much, and yet nevertheless find a way to sustain our lives in common".[149] These ways of sustaining life in common are not necessarily enlightened responses to diversity and cultural difference. As the

[145] Webber, *Contextual Constitution, supra* note 111 at 8.
[146] Webber, *Contextual Constitution, supra* note 111 at 8.
[147] Webber, *Contextual Constitution, supra* note 111 at 8.
[148] Webber, *Contextual Constitution, supra* note 111 at 8.
[149] Webber, *Contextual Constitution, supra* note 111 at 264.

history of Indigenous peoples in Canada attests, the arrangements in which life in common is led can be to the benefit of some over others and can have ultimately colonial effects. But the aspiration of agonistic constitutionalism is to respond constructively to the "challenges of sustaining a deeply diverse political community".[150]

In an agonistic constitutional order, some constitutional disputes will deeply engage the agonistic dimensions of the constitution and, as a result, may be ill-suited to an early adjudicated settlement. As noted above, the courts, and in particular the Supreme Court, are usually expected to resolve or settle unreconciled and competing constitutional claims. This is the Court's role as the "final arbiter". This expectation of dispute-settling reflects the "jurispathic" character of the judicial role,[151] the role of choosing (i.e. doing violence to) one normative order over another when faced with competing normative positions or unclear law.

Cover argues that judges are always jurispathic. When confronted with social realities saturated with multiple forms and orders of law, a judge must do violence to some of that law in order to resolve disputes between parties.[152] Indeed, that is the function that judges have been assigned. The "origin of and justification for a court", Cover explains, is "to suppress law, to choose between two or more laws, to impose upon laws a hierarchy".[153] The problem of too much law is solved by the courts and ultimately by a supreme tribunal. "It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the

[150] Webber, *Contextual Constitution, supra* note 111 at 264.
[151] Robert M Cover, "Foreword: *Nomos* and Narrative" (1983) 97 Harv L Rev 4 at 40.
[152] *Ibid*.
[153] *Ibid*.

solution".[154] Cover contends that the "classic apology for a national supreme court" flows from this "problem of too much law".[155] Citing the *Federalist Papers*, Cover sets out the apology as a call for monism:

> To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.[156]

While Cover is critical of resort to the "superior brute force" of the courts because it "shuts down the creative hermeneutic of principle that is spread throughout our communities",[157] he raises an important question: to what extent is "coercion…necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous communities"?[158] To what extent, in

[154] *Ibid*.
[155] *Ibid* at 41.
[156] *Ibid* at 41, citing A Hamilton, *The Federalist No 22* (E Bourne ed. 1947) at 148-9.
[157] *Ibid* at 44.
[158] *Ibid* at 44.

other words, do we need jurispathic institutions like courts, including a supreme court, in order to facilitate peaceful and productive social relations?

The agonistic character of the Canadian constitution offers an avenue toward answering this question in relation to constitutional disputes. It is an opportunity to take notice of the background of disagreement and normative diversity against which disputes arise[159] and to consider the possible ways that courts can respond in light of that disagreement. One way is to fulfill the role of final arbiter and offer disputing parties an "answer", deciding what law governs their relationship and settles the issue between them.

Webber makes this point in relation to formal institutions of legal dispute resolution generally. He first argues that the move towards law, the desire for it, is based on a desire "to have some order established, even in the face of continued normative diversity within society at large".[160] Law, on this view, does not usually (if ever) emerge from implicit agreement or exist against a backdrop of consensus. Rather, a normative order usually entails that parties with "disparate attitudes" reach a "single outcome" (i.e. the governing norm) despite their continued disagreement.[161] The parties "acquiesce" to the single outcome "because that is the only way that [peaceful social relations] can be preserved. It is the act of defining a common position, in the face of continuing disagreement, that is the essence of law".[162]

[159] Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 [Webber, "Human Agency"].
[160] *Ibid* at 177.
[161] *Ibid* at 179.
[162] *Ibid* at 179.

If this is the nature of law and legal disputes, then it leads us to a "renewed appreciation" for institutions that are designed to help us through moments of normative disagreement in the service of achieving and maintaining a peaceful society.[163] Once we notice and take seriously the disagreement at work in social relations, we see that "the formal structures for sifting and aggregating arguments represented by democratic institutions carry distinct benefits".[164] They provide "concrete and knowable mechanisms for popular participation; they allow citizens to speak in their own voice; and they do so on a basis of rough equality…".[165]

The courts, including the Supreme Court, are such institutions and can offer an answer to the dispute that is reached, even in the face of contending constitutional principles and abiding underlying disagreement between the parties. And they do so by virtue of a decision-making process in which the disputing parties have the benefit of active participation, presenting arguments and evidence, and obtaining a reasoned decision that can only be appealed to higher courts for so long.[166]

This understanding of the character of constitutional disagreement and the role of the courts offers a justification for commitments to judicial supremacy and to the Court's paramountcy in interpretive questions. Indeed, this is an understanding of the judicial role in a plural legal landscape that offers a more optimistic frame through which to understand Cover's observations.[167] That is, when we pay attention to disagreement in society and appreciate the

[163] *Ibid* at 180.
[164] *Ibid* at 180-1.
[165] *Ibid* at 180-1.
[166] On the distinct character of adjudication as a mode of legal ordering, see Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353.
[167] See Cover, *supra* note 151; Webber, "Human Agency", *supra* note 159 at 180-181.

multiple types of law that govern our lives, we are reminded of the importance of mechanisms that help us reach common ground with our neighbours and thereby maintain "peaceable social relations".[168] With this understanding, the 'violence' that Cover attributes to the judiciary becomes one strategy (among many) for overcoming the normative disagreement and plurality that flows from social diversity.

In attending to the mechanisms by which we settle disagreements, we are forced to weigh their adequacy, their legitimacy, and their effectiveness. In understanding the Court in this light, we are urged to measure its role in settling disputes against its effects in fomenting disputes, preventing them, and channeling them into litigation or other processes.[169] Thus we are compelled to confront the basic questions of the Court's functioning, rather than assuming these questions have already been answered or are resolved by definition.

It is in this light that the agonistic nature of the constitution illuminates another way in which the courts might respond to constitutional disputes, one that leans into the contending positions in cases in which it might be best for the parties, rather than the courts, to determine how to move forward despite – indeed, in light of - their "divergent, perhaps even contradictory, assertions of fundamental principle".[170] That is, there may be circumstances in which a court – usually expected to settle the dispute – should instead acknowledge the contending constitutional tensions at stake in the dispute without offering a way out. In these circumstances, the courts provide guidance on how the parties might or should conceive of the principles underlying their divergent positions

[168] Webber, "Human Agency", *supra* note 159 at 181.
[169] On courts' "multidimensional" relationship to disputes, see Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 J Legal Pluralism 1.
[170] Webber, "Section 35", *supra* note 143 at 64.

rather than offering a substantive answer on how to resolve them. The parties are then left to negotiate a way forward and to devise ways of navigating and mediating the competing claims in order to continue their relationship, that is to continue living together in the world.

Turning to the role of the Supreme Court in particular, consider two cases that illustrate the difference between types of constitutional disputes and the different role that the Court can play in each. First, a case that called out for a clear answer from a final authority is *Daniels v Canada (Indian Affairs and Northern Development)*.[171] The primary issue in *Daniels* was whether Métis and non-status Indians are "Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*. Resolving the dispute between the federal and provincial governments underlying this litigation had material and doctrinal significance. If the answer was 'yes', then the affairs of Métis and non-status Indians fell under federal jurisdiction. Otherwise, these affairs were a matter of provincial jurisdiction. The need for a final adjudicated response was compelling - each order of government had disavowed itself of jurisdiction,[172]giving rise to an ongoing "jurisdictional wasteland" and the deprivation of funding, "programs, services and intangible benefits recognized by all governments as needed" for Métis and non-status Indians.[173] The Crown argued that this was not the right case to decide the jurisdictional question as there was no legislation at issue. Justice Abella, writing for the Court, rejected this submission. Accepting that a declaration on the constitutional issue would not generate a duty to legislate, Justice Abella recognized that it *would* have the "undeniabl[e] salutary benefit of ending a jurisdictional tug-of-war in which these groups

[171] *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12 [*Daniels*].
[172] *Daniels*, *ibid* at para 14. Justice Abella, writing for the Court, explained: "Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. As the trial judge found, when Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24). And when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one" (para 14).
[173] *Daniels*, *ibid* at para 14.

were left wondering about where to turn for policy redress".[174] The "legislative vacuum" that the Crown pointed to was a manifestation of this tug of war, as "neither level of government has acknowledged constitutional responsibility".[175] A declaration from the Court thus had the benefit of bringing "certainty and accountability" and, as a result, "easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute".[176]

In the result, the Court held that "Indians" in section 91(24) includes "*all* Aboriginal peoples, including non-status Indians and Métis".[177] This result could be reached despite "definitional ambiguities" about who is considered Métis or a non-status Indian. [178] Those ambiguities could be attended to by the parties or perhaps addressed in future litigation, but they did "not preclude a determination into whether the two groups, however they are defined, are within the scope of s. 91(24)".[179]

Compare *Daniels* to the *Secession Reference*. Admittedly, these cases are very different on their face given the issues at stake and the ways in which they came to the Court. But the differences between them are, in fact, part of the point. The primary issue at stake in the *Reference* was whether the legislature or government of Quebec had the constitutional authority to unilaterally effect the secession of Quebec from Canada. The Court answered the question, concluding that neither the legislature nor the government of Quebec could lawfully effect a secession of Quebec from

[174] *Daniels*, *ibid* at para 15.
[175] *Daniels*, *ibid* at para 15.
[176] *Daniels*, *ibid* at para 15.
[177] *Daniels*, *ibid* at para 19.
[178] *Daniels*, *ibid* at para 19.
[179] *Daniels*, *ibid* at para 19.

Canada without "principled negotiations".[180] But what is more interesting is the Court's reasoning in reaching this answer and that which it did not do.

In its advisory opinion in the *Reference,* the Court drew on constitutional history and practice to identify four "fundamental and organizing principles" of the constitution of Canada that it considered relevant to the *Reference*, namely federalism, democracy, constitutionalism and the rule of law, and respect for minorities.[181] The Court described the interaction of the principles and how they came to "qualify, shape and ultimately (in the Court's view) sustain each other",[182] noticing points of both tension and harmony between them. In presenting the principles, the Court "sought to present an interpretation of how the whole [constitution] fits together, not as an ordered, structured and comprehensive body of rules, but as a body of experience, with its own preoccupations and commitments, from which principles may be derived for its continued development".[183]

The Court's analytical approach in the *Reference* mirrors one dimension of an agonistic constitution, namely its focus on the ways in which constitutional practice and experience sustain the constitutional conversation without dictating or determining its content.[184] In this sense, agonism is consistent with thinking about the constitution, as the Court did in both the *Secession*

[180] *Reference re Secession of Quebec,* [1998] 2 SCR 217 at para 104 [*Secession Reference*].
[181] *Ibid* at para 32.
[182] Webber, *Contextual Constitution, supra* note 111 at 259.
[183] Webber, *Contextual Constitution, supra* note 111 at 260. See e.g. *Secession Reference, supra* note 180 at para 49, where the Court explains that the principles operate in "symbiosis", with no one principle having its full meaning understood in isolation from the others and no one principle trumping any other. See also, for example, at para 66, where the Court argues that the principle of democracy must be understood in relation to the principle of federalism, such that there may be different and equally legitimate majorities in different provinces and territories and at the federal level.
[184] Webber, *Contextual Constitution, supra* note 111 at 260.

Reference and the *Patriation Reference*, as a "global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state".[185] Such a constitution strives to "endure over time" by offering ways to condition abiding relationships, but not offering the conceit of ready-made solutions.[186]

With respect to what it did not do in the *Secession Reference*, the Court did not decide which amending formula would apply to a case of secession.[187] The Court adopted this approach despite also noting that Part V was raised by the parties and that secession would constitute an amendment to the Constitution of Canada.[188] Instead, the Court concluded that the operation of the unwritten principles supported a legal obligation on all parties to negotiate in the event of a clear expression of public support for secession in Quebec. The content of the negotiated solution was, the Court contended, a political matter, to be achieved by the parties engaged in the negotiation. "[I]t is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess".[189] The Court explained that the "reconciliation of the various legitimate constitutional interests" was "necessarily" a matter for the political realm, not the judicial one.[190] This was "precisely because" reconciliation of the interests at stake could, in the Court's view, only be achieved through "the give and take of the negotiation process". [191] The Court's role was to provide a normative justification for the obligation to negotiate and an account of the constitutional morality that should

[185] *Re Resolution to Amend the Constitution,* [1981] 1 SCR 753 at p 874; *Secession Reference, supra* note 180 at para 32.
[186] *Secession Reference, supra* note 180 at para 32.
[187] Webber, *Contextual Constitution, supra* note 111 at 260.
[188] *Secession Reference, supra* note 180 at para 105.
[189] *Secession Reference, supra* note 180 at para 101.
[190] *Secession Reference, supra* note 180 at para 101.
[191] *Secession Reference, supra* note 180 at para 101.

orient the negotiate process. But, having established the legal framework, it was then, in the Court's view, for the democratically elected leadership of the various participants to resolve their differences.[192]

While the Court's approach can be explained away as political prowess, it can also be justified as respectful of a second dimension of agonistic constitutionalism, namely a comfort with the discomfort caused by legally unreconciled claims, both in and after an adjudicated response. The Court could respect its holding that none of the principles trump the others, thus avoiding the need to conclude that "federalism, constitutionalism, the rule of law or minority rights should simply overpower the democratic will of the people of Quebec" or that "either of the two majorities inherent in a federal structure, one at the level of Canada, the other at the level of Quebec, was entitled to trump the other".[193] Rather, notwithstanding any political buck-passing, there is conceptual justification for seeing legal "value in keeping [the governing] principles in tension, continuing to operate for as long as possible, each tempering the other, so that no one was forced to choose between constitutionalism and democracy unless absolutely necessary".[194] In the end, Webber explains, the Court "exhorted the parties to give due respect to all the principles and seek to work out their differences at the negotiating table".[195]

These observations about agonistic dimensions of the constitution and the examples of *Daniels* and the *Secession Reference* spur reflection on the nature of the Court's adjudicative role. As an adjudicator, the Court plays an important function in offering ways to settle legal disputes. Courts

[192] *Secession Reference, supra* note 180 at para 101.
[193] Webber, *Contextual Constitution, supra* note 111 at 261.
[194] Webber, *Contextual Constitution, supra* note 111 at 261.
[195] Webber, *Contextual Constitution, supra* note 111 at 261.

provide a formal, public mechanism through which competing normative claims can be resolved, at least provisionally, and disputing parties can move forward.[196] The Court's role is particularly important as it is the final appellate court. And yet an agonistic constitutional vision reveals the limits of this adjudicative description. It fails to capture what the Court does in all instances. As a final court in an agonistic constitutional order, the Court need not always resolve the tensions on which a dispute rests. Rather, in some cases, the Court may justifiably lean into the tension between contending considerations, going no further than to set out parameters within which disputants can navigate the interacting normative forces of public and private life. It is a role in which the Court respects the capacity of communities and individuals – whether office-holders or otherwise – to deliberate and exercise judgment on issues of law and governance.

III. CONSTITUTIONAL TRADITIONS

This final section of this chapter deals with the legal traditions of constitutionalism in Canada. It is the most economical section in the chapter, not because it makes a claim of lesser importance, but rather because of the character of the claim. The core observation of Part III is that the conventional narratives about the institutional dimensions of the Court are too often based on an assumption of bijurality and dualism in Canada's constitutional order, thereby failing to adequately account for Indigenous legal traditions and governance as part of the conversation, experience, culture, and claims of constitutionalism in Canada. This failure represents an inaccuracy and an incompleteness in the conventional account. These alone are sufficient to ground a claim of the need for revision of the conventional account. But the salience and force of the claim for revision

[196] Webber, "Human Agency", *supra* note 159 at 180-82. See also Cover, *supra* note 151.

are further rooted in the implications that flow from the inaccuracy, in the way it diminishes the Court and the constitution, in the way it contributes to and allows for the perpetuation of "dispossession and sorrow for Indigenous peoples", and in the way it "undermine[s] the vitality of Indigenous law".[197]

Multijurality in Canadian constitutionalism

At the outset of a chapter on "Challenges and Opportunities in Recognizing Indigenous Legal Traditions" in *Canada's Indigenous Constitution,* John Borrows reminds us of a legal truth, that "the relationships between civil law, common law and Indigenous legal traditions are not fixed".[198] As Borrows explains, the interpretive diversity and openness of law entail that diversity, openness, and disagreement will endure in determining "what 'the law' *is* or *should be* in the relationship between Canada's legal traditions".[199] As the character and limits of the relationship are confronted, admitted, and tested, an abiding interpretation and reinterpretation takes place; such is the nature of legal reasoning and constructs.[200] It is as these multiple traditions continue to interact over time and territory that the law in Canada takes shape, "influenced by criticism about the reality or desirability of their coexistence" and the ways in which these traditions are lived and conceived of in daily life.[201] Institutions and associations, of both state and non-state origins, play a role in channeling and conditioning the interactions.

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[197] John Borrows, *Canada's Indigenous Constitution*, (Toronto: University of Toronto Press, 2010) at 179 and 15-6 [Borrows, *Indigenous Constitution*].
[198] *Ibid* at 138.
[199] *Ibid* at 138. On the openness and interpretive diversity of law, see Webber, "Human Agency", *supra* note 159.
[200] Borrows, *Canada's Indigenous Constitution*, *supra* note 197 at 138. On this point in relation to sovereignty, see Mark Walters, "'Looking for a knot in the bulrush': Reflections on Law, Sovereignty, and Aboriginal Rights" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 35 at 40.
[201] Borrows, *Canada's Indigenous Constitution*, *supra* note 197 at 138.

And yet in the interaction of the common law, civil law, and indigenous legal traditions, we come to see that the "operation of multiple legal systems is a Canadian tradition" [202] and that constitutionalism in Canada is better captured by conceptions of multijuralism rather than bijuralism.[203] "It is a mistake", Borrows writes, "to write about Canada's constitutional foundations without taking account of Indigenous law. You cannot create an accurate description of the law's foundation in Canada by only dealing with one side of its colonial legal history".[204] It is part of the endeavor of constitutional law to explore the relationship of Canada's various jurisdictions and orders of authority, "each of which has its own mechanisms for decision-making, standards of authorization and legitimacy, and language of normative ordering".[205] The legal traditions of Indigenous peoples, alongside the common law and civil law traditions, thus belong in the "constitutional conversation" in Canada as sources and sites of "legitimacy, due authority and social ordering".[206]

Macklem describes the "legal pluralism that captures salient properties of Indigenous-settler relations" as one of "constitutional pluralism".[207] That is, one "where there exists a plurality of constitutional orders within, and conceivably, across, state boundaries".[208] In a constitutionally

[202] Borrows, *Canada's Indigenous Constitution*, *supra* note 197 at 125.
[203] Borrows, *Canada's Indigenous Constitution*, *supra* note 197 at 107. See also Tully, *supra* note 143 and Woo, Grace Lu Xiu, *Ghost Dancing with Colonialism: decolonization and indigenous rights at the Supreme Court of Canada* (Vancouver: UBC Press, 2011).
[204] Borrows, *Canada's Indigenous Constitution*, *supra* note 197 at 15.
[205] Webber, *Contextual Constitution, supra* note 111 at 253.
[206] Webber, *supra* note 111 at 253. See also Brian Slattery, "The Aboriginal Constitution" (2014) 67 SCLR (2d) 319; Borrows, x 3;
[207] Patrick Macklem, "Indigenous Peoples and the Ethos of Legal Pluralism in Canada" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 17 at 19.
[208] *Ibid.*

plural environment, "there are multiple legal norms of different content, multiple sites of legal norm production, multiple legal sources for these sites, and multiple forms of norm enforcement".[209] The quandaries and challenges of interpretation and encounter in such states of pluralism are inescapable and rich. Indeed, the agonistic dimensions of the constitution are "especially evident" in the Indigenous character of the practice, experience, and claims of Canadian constitutionalism.[210]

The interpretive diversity and agonism at play in Canada's multijural constitutional experience disrupt traditional conceptions of constitutionalism and interpretive authority by, among other things, unsettling the position of the state and of judges. Questions emerge about the ways in which the normative, aesthetic, and symbolic claims of the multiple traditions can and should be reflected in the institutions, processes, and practices of decision-making and dispute settlement. For example, the constitutional and statutory frameworks governing central legal institutions have devised ways of embodying and responding to aspirations and needs of the Anglophone and Francophone linguistic communities and the common law and civil law traditions through, among other things, official language requirements and guaranteed representation of Quebec on the Supreme Court. But how can – and should – these institutions embody and respond to the constitutional imperatives that emerge from the place of Indigenous legal traditions in Canadian consitutionalism, both *simpliciter* and in their own diversity? Further queries are raised about the ways in which multiple orders of governance can be accommodated and recognized in a federal constitutional configuration, about the ways in which the forms and identities of diversity and unity

[209] *Ibid.*
[210] Webber, "Section 35", *supra* note 143 at 65.

should be recognized.[211] Thinking again of the institutional context, how can and should the composition of central institutions of the state, such as the Supreme Court and the Senate, which is currently defined according to the regional and representational notions of a bifurcated federalism, respond to Indigenous self-governance?

These questions have no clear answers. The openness of law and the constitution ensures as much. There will be times when disputes about these questions must be settled, institutional processes are invoked, and answers are given.[212] Other occasions will call for negotiation or "co-definition", finding a means for reconciliation or, at a minimum, cohabitation that attends to the most pressing issues as other disagreements are held in suspension.[213] Others, or perhaps all, will call for a close examination of the structures that give the constitution shape and form. All will demand continuing consideration; responses will be provisional as relationships, attitudes, and social realities shift and live on.

Recognizing the absence of a fixed relationship between the multiple traditions of Canada's constitutional order, and the uncertainties that come with it, is not to deny constitutional pluralism in Canada, but rather to appreciate it. It is an exploration of implications, not a challenge to the starting point. In other words, the exercise of investigating the relationship between the multiple legal traditions of Canadian constitutionalism is not impelled by the question of *whether* Canada's constitutional foundations can or should be conceived of without accounting for Indigenous legal

[211] On the nature of federalism and it capacity for attending to pluralism, see Roderick A Macdonald, "Kaleidoscopic Federalism" in Jean-François Gaudreault-DesBiens & Fabien Gélinas, eds, *Le federalism dans tous ses états: gouvernance, identité et méthodologie* (Cowansville, QC: Éditions Yvon Blais, 2005) 261.
[212] See e.g. *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44.
[213] See e.g. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511*; Haida Gwaii Reconciliation Act,* SBC 2010, c 17. On co-definition, see Webber, "Section 35", *supra* note 143 at 85.

traditions. The answer is no. Rather, the motivating inquiry is *how* to do so and *what* that conception looks like.

Bijurality in the conventional narratives

These queries of *how* and *what* must be attended to in the stories we tell of the Court, in the legal frameworks that establish the mandate of the Court, and in the institutional life and culture of the institution. It is, to be certain, crucial to adopt a posture of suspicion and caution when assessing how governments and courts can and should recognize and encounter Indigenous legal traditions, as the coercive conceptual and material force of "official state organs can overwhelm other institutions of civil society" and communities, in particular in a culture of centralism and monism.[214] This coercion can thereby "usurp vital functions" that are best performed by associations and bodies, such as Elders, families and clans.[215] However, understanding the institutions of the state from a constitutional outlook that neglects or ignores the traditions that animate the constitution and the lives of the people and communities that bring the constitution to life undermines the institutions and the constitution, disregards and shuns the agency and experiences of the people and communities of the constitutional project, and neglects the realities of Indigenous law.

To ensure that Indigenous legal traditions inform legal conceptualizations and expectations of the Court, the constitutional assumptions on which these conceptualizations and expectations are based must shift from a commitment to bijurality to a commitment and appreciation of

[214] Borrows, *Canada's Indigenous Constitution, supra* note 197 at 179.
[215] Borrows, *Canada's Indigenous Constitution, supra* note 197 at 179.

multijurality as a feature of constitutionalism in Canada. Scholars of indigenous law have made crucial contributions to understandings of Canadian constitutionalism by dismantling and rewriting traditional, deeply entrenched narratives about constitutional history, experience, and law in Canada, showing how these narratives have failed to account for the constitutional history, experience, and law of Indigenous peoples, and pointing to the harms of such failures. Many of these scholars have engaged with the jurisprudence of the Supreme Court, arguing for a decolonization of analytical approaches and carefully attending to the successes and failures of the Court's reasoning in cases dealing with Aboriginal law and Indigenous issues.[216] Some speak to approaches to judicial decision-making more broadly[217] and some others consider institutional dimensions of the Court, such as the appointment of Indigenous judges.[218]

But despite the significant body of work addressing Indigenous legal traditions and governance across areas of public law, in constitutional, Aboriginal, and Indigenous law, the accounts of the institutional dimensions of the life of the Court are still so often told through the frame of bijurality and dualism. That is, the conventional accounts are often told through the constitutional lens of two legal traditions, the common law and civil law, and an understanding of political identity that is defined in terms of the provincial and federal allegiances of federalism. Both the bijural character of Canada's constitutional foundations and the dualistic quality of federalism are particularly prominent in understandings of the origins of the Court, the constitutional guarantees of its composition, and its role.

[216] See e.g. Woo, *supra* note 203 and Walters, *supra* note 200.
[217] Woo, *supra* note 203 and Webber, *supra* note 143.
[218] See the discussion in Chapter 3, Part III.

A signal example of the prominence and familiarity of bijurality as the juridical animus of the constitution and the Court is found in the reasoning of the majority in the *Supreme Court Act Reference*. As discussed in Chapter 1, the majority in the *Reference* gave an account of the history of the Supreme Court of Canada within Canada's constitutional order, linking it to the common and civil law traditions and the ways in which those traditions are reflected in the design, practice, and history of the Court. In its account, the majority is attentive to pluralism in the Canadian constitutional order. However, this pluralism is limited to that which divides along the lines of federal-provincial federalism and the common law and civil law traditions. According to the majority, the legitimacy and competency of the Court depends on its representation of "Canada's two legal traditions".[219] Such representation ensures that the Court can perform its role of seeing that "the common law and civil law would evolve side by side, while each maintained its distinctive character".[220]

The majority further explained that the composition of the Court was afforded status in the constitutional amending formula in order to protect the place of the civil law tradition in the constitutional order: "the Court's composition has been long recognized as crucial to its ability to function effectively and with sufficient institutional legitimacy as the final court of appeal for Canada".[221] More precisely, the creation of the Court was secured by the guarantee that a "significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture".[222] In the majority's view, this "objective of ensuring representation from Quebec's distinct juridical tradition" has equal force today because it speaks to the competence, legitimacy,

[219] *Supreme Court Act Reference, supra* note 7 at para 85.
[220] *Supreme Court Act Reference, supra* note 7 at para 85.
[221] *Supreme Court Act Reference, supra* note 7 at para 93.
[222] *Supreme Court Act Reference, supra* note 7 at para 93.

and integrity of the Court.[223] In its account of the evolution of the constitution in Canada and the trajectory of the Court in that history, the majority makes no mention of or signal to the Indigenous dimensions of the constitution.

The conventional narratives contend that Canada is bijural and therefore the Court must, in its design and expertise, reflect this dualistic feature of the constitution. The claim is that the juridicial traditions that inform the constitutional order in which the Court operates must orient and guide the operation and development of the Court. A similar logic is invoked in the context of federalism. The conventional narratives conceive of federalism in Canada as dividing along the political boundaries between central and provincial authorities and position the Court plays an authoritative role in managing those boundaries.

The majority's reasoning in the *Reference* reflects a dualist understanding of both Canadian federalism and of the legal traditions that comprise the constitution of Canada. This commitment to dualism, tethered to the workings of the political state, is consistent with long-standing understandings of Canadian federalism and the history of Canada's constitution as founded on the common and civil law traditions.[224] And they rightly pay attention to structural dimensions of the constitution, noting their implications for composition of the bench and injecting them into the institutional aspirations that should guide the Court.

Indeed, the majority's reasoning in the *Reference* tidies up Canadian constitutionalism in ways that are perhaps understandable or even justified given the issues before the Court, which dealt with

[223] *Supreme Court Act Reference, supra* note 7 at para 93.
[224] See e.g. *Secession Reference*, *supra* note 180 at paras 33-47, 55-60.

the legality of an appointment under section 6 of the *Supreme Court Act*. A legal realist might speculate that the Court's choices were politically motivated, strategically placed in order to justify what was, in effect, an exercise of self-entrenchment. A constitutional minimalist might contend that the Court's choices were designed to avoid difficult issues, such as indigenous representation on the Court, and bilingualism as a matter of eligibility, in relation to the interpretation of "composition of the court". This account would assume that the Court's constitutional vision in the *Reference* was a manifestation of constitutional humility and restraint, limited to what was necessary to answer the reference questions and what was put forward by the parties.[225]

But of greater moment for the analysis here is a consideration of the implications of telling the story in this way. Does the telling of this "tidy" constitutional story matter? One implication of the majority's choices is that they convey the message that the courts are the primary site for establishing constitutional meaning and resolving constitutional disputes. As noted above, this kind of court-centricity gives the impression that constitutional meaning, legitimacy, authority, and implementation are grounded in judicial interpretation rather than in the effective action of government, the lived experience of citizens, the inheritances of tradition, or in the interaction of legal traditions. This does not accord with the full picture of Canadian constitutionalism, one in which sovereignty, governance, and legal tradition exist beyond the state but still within the constitutional frame. In doing so, it undermines the attempt to create the conditions necessary for "developing a culture of argument in relation to the place of Indigenous legal traditions in Canada".[226]

[225] I return to a different understanding of humility and restraint in Chapter 3, Part II.
[226] Borrows, *Canada's Indigenous Constitution, supra* note 197 at 119.

In addition, by writing non-judicial state actors out of the story, the majority's narrative gives the misleading impression that the Court's status as both essential and expert is absolute. It locks the Court in a self-fulfilling prophecy. In essence, the majority's argument is that the Court is constitutionality significant because courts are the guardians of the rule of law. But by positing itself as the guardian of the rule of law, the Court guarantees its own constitutional significance,[227] but draws on a very narrow conception of the rule of law, constitutional interpretation, and dispute resolution, one that does not leave room for plurality.

The choice to privilege these accounts of federalism and Canada's constitutional traditions neglects the multijural character of constitutionalism in Canada, the cultural contingency of the common law and civil law traditions,[228] and the multiple sites of governance and legal authority, the multiple normative forces and webs of meaning that bear on the lives of individuals. By virtue of presenting Canada's constitution in terms of bijurality rather than multijurality and in terms of two political communities rather than multiple cultures and communities that speak to identity and belonging, the constitutional vision that underpins the conventional narratives fails to capture the experiential character to which the constitution is intended to speak.

CONCLUSION

Ultimately, a constitution is a "matter of a community governing itself".[229] Ideally, part of that governance takes place through "an array of well-considered and well-coordinated institutions"

[227] On the Court protecting its own constitutional significance, see Daly, *supra* note 6.
[228] Borrows, *Canada's Indigenous Constitution, supra* note 197 at 109.
[229] Webber, *Contextual Constitution*, *supra* note 111 at 265.

that are "sustained and given life by its members."[230] Unpacking the stories we tell about the Court, as this dissertation aims to do, is therefore an attempt to discern how one particular institution can and should contribute to the endeavor of constitutionalism and, second, how we as citizens can and should sustain it.

This chapter points to the assumptions about law and the constitution of Canada that underpin the conventional narratives about the Court that were set out in Chapter 1. These assumptions speak to institutional hierarchies, official normativity, the amenability of constitutional disputes to adjudication by judges, and the two legal traditions and identities that matter in Canadian constitutionalism. This chapter points to how these assumptions are thin. They neglect the shared project of constitutional interpretation told in administrative law stories, the accountability features of *stare decisis*, the agonistic dimensions of the constitution, and the multijurality of constitutionalism in Canada. On account of this neglect, the conventional accounts are built on an incomplete and unstable understanding of the structural dimensions of the constitution, of the distributions of power, of the institutional relationships, of the animating forces and traditions, that comprise the constitutional order.

This chapter has tried to fill some of those gaps and nod towards some of the ways in which we should alter our understandings of the Supreme Court. These alterations are explored in greater detail in the next chapter. As we will see, the revised constitutional vision presented in this chapter generates and justifies a series of expectations, practices, and commitments in relation to the Court, which are discussed in the next. These expectations, practices, and commitments make demands

[230] Webber, *Contextual Constitution*, *supra* note 111 at 265.

on citizens, the judges of the Court, and executive officials, demands that speak to the paths that open up when we see the constitution better.

3 The Supreme Court in Canada's Constitutional Order

Chapter 2 identified assumptions about the constitution that underlie conventional narratives about the Supreme Court and showed that they do not adequately attend to meaningful aspects of constitutionalism in Canada. The aspects that had not been attended to were matters of constitutional structure – animating traditions, institutional relationships, and fundamental principle. The revised constitutional landscape that emerged in Chapter 2 accounts for these structural features. It recognizes the extensive, shifting network of public institutions that engage with the constitution, all acting in service of the individuals, communities, and institutions to whom the constitution is intended to speak. It gets texture from the practices, interpretations, decisions, and conflicts of these individuals, communities and institutions. That texture thickens from the multiple legal traditions that co-exist, interact, and resist each other within the constitutional order. And the landscape expands and contracts as boundaries of unity and diversity are made and re-made across fluid categories of identity and difference. The backdrop of this landscape is painted with two brushes, those of abiding disagreement and common pursuits. I will refer to this constitutional landscape as 'revised' or 'structural'.

Starting from this revised landscape of Canadian constitutionalism, Chapters 3 and 4 add to existing stories about the Supreme Court in Canada's legal order. This chapter focuses on the present, urging a shift in expectations, attitudes, and practices in relation to the Court. The next chapter then turns to the future, arguing for an approach to Court reform that is sensitive to the aspirations of institutional design, and the possibilities and limits of constitutional amendment in Canada. By the end of these two chapters, we will have an account of the Court that is less tidy than its conventional

counterpart, but also one that is more attentive to relational, structural, and experiential features of Canadian constitutional life.

We begin in the present. Chapter 2 has already gestured to some of the implications of the revised constitutional outlook for our understandings of the Court. The current chapter elaborates these implications and points to others. It proceeds in three parts. Part I looks to the expectations that we should have for the Court. I argue that the legal significance of the Court is both less and more than is captured in the conventional accounts. This assessment should not lower our expectations of the Court's work, but rather advance our understanding of the limits of the Court's contributions and the need for it to embody the highest ideals of the rule of law. Part II speaks to judicial attitudes and practices. It contends that judges of the Court should come to the task of constitutional interpretation with a kind of humble pride about the Court's position in the shared project of constitutionalism, as well as a practice of judicial patience in some cases, one that justifies a judicial opinion that does not ultimately settle the constitutional tensions at stake in the case. Part III deals with commitments that should guide decision-makers in the selection of judges of the Court. In particular, I present a case for Indigenous representation on the Court, focusing on the meaning of "composition" in Part V of the *Constitution Act, 1982* and accounting for the place of Indigenous legal traditions in the structure of constitutionalism in Canada.

The analysis presented in this chapter is part of larger conversations about the constitutional character of the Court and the nature of the Canadian constitutional order. Other scholars have studied the constitutional status and narratives of the Supreme Court. For example, Scott contended that, at the time of patriation, the new constitutional amending procedures were not merely

placeholders, but rather shielded the Supreme Court from major unilateral reform.[1] In 2000, to mark the 125th anniversary of the Court, Van Praagh looked to questions of identity and diversity and argued that the Court is just one (albeit one active and important) participant in the shared project of determining how to live together in a multicultural society.[2] More recently, Newman reasoned that the constitution, maintenance and organization of the Court are entrenched within the Constitution of Canada by virtue of a "purposive and progressive" interpretation of section 101 of the *Constitution Act, 1867*.[3] After the *Supreme Court Act Reference*, Mathen examined the context in which the *Reference* was decided, contending that the constitutional forces at stake amounted to a "perfect storm of law and politics."[4] And Daly argued that the autobiographical story told by the majority in the *Reference* is selective, and fails to address the ways in which the Court has used its own jurisprudence to enhance its institutional significance within Canada's constitutional architecture.[5]

In this dissertation, I too contest the stories told in the *Reference* and explore the character of the Supreme Court's place in Canada's public life. However, unlike much of the existing scholarship that takes up these tasks, my analysis relies on the body of work that explores how normative diversity tests the prevailing theories and stories of Canadian constitutionalism.[6] In an example of this work, Macdonald challenges accounts that ignore or undervalue the law-making capacities of

[1] Stephen A Scott, "Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes" (1982) 20:2 UWO L Rev 247; Stephen A Scott, "The Canadian Constitutional Amendment Process" (1982) 45:4 Law and Contemporary Problems 249.
[2] Shauna Van Praagh, "Identity's Importance: Reflections of – and on – Diversity" (2001) 80 Can Bar Rev 605.
[3] See Warren J Newman, "The Constitutional Status of the Supreme Court of Canada" (2009) 47 SCLR (2d) 429.
[4] Carissima Mathen, "The Shadow of Absurdity and the Challenge of Easy Cases: Looking Back on the *Supreme Court Act Reference*" (2015) 71 SCLR (2d) 161 at 162.
[5] Paul Daly, "A Supreme Court's Place in the Constitutional Order – Contrasting Recent Experiences in Canada and the United Kingdom" (2015) 41:1 Queen's LJ 1.
[6] For examples that focus on the Court in more specific contexts, see Van Praagh, *supra* note 2; Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39:1 Queen's LJ 175; and Roderick A Macdonald, "Was Duplessis Right?" (2010) 55:3 McGill LJ 401 [Macdonald, "Duplessis"].

individuals.[7] His work encourages more attention to institutional forms and processes that engage citizens in the project of just law-making, interpretation, judgment, and reform.[8] Similarly, Webber contests narratives that pay too little attention to the role of disagreement as an abiding feature of the constitution, at the level of both individual relationships and constitutional order.[9] In contrast to constitutional accounts that seek to alleviate the tension between competing values, Webber describes the Canadian constitutional order as agonistic. As noted in Chapter 2, for Webber, this means that Canada's constitution is animated by contending, perhaps contradictory, positions, and that these positions "are not neatly contained within a comprehensive, overarching theory," but rather persist in tension in Canadian public life.[10]

More of these constitutional counterclaims are found in the work of Borrows, Berger, and MacDonnell. As we know from Chapter 2, Borrows draws on the lived experience and institutional frameworks of Indigenous legal traditions to establish that law's dominant narratives do not speak to the multijuridical character of Canadian constitutionalism, but that they should.[11] As will be

[7] Generally, see e.g. Martha-Marie Kleinhans & Roderick A Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS 25. In the constitutional context, see e.g. Roderick A Macdonald, "Kaleidoscopic Federalism" in Jean-François Gaudreault-DesBiens & Fabien Gélinas, eds, *Le federalism dans tous ses états: gouvernance, identité et méthodologie* (Cowansville, QC: Éditions Yvon Blais, 2005) 261 [Macdonald, "Federalism"].

[8] See e.g. Roderick A Macdonald, "Law Reform for Dummies (3rd Edition)" (2014) 51:3 Osgoode Hall LJ [Macdonald, "Law Reform"], and Roderick A Macdonald, "The Integrity of Institutions: Role and Relationship in Constitutional Design" in Law Commission of Canada, *Setting Judicial Compensation: Multidisciplinary Perspectives* (Ottawa: Law Commission of Canada, 1999) [Macdonald, "Integrity of Institutions"]. See also Hoi Kong, "The Unbounded Public Law Imagination of Roderick A Macdonald" in Richard Janda, Rosalie Jukier & Daniel Jutras, eds, *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (Montreal: McGill-Queen's University Press, 2015) [Janda, Jukier, & Jutras, *Legal Imagination*].

[9] Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 [Webber, "Legal Pluralism"].

[10] Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 8 [Webber, *Contextual Constitution*]. See also Jeremy Webber, "Section 35 and a Canada beyond Sovereignty" in Patrick Macklem & Douglas Sanderson, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal Treaty Rights* (Toronto: University of Toronto Press, 2016) 63 [Webber, "Section 35"].

[11] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Canada's Indigenous Constitution*]; John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010).

discussed in greater detail below, Berger disrupts conventional accounts of constitutionalism, revealing the hubris of the constitutional rule of law's claims of independence from culture, and destabilizing entrenched accounts of law's relationship to religious difference in Canadian constitutional life.[12] In so doing, Berger establishes the promise and limits of more nuanced appreciations of cultural and normative encounter in modern constitutionalism. And in work that resonates throughout this dissertation, MacDonnell contests the prevailing judicialized lens of understanding the constitution by establishing that political actors and civil servants are constitutional agents, in particular in the realm of interpreting and implementing *Charter* rights.[13]

As was developed in the Introduction and in Chapter 2, this dissertation draws on the insights of these and other scholars, as well as examples from public law jurisprudence, to argue that Canada's constitutional imagination – including its understanding of the constitutional character of the Supreme Court – is richer than the account offered in the majority opinion in the conventional narratives. This chapter continues to build on this body of work, exploring the implications of the revised constitutional outlook presented in Chapter 2 for the stories we tell of the Supreme Court.

I. EXPECTATIONS

Judicial contributions

[12] See e.g. Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) ["*Law's Religion*"].
[13] Vanessa MacDonnell, "The Constitution as Framework for Governance" (2013) 63:4 UTLJ 624 ["Framework"]; Vanessa MacDonnell, "The Civil Servant's Role in the Implementation of Constitutional Rights" (2015) 13:2 Intl J Constitutional L 383 [MacDonnell, "Civil Servant"].

Chapter 2 disrupted some of the purchase of judicial supremacy in the Canadian constitutional imagination and reminded us that while the Supreme Court is Canada's final appellate court, it is also just one participant in a shared project of constitutional interpretation and implementation. This shared project encompasses a network of institutions, all of which embody the values of the rule of law and exercise deference and discretion within legal parameters. Studying the nature of these institutions and their interaction suggests that the network of institutions interpreting the constitution has horizontal and shifting qualities, not only vertical and hierarchical dimensions. With these horizontal and shifting dimensions of the institutional network, we are reminded that the Court's interpretive supremacy is tempered, not in every case on every issue, but rather insofar as its constitutional role as final appeal court encompasses deferring to and interacting with other decision-makers that are equally engaged in the project of interpretation and equally committed to the values of the rule of law. The conventional accounts tended to focus on the deference owed to Parliament. The revised account shows that the relationships of deference, respect, and reliance that must be attended to extend much further.

The revised reading of the constitution also serves as a reminder that the institutions engaged in constitutional interpretation are never the final word on constitutional meaning. Legal disputes and issues always exist within the wider context of social and political life and not in the realm of law alone. This reminder captures two points about the normative and contextual character of a judgment of the Court and the way in which it captures, and plays out in, our realities.

The first point is that the doctrinal effect of a judgment of the Court is not the same as its experiential effect. Recall the discussion of normative force from Chapter 2. As Borrows puts it,

"expectations about the result and force of [the Court's] decisions often masquerade as reality".[14] But while a judgment of the Court is the final domestic judicial decision in a single legal dispute, our lives are governed by customs, regulations and codes outside of official statutes, constitutions and cases. In any given moment of decision-making by an individual, a judgment of the Court is necessarily understood alongside claims made by other relevant laws, norms, and claims. That is, the meaning and normative force of the Court's judgments will always depend in part on how legal actors navigate the overlapping normative claims that bear on their lives[15] and how communities integrate statements of official law into their everyday practices.[16]

The second point is that disputes over constitutional meaning, and the lives of parties in dispute, are always more complicated and layered than what is relevant to, and can be managed through, adjudication at a high court. On this point, Albie Sachs has said that, every judgment that he wrote while a judge of the South African Constitutional Court was a lie.[17] The *lie* of the judgment flowed from the disciplining effect of the logics of persuasion and justification on the logic of discovery.[18] That is, there was a false "pretense implicit in the presentation of [the] judgment that it ha[d] been written [and reasoned] exactly in the way it appear[ed]".[19] But a written judgment released by a high court must also be a lie in a second way. Here, the falsity is found in the way a judgment packages the facts of a dispute into a tidy, linear story, one much tidier and more straightforward than the lives we lead or the social issues with which we grapple.

[14] Borrows, *Canada's Indigenous Constitution, supra* note 11 at 359-60, n 2.
[15] On overlapping claims and individuals as an irreducible site of normativity, see Kleinhans & Macdonald, *supra* note 7.
[16] See e.g. Cover, Robert M. "Foreword: *Nomos* and Narrative" (1983) 97 Harv L Rev 4; Kislowicz, *supra* note 6.
[17] Sachs, Albie. *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009) at 47.
[18] *Ibid* at 52, 55.
[19] *Ibid* at 51.

Bearing witness to these two forms of falsity in the decisions of a high court is not a justification to dismiss the court's opinions. Rather, the culture of the rule of law and justification demands that judges invest fully and completely in these two lies. They are expected to present judgments that are clear, ordered and persuasive, even though neither our lives nor our reasoning are simple, clear, or ordered. Sachs explains that there is a paradox inherent in these expectations for judges. To achieve the necessary standard of the rule of law, Sachs writes, "I invest all my honesty, I labour and labour again, think and re-think, test and re-test the logic, and examine and re-examine the arguments presented for and against by my colleagues".[20] The end result is that "the greater and more successful the honesty of the endeavor, the greater the falsehood of the presentation".[21]

These observations about the "false" character of judicial opinions speak to the integrity of the judge in the culture of the rule of law and to the nature of the reason-giving exercise. To achieve the standard expected, the judge must fully, honestly, and candidly commit to the culture and to the expectations of role it entails. At the same time, the judge must be attentive to the limits of the judicial exercise. The court's word is never the last. While the courts contribute reasoned, expert opinions on the legal dimensions of a dispute, the broader context in which the dispute arises and in which the judgment will be rendered will almost always prevent a judicial opinion of the Supreme Court from being 'supreme' in the ways that the conventional narrative suggests.[22] These observations about commitment and awareness speak to the attitudes and practices of adjudication, to which I will return in Part II, below. First, though, I consider the implications of disrupting the Court's image as the supreme interpreter of the constitution for the people who call upon the Court

[20] *Ibid* at 58.
[21] *Ibid* at 58.
[22] With respect to courts more generally, see Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" in (1981) 19 J Legal Pluralism 1.

for assistance. That is, what should we expect of the Court when we confront more directly the nature and limits of its power?

Expectations of the Supreme Court

When we start from the revised constitutional outlook presented in Chapter 2, we are confronted with the notion that the Supreme Court's significance within Canada's constitutional order is both more and less than the conventional conception of supremacy provides. It is much less because the light of the Court's supremacy dims and blurs as the judgments of the Court take their place on the crowded map of normative possibilities that weigh on the everyday lives of individuals and communities. We are all touched and shaped by various "meaning-giving frameworks" when we "come before the bar of law."[23] The judgments of the Court, offered from within that culture of the rule of law, must be woven into the existing meanings and structures in our lives in order to be brought to life. And yet, for the same reason, the relationship of the Court to law within the constitutional order is also much more than the conventional accounts contemplate. This is true as the crowded map of normativity and legal cultures puts the Court and its judgments in potential interaction with countless other norms, institutions, and interpreters. Our various "meaning-giving frameworks" interact in deep ways as people and communities live out their lives, ensuring that "the constitutional rule of law is always in competition with other cultures, other compelling and rich ways of generating meaning and giving structure to experience".[24]

[23] Berger, *Law's Religion, supra* note 12 at 172.
[24] *Ibid*.

A constitutional outlook that appreciates the horizontal dimensions of Canada's constitutional architecture sees that the Court is not merely an apex institution, but rather is one institutional actor – and one constitutional voice - amongst many. At times, the Court's position at the acme of the judicial pyramid is prominent and far-reaching, such as when the Court concludes that legislative action is unconstitutional and therefore invalid.[25] In other instances, the Court shows deference to administrative decision-makers in their findings and interpretations, such that the Court's status as *supreme* is suspended or nuanced within the constitutional matrix.[26] On other occasions, the Court's relational status is at the fore, as in "second look" cases.[27] And yet still at other times, the judgments of the Court are held accountable against the measure of time, as lower courts push against the boundaries of *stare decisis*.[28] Within this network of institutions and decision-makers, the Court is never an island but may be a guiding star. The actors within the network experience shifts in power and significance, depending on the dispute at stake and the decision-makers involved. Further, the Court's position in the constitutional architecture at any particular moment is always subject to how its judgments play out in the world.[29]

The outcome of this shift in the story of the Court, one that appreciates the tempered, flatter qualities that sometimes attach to the status of a Supreme Court, is not one that helps to predict the outcomes of future cases. Rather, this shift in the story represents a modest turn in the discourse,

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[25] See e.g. *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21; [2014] 1 SCR 433 [*Supreme Court Act Reference*]; *Carter v Canada (AG)*, 2016 SCC 4 [*Carter*].
[26] See e.g. *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765 [*Conway*]; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr*]. On deference to other decision-makers in other contexts, see e.g. *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.
[27] See e.g. *R v Mills*, [1999] 3 SCR 668; *R v Hall*, [2002] 3 SCR 309.
[28] See e.g. *Canada (Attorney General) v. Bedford,* 2013 SCC 72, [2013] 3 S.C.R. 1101 [*Bedford*]; *Carter, supra* note 25.
[29] See the jurisprudential assessments in Kislowicz, *supra* note 6 and Van Praagh, *supra* note 2.

one that should prompt other modest shifts and could reveal new pathways for conceiving of the Court and holding it to account. This focus on discursive shifts rather than doctrinal outcomes is a move sympathetic to that of Van Praagh in her study of the Court's role in relation to identity formation.[30] Speaking to the specific context of claims of identity and diversity, Van Praagh drew attention to both community expectations and the Supreme Court's judicial responsibilities to argue that the Court does not impose social structures on citizens or define the identities of groups. Rather, the Court is "an active participant", indeed, an "indisputably important participant", working within the "dynamic and constantly developing framework for how we live together in Canada".[31] The shift to thinking of the Court as a participant in a project rather than an ultimate interpreter is to recognize that the Court is not the head engineer of a constitutional order, but rather is "a partner in an ongoing dance", a dance with many partners, in fluctuating relationships, and "constant changes in rhythm, direction and coordination".[32]

For Van Praagh, the cascading effects of this shift in foundation would culminate in a legal discourse that does not assume either "a unidirectional impact by the Court on identity and diversity" or "deference on the part of the Court to community claims". Rather, it is a legal discourse that explores "the ways in which the Court's contributions are effectively incorporated into a shifting and exciting picture".[33] In this discursive space, she writes, we might "find an enriched understanding of the Court and law's boundaries reflected in the way in which multiculturalism develops and builds".[34]

[30] Van Praagh, *supra* note 2.
[31] Van Praagh, *supra* note 2 at 618.
[32] Van Praagh, *supra* note 2 at 618.
[33] Van Praagh, *supra* note 2 at 618.
[34] Van Praagh, *supra* note 2 at 618.

An appreciation of the revised constitutional outlook similarly holds the promise of shifting the discourse about the Court's place in the constitutional order in productive ways, helping us to better understand the Court's contributions and directing our energies to important questions about the Court that have too often been neglected. It suggests that Van Praagh's conclusions extend beyond the case of claims about identity and diversity to constitutional issues more broadly. That is, with each constitutional case, the Court is a participant in the project of finding meaning and assessing claims, rather than its umpire or guardian, "dancing with" other institutions and individuals who also participate, in their own ways, in articulating, contesting, and navigating the constitution. Whether we focus on the Court's significance as either *more* or *less* than provided for in the conventional account, we are led to the same conceptual point, namely, that the normative weight ascribed to the Court's judgments – and the measure of the Court's significance based on the impact of its work – can never be assumed. They are always provisional, not just because disputes, relationships, and circumstances change over time, as Webber suggests,[35] but rather also because they must always be assessed within the other orders acting within the normative lives of the citizens and communities to which they speak.

The work of the Court can be experienced by citizens as violent, alienating, and colonizing in the ways that concern Cover,[36] Berger,[37] and Woo.[38] It can also serve as a catalyst for peaceful social

[35] See Webber, "Legal Pluralism", *supra* note 9 at 179-80.
[36] Cover, *supra* note 16.
[37] Berger, *Law's Religion, supra* note 12.
[38] Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver: UBC Press, 2011).

relationships in the ways imagined by Webber and Sachs.[39] Or it could be a signal to some people of their value or to others of their lack of legal recognition as imagined by Van Praagh.[40] Whatever the effect, focusing on the ways in which the Court's judgments are experienced impels us to see the Court as discursive participant rather than as saviour or oracle. Moreover, it shows that the Court's constitutional status and significance cannot be assessed without looking outward, to the interactions of the Court and its work with the institutions, officials, and citizens with whom it is engaged in the shared project of constitutional interpretation. The status and significance of the Court and its work are not fixed as supreme, but rather are shifting and conditional.

Appreciating both the contributions that the Court can make and the limits of those contributions provides some insight into the use of the Court's advisory jurisdiction to settle constitutional issues of public importance.[41] In particular, expectations about what a reference case can offer should be calibrated by the knowledge that an advisory opinion should not be treated as a panacea for social ills or a means of shirking the civic obligation to seriously engage with the country's stickiest issues. Rather, while the Court's opinions can be powerful legal, political, and rhetorical accounts that answer legal questions and offer pathways by which to move forward, they also only represent a slice of a dispute that has more context and mess than the Court can legitimately or competently address.[42] Appreciating the richness and messiness of constitutional issues, and the many perspectives that can valuably contribute, reinforces the power and limits of the Court's contribution. That is, the Court's contributions on constitutional issues should be taken for what

[39] See Webber, "Legal Pluralism", *supra* note 9; Sachs, *supra* note 17. Examples of these cases could include *Reference re Secession of Quebec,* [1998] 2 SCR 217 [*Secession Reference*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].
[40] See Van Praagh, *supra* note 2 at 616.
[41] *Supreme Court Act,* RSC 1985, c S-26, s 53.
[42] On frames and slices of social experience, see Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Cambridge, Mass: Harvard University Press, 1974).

they are – important, doctrinally-authoritative analyses of the legal dimensions of constitutional questions, that must then be considered within the bigger conversation of the ethical, political, scientific, and economic elements of the issue at stake in the constitutional questions of public importance in Canadian society.

The structural constitutional account illuminates an opportunity for better understanding the Court by turning outward, but also signals the need going forward to turn inward, to better see the inner workings of the Court, in both their real and ideal forms, and to reflect on the expectations that flow from that clearer picture. This turn inward compels an inquiry into the Court's institutional form and the moral ends of law. With respect to ideals, the inquiry is, what is the inner or institutional morality that is implicit within the nature of this Court, in this particular constitutional order? And with respect to realities, the question is, what work is the Court doing, "not just in the instrumental sense relevant to the ends being pursued through it, but in terms of shaping the lives, roles, expectations and agency of those participating within it?"[43]

These are questions about the design and operations of the Court, with an attention to the attitudes and aspirations that should inform them.[44] The inner workings of the Court will always depend on many factors that bear on the culture of an institution, factors of history, experience, regulatory framework, procedure, people, and constitutional structure and culture.[45] Thinking about the

[43] Kristen Rundle, "Reply" in (2014) 5:1 Jurisprudence 133 at 134 [Rundle, "Reply"].
[44] See e.g. Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2013) [Rundle, *Forms Liberate*]; Roderick A Macdonald, "Office Politics" (1990) 40:3 UTLJ 419 [Macdonald, "Office Politics"]; Jeremy Webber, "A Society of Friends" in Janda, Jukier, & Jutras, *Legal Imagination, supra* note 8; Lon L Fuller, *Morality of Law,* Revised Ed (New Haven: Yale University Press, 1969) [Fuller, *Morality of Law*].
[45] On the Court's institutional culture, see Jean-Guy Belley, "What Legal Culture for the Twenty-First Century?", translated by Nicholas Kasirer, (2011) 26:2 CJLS 237. On what procedure can contribute to or signal about supreme court culture, see Jamal Greene, "The Supreme Court as a Constitutional Court" (2014) 128 Harv L Rev 124.

Court's institutional culture raises more questions about the realities of the workings of the Court. In what ways is the Court's mandate promoted or undermined by the quality and character of its internal rules, relationships, and practices? And does the internal ordering of the Court – that is, the allocation of personnel, the distribution of authority, the varying modes of decision-making, the flow of information, and so on - respect the ethos that justifies and sustains the Court's claim to legitimacy as a law-maker?

But thinking about the Court's institutional culture also raises more questions about the ideals that shape the workings of the Court and what we should expect of it as a result. The institutional morality of the Court is shaped in large measure by the Court's place within the architecture of the Canadian constitutional order.[46] Our expectation must be that the Court will embody, respect and pursue the highest ideals of the constitution. As a significant part of the constitutional architecture and part of the "structure of government" that the constitution "seeks to implement",[47] the Court is brought to life in part by the foundational principles of the constitution – the principles of democracy, federalism, judicial independence, constitutionalism and the rule of law, respect for minorities, constitutional integrity, and so on.[48] These principles "dictate major elements of the architecture of the Constitution itself", like its central institutions, and "are as such its lifeblood".[49] The Court is one of those "major elements" and, as such, must be animated by these highest constitutional foundations and aspirations. In order words, these foundations and aspirations shape and bear on the institutional morality of the Court.

[46] Rooting the conception of institutional morality squarely in the Canadian constitutional experience allows for an inquiry into whether there is a "distinctly [Canadian] embrace of the legal subject…as the source of law": see Rundle, *Forms Liberate, supra* note 44 at 49, commenting on Fuller's attention to the American experience.
[47] *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 at para 26 [*Senate Reform Reference*].
[48] See e.g. *Secession Reference*, *supra* note 39 at paras 49-82; Robin Elliot, "References, Structural Argumentation & the Organizing Principles of Canada's Constitution" (2001) 80 Can Bar Rev 67.
[49] *Secession Reference*, *supra* note 39 at para 51.

All the central institutions of the constitutional order have the same underlying constitutional foundations but, of course, they bring them to life in different ways, depending on the institution's role in the structure as a whole and its institutional relationships. The institutional morality of the Court, and thus our expectations of it, are defined by the role of the Court as the final appellate Court in Canada and thus, by its role in the pursuit of justice. Chapter Four addresses this particularity, drawing on a comparison of the Senate and the Supreme Court and considers how the inner morality of an institution is expressed through its key features and design. And the next section of this chapter, as well as Chapter 2, speak to expectations that flow from the rule of law and the Court's place in it. Here, we can focus on the adjudicative dimensions of the Court and the demands of the constitutional principles for such an institution.

Adjudication is just one mode of decision-making and social ordering, just one way of working through the disputes and questions of a constitutional order. At its essence, adjudication is a form of decision-making that offers a particular quality of participation to the parties involved, that of making submissions and giving evidence in the decision-making process.[50] The ways in which these demands of participation are attended to in the decision-making of a judge, as evidenced in the proceedings and in the reasons given, are relevant to the legality and legitimacy of the judge and her decisions. They are also relevant to the normative value of the decision, as the force of the judgment flows from its manifestation of qualities that show the judge's respect for the agency of the parties involved.[51]

[50] Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353 [Fuller, "Forms and Limits"].
[51] Fuller, *Morality of Law, supra* note 44 at 39-40.

Our expectations of the Court, therefore, and our assessments of its legitimacy and the force of its judgments, depend in part on the character and quality of the participation it offers to parties whose interests are affected by the decision in the course of fulfilling its law-making and law-interpreting roles. In constitutional decisions, this assessment could be tied to, for example, the Court's approach to granting status to, and considering the submissions of, intervenors and *amici curiae* in order to hear relevant and informed perspectives that would otherwise be absent. Moreover, our expectations and assessments of the Court depend on the ways in which the Court and its judgments manifest the formal qualities that show respect for the agency of citizens.[52] On this point, assessments would consider, for example, the accessibility of the Court's reasons, both in substance and in process.[53] The ways in which the judges of the Court adopt attitudes of fidelity and humility and practice patience in the cases that call for it, attitudes and practices to which I now turn in Part II, are also meaningful indicators of the ways in which the Court not only shows a respect for the parties that come before it, but also lives up to its institutional morality more generally.

II. POSTURES & PRACTICES

In *Law's Religion: Religious Difference and the Claims of Constitutionalism*, Berger reimagines the relationship between religion and the constitutional rule of law, exhorting us to attend to the experience of this relationship and the cross-cultural encounter it entails.[54] By "re-politicizing the story about religion and Canadian constitutionalism", Berger offers us the opportunity, should we

[52] On these formal qualities, see Fuller, *Morality of Law, supra* note 44 at Chapter 2; Rundle, *Forms Liberate, supra* note 44 at 1-11, 25-50. See also Kong, *supra* note 8.
[53] On the structure of the Court's judgments, see Peter McCormick, "Structures of Judgments: How the Modern Supreme Court of Canada Organizes its Reasons" (2009) 32:1 Dal LJ 35.
[54] Berger, *Law's Religion, supra* note 12.

choose to seize it, to see, live, and reason better in a world rich with difference.[55] While deliberately resisting the usual prescriptive and reformative pressures of legal scholarship, Berger's cultural understanding of the constitutional rule of law and its implications for the interaction of law and religion illuminates a new ethic of adjudication, one tailored to the adjudication of claims "born of strong religious difference".[56] This ethic captures an ethos that judges should bring to these claims and a practice of reasoning that "giv[es] due regard to the ineradicable influence of law's culture on the adjudicative process" while "stay[ing] the violent hand of the law" that so troubled Cover.[57]

Like the shape of the analysis in *Law's Religion*, as well as in the revisionary projects of Bickel[58] and Borrows,[59] this dissertation considers the implications of its revised constitutional outlook for the work of judges. In particular, of course, I focus on the particular implications for the judges of the Supreme Court in constitutional cases. In the sections below, I focus first on the effect of the revised account on the postures or attitudes of adjudication at the Court and then on adjudicative practices.

Judicial Postures

The ethic of adjudication presented in *Law's Religion* has a sensitivity to the virtues of forbearance and patience, and a concern with pluralism in the constitutional rule of law, which flow from an

[55] Berger, *Law's Religion, supra* note 12 at Chapter 1 and 170.
[56] Berger, *Law's Religion, supra* note 12 at 177.
[57] Berger, *Law's Religion, supra* note 12 at 178. On the ethos of fidelity and humility, see 169-177 and on the practice of cultivating indifference, see 177-186. On the jurispathic nature of adjudication, see Cover, *supra* note 16 and the discussion in Chapter 2 under the heading "Constitutional Disputes".
[58] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).
[59] Borrows, *Canada's Indigenous Constitution, supra* note 11.

attention to experience, meaning, and normative interaction. While that ethic of adjudication has a specificity of purpose and application that follows from its root in claims of religious freedom, its substance and underlying sensitivities overlap and resonate deeply with the ideas of this dissertation. Thus, the ethos of adjudication proposed in *Law's Religion* is a helpful starting point for thinking through the effect of the revised constitutional account offered in this dissertation – and its focus on institutional relationships, disagreement, and multijurality - for the attitudes of judging.

The ethos in *Law's Religion* is twofold. First, it entails a "fidelity to the culture of the constitutional rule of law".[60] For Berger, this means that "the judge in a liberal constitutional order is justified in claiming and expressing a certain commitment to the language, framing assumptions, and structural values expressed in the culture of Canadian constitutionalism".[61] This ethos flows from an understanding that the constitutional rule of law is not above the cultural realm, but rather is emphatically cultural in its own right. This realization authorizes a shedding of our "reticence in constitutional adjudication to speak openly about the informing commitments, projects, and ways of being that are valued and pursued in the constitutional rule of law"[62] and an embrace of the "special role" of a judge "in cultivating and caring for the public gifts of a liberal constitutional culture".[63]

The fidelity to the rule of law is also an adjudicative virtue when we think about the Supreme Court's place in the revised constitutional order presented here. The fidelity that is of particular

[60] Berger, *Law's Religion, supra* note 12 at 170.
[61] Berger, *Law's Religion, supra* note 12 at 170.
[62] Berger, *Law's Religion, supra* note 12 at 171.
[63] Berger, *Law's Religion, supra* note 12 at 170.

importance in this constitutional landscape is also to the constitutional rule of law, but here it is one particularly concerned with the shared institutional project of constitutional interpretation. This fidelity thus entails a commitment to the particular institutional morality that the shared project of interpretation imagines for the Supreme Court. This demands an approach to adjudication that not only embodies the highest standards of respect for the constitutional order, including the principles and aspirations that animate the constitution, as discussed above, but also a well-developed respect for deference to other institutional interpreters of the constitution, as is sought in the realm of administrative law and as was discussed in Chapter 2. In this sense, fidelity is about embracing the Court's role as the final court, and about pursuing the ideal form of that role in all aspects of the exercise of the judicial office, including in its respect of, and approach to, the constitutional work of other interpretive institutions. Fidelity entails a dimension of sincerity, of honestly and loyally performing this role. To do that well is to embrace it, fully and without timidity.

The second part of the ethos of adjudication offered in *Law's Religion* is a form of humility. It is a "humility about the potential universality of law's culture, about the capacity of law to understand other cultural forms, and about the ultimate contingency of the privilege enjoyed by law's culture".[64] By revealing the limits of constitutional adjudication, the cultural account inspires humility, indeed demands it. It entails an appreciation of the significant but necessarily, and rightly, limited role of the courts. "Essential though their role may be", Berger writes, "courts are never the only – and rarely the best – institutional and social settings for appreciating and attending to the richness of the interests, subtleties of power, and need for creative solutions raised by issues of religious identity, belonging and difference".[65]

[64] Berger, *Law's Religion, supra* note 12 at 173.
[65] Berger, *Law's Religion, supra* note 12 at 173.

A lesson of the constitutional analysis in Chapters 2 and 3 of this dissertation is that the shared project of constitutional interpretation and the recognition of the web of meaning that we all navigate in our lives, calls on the judges of the Supreme Court to be humble in the exercise of their judicial mandate in all constitutional cases. The notion of supremacy that attaches to expectations of the Court is tempered, as has been discussed, by the realities of quotidian decision-making. The judgments of the Court are always in competition with a range of normative forces, both well-defined and amorphous, that bear on our conduct and decision-making. The individual – the agent – whether citizen or official, is the "irreducible site of normativity".[66] This calls for judges to approach their task with an appreciation of the complexities of the lives and offices of the parties that appear before them. It is a posture towards decision-making that is "inspired by an awareness of the limits of adjudication",[67] limits revealed by a sensitivity to the normatively plural character of our lives.

In sum, an understanding of the Court that starts from a constitutional vision attentive to structure and pluralism calls on the judges of the Court to approach their task of adjudication with a measure of restraint and allegiance that is delicately calibrated to the shared project of constitutional interpretation, a project that spans institutions and individuals. A posture of Supreme Court adjudication that reflects the fidelity and humility called forth by the structural account would entail that a judge lean in to the demands of the rule of law, to embrace the pride of institution that accompanies the mandate of the Court, while also being humble about the contribution that the Court can make to the conversations of the day, which has such range.

[66] Kleinhans & Macdonald, *supra* note 7.
[67] Berger, *Law's Religion, supra* note 12 at 173.

Judicial Practice

This discussion of the implications of the revised constitutional outlook for adjudication leads to a final observation, one which speaks to the practice of adjudication at the Court. The analysis in Chapter 2 described the agonistic dimensions of the constitution and examined constitutional disputes through the lens of this agonistic character. As discussed in Chapter 2, understanding the inevitability and value of disagreement in Canada's constitutional order complicates the notion that legal disputes about constitutional interpretation are always amenable to adjudication and can (and should) be settled by the courts, unless captured by one of the justiciability doctrines.

The agonistic dimensions of the constitution signal the need for judges to practice patience in some cases. By *patience*, I mean that in those rare cases of special 'agonistic' character, the best adjudicative course may be not to resolve the dispute between the parties but rather to draw attention to the tension at play, explain it and its implications, and offer the parties a way forward without alleviating the tension or "imposing" a solution. This is a practice of adjudicative patience because it calls on judges to resist the conventional expectation of dispute resolution that attaches to the judicial role, an expectation that attaches with special heightened force to the Supreme Court and its final appeal status. Instead of resolving the points of tension between the contending principles and positions invoked by the parties, the patient judge holds the dispute in abeyance, taking the legal analysis to a point that imagines a path forward, but recognizes – and respects - the agency of the parties in navigating difference, diversity, and disagreement, and the space for this navigation that the constitutional order contemplates, if not requires.

Reflecting on the judicial practices of the Supreme Court in light of constitutional agonism in Canada reveals that the court can legitimately and fruitfully assist in both settling constitutional disputes and sustaining them. Its role of answering legal questions, offering 'points of closure' to disputing parties who are looking to move ahead, is the Court's primary role and the practices of judicial reasoning and reason-giving that are already embedded in the constitutional core of the institutional morality of the Court demonstrate its capacity for fulfilling this role. But, in certain cases, albeit rare, this description of the Court's role reaches its limits, and should shift slightly to capture the Court's role in sustaining and facilitating constitutional tension as well as the attendant need for a practice of judicial patience. In effect, in this sustaining role, the Court demonstrates a comfort with the discomfort of unreconciled principles and ongoing tension. It is a role in which the Court respects the capacity of communities and individuals – whether office-holders or otherwise – to deliberate and exercise judgment on issues of law and governance.[68]

Taking the *Secession Reference* as an archetypal case calling for adjudicative patience, we see two defining features: first, that there is value in keeping the implicated constitutional considerations in tension "as long as possible, each tempering the other", so that no one, whether party or third-party decision-maker is "forced to choose…unless absolutely necessary";[69] and second, that there is value in "exhort[ing] the parties to give due respect to all the principles and seek to work out their differences at the [real or metaphorical] negotiating table".[70] The cases that meet these criteria and fall within the category of disputes calling for agonistic patience are likely to be rare. They are perhaps most easily imagined in reference and other cases dealing with disputes that implicate

[68] On the importance of this jurisgenerative capacity of individuals, see the sources cited *supra* note 7. In the particular context of Supreme Court jurisprudence, Kislowicz, *supra* note 6.
[69] Webber, *Contextual Constitution, supra* note 10 at 261.
[70] Webber, *Contextual Constitution, supra* note 10 at 261.

foundational issues of constitutional structure, those in which the relationships between multiple governments and their respective sovereignty are at issue, such as in the *Secession Reference* and the *Patriation Reference.*[71] Certain cases dealing with the duty to consult, land claims, and the interpretation of treaties between Indigenous peoples and the Crown are also cases that implicate foundational structural issues and sovereignties. Indeed, they might be cases in which the agonistic dimensions of the constitution are almost always present.[72] But again, the determination of whether adjudicative patience is warranted must be made individually, case-by-case rather than category-by-category,[73] and the power dynamics at stake between the Crown, the Court and the Indigenous parties must be attended to. Identifying and enforcing the legal duties attendant upon intergovernmental cooperative endeavours within the realm of cooperative federalism might be another area in which the configuration of agonistic claims and considerations of complexity should trigger a judge of the Court to reflect on whether adjudicative patience is warranted.[74]

Exercising patience takes seriously the implications of judicially "imposing" the content of a constitutional conversation, namely that it "might prevent the conversation from even beginning".[75] This is true in the exercises of both constitution drafting and constitutional adjudication – in both there can be virtue in practicing restraint and economy in formalization and prescription.[76] Sometimes, the greatest benefit is derived from the freedom that forms offer – whether the form is a constitution or a constitutional decision of the Supreme Court. If, for example, the Court in the

[71] *Secession Reference*, *supra* note 39; *Re Resolution to Amend the Constitution,* [1981] 1 SCR 753.
[72] Webber, "Section 35", *supra* note 10 at 64.
[73] See e.g. *Haida Nation, supra* note 39.
[74] On cooperative federalism and these duties, see Kate Glover, "Structural Cooperative Federalism" (2016) SCLR [forthcoming].
[75] Webber, *Contextual Constitution, supra* note 10 at 264.
[76] Roderick A Macdonald, *Lessons of Everyday Law* (Montreal & Kingston: McGill-Queen's University Press, 2002 at 33-37; Lon L Fuller, "Means and Ends" in Kenneth Winston, *The Principles of Social Order: Selected Essays of Lon L Fuller,* Rev'd Ed (Oxford: Hart Publishing, 2001) 61 [Fuller, "Means and Ends"].

Secession Reference had concluded that Quebec could secede only with the agreement of six, or perhaps all, of the other provinces, it would have sent the message that "Quebecers were held within Canada by force".[77] Instead, the opinion of the Court offered a framework for future negotiation, one that would compel the parties to confront the issues in greatest tension between them, but each from a position of constitutional recognition and affirmation.

The practice of exercising patience described here is not the same as the restraint or incrementalism that is counselled by critics of *Charter* activism in Canada, and it is not rooted in doctrines of justiciability.[78] But exercising patience is a species of the passive virtues for which Bickel, in his concern with the separation of powers and judicial review, advocated. It is a species of the passive virtues because it too is a technique of "not doing" and because it too is rooted in a deep respect for constitutionalism.[79] The practice of exercising patience requires that a judge of the Court have a rich understanding of the agonistic dimensions of the constitution and confidence in the transformative potential of negotiation, silence, inaction, and time, knowing that parties can always come back to the courts in the future if necessary. This practice is not a license to pass the buck on particularly difficult or fraught questions, although the questions that call for patience will all be difficult and fraught by definition. Rather, in its respect for human agency and participatory procedures, exercising patience is a manifestation of the rule of law and the highest ideals of the adjudicative role, in both substance and process.

[77] Webber, *Contextual Constitution, supra* note 10 at 264.
[78] On justiciability, see e.g. *Secession Reference, supra* note 39 at paras 24-31 .
[79] Berger makes this point in *Law's Religion*, noting that after presenting a new account of the interaction of Canadian constitutionalism and religion, he "make[s] a move sympathetic in form to Alexander Bickel's appeal to the passive virtues – the 'various devices, methods, concepts, doctrines and techniques' of 'not doing' that he argued could reconcile the Supreme Court's role as the authoritative speaker of constitutional principles with his story about the inter-branch challenges posed by judicial review": Berger, *Law's Religion, supra* note 12 at 169.

III. COMMITMENTS

The preceding parts of this chapter speak to the institutional morality of the Court, noting how it captures the foundations and principles of the constitution, as transformed into a guiding morality or ethos for the design, operation, and assessment of the Court. The institutional morality of the Court is both part of its practice and the aspirations of the constitutional order for it. The culture of the Court, as cultures do, changes over time, as the forces of history, practice, and law operate. These changes are expressed in tangible and intangible ways through the actions, operations, and features of the Court.[80] Some of those actions, operations, and features, like the rules of procedure and the Court's relationship with the press, are within the control of the personnel of the Court,[81] and others, such as the composition and jurisdiction of the Court, are in the hands of legislators and executive actors.[82] But regardless of the actors responsible for decision-making and conduct, all of these actions, operations, and features, must reflect the imperatives and ideals of the constitution.

The constitutional considerations that shape the institutional morality and design of the Court are addressed throughout Chapters 2, 3 and 4. In this chapter, Parts I and II focus primarily on the implications of the rule of law and constitutional agonism. In this part, I focus on the implications of multijurality.

[80] This was one point made by Belley, *supra* note 45.
[81] On the authority to make rules of procedure, see the *Supreme Court Act, supra* note 41, s 97. On the Court's relationship with the press, see Florian Sauvageau, David Schneiderman & David Taras. *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006).
[82] *Supreme Court Act*, *supra* note 41, s 4(2); *Supreme Court Act Reference, supra* note 25 at para 94.

Recall from Chapter 2 that the "operation of multiple legal systems is a Canadian tradition"[83] and that our understandings of the Court, whether the Court's jurisprudence or its institutional dimensions, must express and reinforce the multijural nature of constitutionalism in Canada. Multijuralism, in other words, is a constitutional consideration that shapes and bears on the institutional morality of the Court. In this part, I explore the implications of the observations about multijurality from Chapter 2 for one particular aspect of the Court's institutional life, namely its composition. In thinking through the implications of multijurality for the composition of the Court, the discussion in this part necessarily has implications for the criteria and process by which the judges of the Court are selected. As criteria, selection process, and composition are ultimately issues beyond the control of the members of the Court, the claims made here generate responsibilities and commitments for officials involved in the selection of the judges of the Court. The reasoning in this part suggests that composition of the Supreme Court should be interpreted to require Indigenous representation, as it requires the representation of the common law and civil law traditions. The failure of the executive to appoint an Indigenous judge undermines the Court's capacity to act in accordance with the demands of its institutional morality.

Many others have argued for Indigenous representation on the Supreme Court.[84] These arguments are often framed in terms of diversity and competence, invoking needs for representation and

[83] Borrows, *Canada's Indigenous Constitution*, *supra* note 11 at 125.

[84] See e.g. *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment,* vol 5 (Ottawa: Supply and Services Canada, 1996), online: Collections Canada < http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e .html> at Chapter 5; Indigenous Bar Association, "Respecting Legal Pluralism in Canada: Indigenous Bar Association Appeals to Harper Government to Appoint an Aboriginal Justice to the Supreme Court of Canada" in Nadia Verrelli, ed *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal-Kingston: McGill-Queen's Press, 2013) 65; Indigenous Bar Association, "Indigenous Bar Association Urges Prime Minister Harper to Remove Barriers to Judicial Appointments for Indigenous Judges" in Nadia Verrelli, ed *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal-Kingston: McGill-Queen's Press, 2013) 67; Borrows, *Canada's Indigenous Constitution, supra* note 11 at 215-16.

knowledge in light of the issues of Aboriginal law that come before the Court. These are strong and persuasive arguments. Borrows argues for more Indigenous judges for all courts, including the Supreme Court, to "ensure that Indigenous traditions would develop by being understood and appropriately applied on a case-by-case basis".[85] Some other arguments suggest that Indigenous representation flows from the place of Indigenous legal traditions in Canada. For instance, Peeling and Hopkins point to Canadian legal pluralism and contend that the legal traditions in Canada must be represented at the Supreme Court. They argue:

> just as the recognition of the civil law of Quebec makes it necessary that there be representation of Quebec judges specifically on the Supreme Court, so too the recognition of Aboriginal laws and customs as living law in Canada makes Aboriginal representation necessary if the legitimate claim of the Supreme Court to be the final arbiter in cases concerning Aboriginal peoples is to be maintained.[86]

I aim to expand upon the constitutional claim for Indigenous representation, drawing on the principles of structural reasoning and the multijural character of constitutionalism in Canada. Rather than focus on representation as the orienting frame, as many of the existing claims do, my starting point is the meaning of "composition of the Supreme Court" in the constitutional context.

Multijurality and the Composition of the Court

[85] Borrows, *Canada's Indigenous Constitution, supra* note 11 at 215.
[86] James C Hopkins and Albert Peeling, "Aboriginal Judicial Appointments to the Supreme Court of Canada" (paper prepared for the Indigenous Bar Association, April 2004) 21, online: Indigenous Bar Association <http://www.indigenousbar.ca> [unpublished].

Composing the bench of the Supreme Court is an exercise that demands attention to multiple considerations, some individual and others institutional.[87] The Court is a collegial court, composed of nine judges – 8 puisne judges and 1 Chief Justice.[88] By constitutional convention, the Court is composed of judges who represent the regions of the country. By statute, three must be from Quebec.[89] Within this framework, the judges of the Court are selected in accordance with executive policy.

The composition of the Court is, in some dimensions, a manifestation of constitutional imperatives.[90] The constitutional components of "composition of the Supreme Court" are protected from unilateral amendment by virtue of Part V of the *Constitution Act, 1982* and can be meaningfully altered only with the unanimous consent of the houses of Parliament and the provincial legislatures.[91] Chapter 4 explores the constitutional components of the composition of the Court in greater detail as it considers the issue of Court reform under Part V. For the purposes of this chapter though, what is of particular relevance is that there are constitutional components of, indeed constitutional imperatives for, the 'composition' of the Court.

The constitutional imperatives that bear on the composition of the Court include those that flow from the legal traditions of Canada's constitutional order. Recall that the institutional morality of the Court is shaped in large measure by the Court's place within the architecture of Canada's

[87] See e.g. Office of the Commissioner for Federal Judicial Affairs Canada, "Qualifications and Assessment Criteria", online: < http://www.fja-cmf.gc.ca/scc-csc/qualifications-eng.html>.
[88] *Supreme Court Act*, *supra* note 41, s 4(1).
[89] *Supreme Court Act, supra* note 41, s 6. This is also protected by the constitution: see *Supreme Court Act Reference, supra* note 25 at para 93.
[90] *Constitution Act, 1982,* s 41(d), being Schedule B to the *Canada Act 1982* (UK), 1982 c 11; *Supreme Court Act Reference, supra* note 25 at paras 93-95.
[91] *Ibid.*

constitutional order.[92] The Court is expected to manifest and pursue the highest ideals of the constitution, as well as express and operationalize the constitutional principles and structures that animate its institutional form. These principles and structures include the traditions that are embedded in the constitutional order of Canada. As was established in Chapter 2, these include the common law, the civil law, and Indigenous legal traditions. The normative claims, symbols, and aesthetics of these traditions emerge in the disputes that come before the Court. And the Court, in order to fulfill its role as the final court of appeal for the country competently and legitimately, must reflect and operationalize this multijurality.

This link between composition and legal tradition was at the heart of the *Supreme Court Act Reference,* as discussed in Chapter 1. The *Supreme Court Act Reference* establishes that the composition of the Court is vital to the Court's capacity to effectively and legitimately fulfill its role as the final court of appeal for the country. It further establishes that, as a matter of constitutional law, the composition of the Court must represent the legal traditions of the constitutional order of the country. This guaranteed representation of Quebec reflects "the historical compromise that led to the creation of the Court"[93] and ensures that the Court has "expertise in civil law", reflects the "legal traditions and social values" of Quebec, and has the "confidence of the people of Quebec".[94] According to the majority in the *Reference,* the constitutional protection of Quebec's juridical tradition is as important today as at the time the Court was created:

[92] *Supra* note 46.
[93] *Supreme Court Act Reference, supra* note 25 at para 59. See also para 49. See also Peter Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969).
[94] *Supreme Court Act Reference, supra* note 25 at para 59; Michael Plaxton & Carissima Mathen. "Purposive Interpretation, Quebec, and the *Supreme Court Act* " (2013) 22 Const Forum Const 15.

> … the Court's composition has been long recognized as crucial to its ability to function effectively and with sufficient institutional legitimacy as the final court of appeal for Canada. As explained above, the central bargain that led to the creation of the Supreme Court in the first place was the guarantee that a significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture. The objective of ensuring representation from Quebec's distinct juridical tradition remains no less compelling today, and implicates the competence, legitimacy, and integrity of the Court.[95]

In the *Supreme Court Act Reference*, the majority of the Court had a historical record and statutory language to rely on to support its conclusions regarding the composition of the Court's bench. The representation of the civil law tradition within the composition of the Court played a role in the negotiations that led to the creation of the Court.[96] Moreover, the text of the *Supreme Court Act* guarantees the representation of Quebec and the civil law on the Court's bench. A claim for the representation of Indigenous legal traditions within the composition of the Court has no similar statutory or historical record to invoke. Indigenous representation has never been included in the *Supreme Court Act* and has not been claimed to have been an issue in the negotiations at the time of the Court's creation. Moreover, the Supreme Court did not make any mention of Indigenous legal traditions in its analysis of the evolution of the Court within the constitutional order of Canada, in its analysis of the essential features of the Court, or in its interpretation of "composition of the Supreme Court of Canada" in section 41(d) of the *Constitution Act, 1982*.

[95] *Supreme Court Act Reference, supra* note 25 at para 93.
[96] *Supreme Court Act Reference, supra* note 25 at para 93; Plaxton & Mathen, *supra* note 94 at 18,

The absence of a historical record embedding Indigenous legal traditions within the statutory design of the Court does not undermine a contemporary claim of Indigenous representation within the composition of the Court. The claim here is structural, grounded in architectural reasoning, the constitutional text, the historical context, and judicial interpretation of constitutional meaning.[97] It is rooted in the architectural place of Indigenous legal traditions within constitutionalism in Canada, through resistance to colonialism, assertions of power and self-governance, the formation of treaties with the Court, and so on.

The place of Indigenous legal traditions within the constitutional conversation differs in its origins and character from that of the common law and civil law traditions, though internal struggles with the legitimacy of the Canadian constitutional order attach to both Indigenous traditions and the civil law, albeit in very different ways. Moving beyond these differences, the architectural claim that the composition of the Court mandates representation of both the civil law and common law traditions, on the basis of legitimacy and effectiveness, lends support to a claim that the composition of the Court should also include representation of Indigenous legal traditions. The recognition of Indigenous legal traditions as foundational to constitutionalism in Canada, the range of legal disputes that expressly engage matters of Aboriginal law and can be richly informed by knowledge of Indigenous legal traditions, and the strain that Indigenous self-governance puts on dualistic conceptions of Canadian federalism supports the claim that the architectural character of Indigenous legal traditions in Canadian constitutionalism should be reflected in the composition of the Supreme Court. This is more than a question of legitimacy, diversity, and competence, although it is all of these things. Rather this claim is one of the imperatives of constitutional structure.

[97] *Senate Reform Reference, supra* note 47 at para 25.

CONCLUSION

In "The Unbounded Public Law Imagination of Roderick A. Macdonald", Kong interprets the public law theories of Macdonald, filling some gaps, by drawing on the work of Fuller, as interpreted by Rundle.[98] In making one connection between these thinkers, Kong explains, "[i]nterpreting Fuller through the eyes of Rundle and Rod, one might say that law is defined not by the imprimatur of the state but by those formal qualities that evidence a respect for human agency".[99] This moral quality of law has consequences for the forms of law. It means, for example, that legislation is not *law* because "it is the handiwork of state legislators" but rather because "it has formal qualities that create a relationship of reciprocal influence between law-maker and law-receiver".[100] Similarly, a contract is law because it enables contracting parties to conceive, communicate, and pursue their ends".[101] And as another example, as is suggested in this chapter, a judgment of the Supreme Court is law not only or simply because it is issued by the final appellate court of the country, but rather because it is the culmination of a decision-making process in which the affected parties could participate in meaningful ways, finding expression through submissions, evidence-giving, and responsive judicial reasons.

This understanding of legal pluralism and the forms of law encourages an evaluation of state law and institutions with, as Kong notes, "an increased sensitivity to the ways in which its forms can

[98] Kong, *supra* note 8.
[99] Kong, *supra* note 8 at 79.
[100] Kong, *supra* note 8 at 79.
[101] Kong, *supra* note 8 at 79.

be structured to achieve the moral ends that Rod and Fuller understood to be intrinsic to law".[102] In other words, it compels an exploration of the institutional morality of our legal forms and the ways in which these moralities are realized and frustrated. Focusing on the constitutional dimensions of this exploration into forms and structures is reflective of the nature of Canada's constitution itself. The constitution is not imposed from above, but rather is an ongoing pursuit of fundamental but dynamic values and aspirations by a community. The pursuit of these values and aspirations gives rise to public institutions, giving the constitution shape and institutional form. They infuse the operations of these institutions and form the parameters within which decisions are made. The constitution is thus brought to life from within, from practice and principle, in their contending and shifting form, rather than from above.

This chapter takes up part of this project in relation to the Supreme Court, wondering about the ways in which the revised constitutional outlook informs and shapes the institutional morality of the Court and, as a result, informs the conduct of the judges of the Court. This morality also serves as a source that contributes to the formulation and articulation of public expectations of the Court and its work. These were addressed in Parts I and II, which focused on calibrating understandings of the Court's significance and expectations about the force of a judgment of the Court. These Parts also addressed judicial attitudes and practices that flow from the revised constitutional account, namely a form of humble pride and a practice of patience in certain cases. These expectations, attitudes, and practices are demanding of the citizen and the judge. They require a deep understanding of the architecture of the constitution and the way in which it manifests in the specific institutional design of the Court. Further, they call on citizens and judges to cultivate a

[102] Kong, *supra* note 8 at 80.

self-awareness that is attentive to the particular complexities of the culture of the rule of law that is not offered to them in the conventional account. It is a self-awareness that calls for abandoning somewhat, the comfort of assumptions of supremacy and answers in favour of ongoing assessments and navigation. The demands of the revised constitution story are just that, more demanding than the conventional account.

This chapter also explored the ways in which the place of Indigenous legal traditions in the architecture of Canadian constitutionalism has implications for the Court, in particular for its composition. As noted above, the Court is a passive player in the exercise of composing its bench and thus, the constitutional imperative that flows from the multijural composition must be acknowledged and responded to by those who appoint the judges of the Court in order to be realized. To be certain, the multijurality discussed in Chapter 2 and in this chapter bears on the institutional morality of the Court beyond the particulars of its composition, although, as I will discuss in the Conclusion of this dissertation, the composition of the Court and the call for Indigenous representation is of particular timeliness in Canada right now.

As this dissertation explores, the privileging of certain values within a constitutional vision is inevitable, but it has implications for the way that constitutional questions and answers are framed, implications that often go unnoticed. One question that arises from the rethinking offered in this dissertation is, what effect would it have, if any, on the *Supreme Court Act Reference*. As has already been discussed, in the *Reference,* the majority's privileging of federalism, hierarchy, and dualism, shaped its analysis of the Court's significance and essential nature. This makes sense:

there is a reciprocity between these issues, each reflecting and shaping the other.[103] As has been a theme throughout this chapter, the functions that the Court should play within the constitutional order necessarily depend on what that constitutional order is understood to entail.

Yet Canadian constitutionalism is a compilation of contending stories and counter-narratives. The Supreme Court's judgment in the *Reference* gives the impression that it is telling a definitive version of the constitutional story and the Court's significance in that narrative. In doing so, it both over- and underestimated the Court's place in the institutional framework within which the constitution of Canada lives and breathes. By expanding the constitutional lens through which the story is told, this dissertation has pointed to the Court's role in sometimes maintaining constitutional tension, and thereby preserving space for office holders and citizens to negotiate their own resolutions to disputes. In this sense, the Court is only one site, albeit an influential one, to look to when governments and communities encounter constitutional discomfort. Further, the observations set out in this paper qualify the conclusion that the Court is "constitutionally essential" by calling attention to the ways in which the Court is integrated within a complex, relational architecture of public institutions. Within this architecture, the Court not only adjudicates disputes, provisionally settles norms, and acknowledges tensions, but also interacts with and defers to the expertise of other institutions, decision-makers and agents. This observation is a reminder not only that the Court's "supreme" status is tempered by the institutional matrix in which it operates, but also that constitutional meaning is made by many actors, in various sites, most of which are, quite rightly, independent of the Court.

[103] On this point generally, see e.g. Fuller, "Means and Ends", *supra* note 76 at 69.

The reasoning in the *Reference* does not engage with the range of constituencies, cultures, and contexts contemplated within the Canadian constitutional imagination. This guaranteed that the metric for assessing the character of the Court's place in the grand constitutional architecture was miscalibrated. As the majority held, the Court makes important – indeed crucial - offerings to the normative discourse of Canada's constitutional life. But the weight of these contributions is neither inherent nor inevitable in the constitution. Rather, the character of the Court's constitutional significance is perpetually in flux, as it ebbs and flows in the replication and transformation of the Court's contributions in our thoughts, actions, ideas, practices, habits and structures.

Part of the difficulty with the majority's reasoning in the *Reference* was its notion of "essential", which was invoked to describe the constitutional status of the Court and some of its features. This use was consistent with the "essential features" language of the *Upper House Reference,*[104] but was somewhat jarring in a constitutional order in which pluralism and agonism guarantee that what counts as essential is complicated and legitimately seen through many lenses. In this chapter, what is 'essential' was assessed through somewhat of a moral frame, a morality infused by constitutional considerations. The considerations that flow from it – patience, temperance, and qualified assessments of significance – will sometimes be at odds with other expectations and practices that will be called for and that the Court should embody in other circumstances – such as, boldness, reach, and supremacy. The Court will serve many ends and the judgment that is called for in navigating those ends, and those expectations and practices puts yet another demand on a judge of the Court.

[104] *Re: Authority of Parliament in relation to the Upper House,* [1980] 1 SCR 54.

This chapter has focused on the present. It considered some of the expectations, attitudes, practices, and commitments that flow from the revised constitutional account in relation to the stories that we currently tell about the Supreme Court. The next chapter looks to the future, exploring the issue of reform. In doing so, it takes a doctrinal perspective and aims to interpret and apply the amending procedure set out in Part V of the *Constitution Act, 1982* to cases of Court reform. This exercise follows up on the issues explored in the current chapter, working through problems of composition and institutional morality in detail, including the meaning of "essential", through the lens of the jurisprudence, constitutional design, and cases of reform.

4 Reform of the Court and the Constitution

Chapter 3 gave an account of the Supreme Court's place in the Canadian constitutional order. It is an account that differs from the conventional narrative. The difference is that it situates the Court in a constitutional landscape that is attentive to the structure of the administrative state, the legal traditions that inform Canadian constitutionalism, and the multiple normative forces that operate in daily life. Many of these insights have already found their way into understandings of Canadian constitutionalism and into analyses of the Court's jurisprudence. But they have often been absent from narratives about the constitutional role and significance of the Court. The effect of this absence has been an understanding of the Supreme Court that does not account for meaningful features of Canada's constitutional life. The account offered in Chapter 3 aimed to start filling that gap.

Chapters 2 and 3 make arguments for reform, but they do not follow the traditional pattern of law reform scholarship. A traditional account would focus on how to amend the constitution or the *Supreme Court Act* to improve the functioning of the Court.[1] But instead of considering how the law should change, Chapters 2 and 3 ask how our thinking ought to change in order to better understand the relationship between the constitution and the Court. Specifically, Chapter 2 argues for a heightened appreciation of the structural dimensions of the constitution, read in light of empirical and theoretical insights of legal pluralism. Then Chapter 3 draws on this reading of the constitution, showing how it helps us to better understand and explain the Supreme Court's position in the Canadian constitutional order. It speaks to shifts in the Court's significance within public

[1] On the nature of law reform scholarship, see e.g. Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: SSHRC, 1983).

life and the role that the Court plays in offering judgments that not only can settle constitutional disputes, but also sustain and manage constitutional tension. It further speaks to implications of multijurality for the institutional morality of the Supreme Court. This revised account of the Court's institutional life unsettles somewhat conventional notions of interpretive supremacy, adjudication, and representation at the high court level.

The current chapter continues this dissertation's inquiry into the constitutional dimensions of the Supreme Court. But unlike earlier chapters, it deals more directly with the traditional anxieties and preoccupations of reformers. This chapter is concerned with reform of the Supreme Court and the questions that such reform raises about processes of constitutional change, especially the formal process for amending the constitution set out in Part V of the *Constitution Act, 1982* ("Part V").[2] Proposals for constitutional amendment on issues related to the Supreme Court have been prominent on the agenda of mega-constitutional reform since the 1950s,[3] and the history of proposals to reform the Court through statutory and executive channels has been long, with the success of those proposals mixed.[4] Today, while the *Senate Reform Reference* and the *Supreme Court Act Reference* have answered some questions about the interpretation of Part V in the context of institutional reform, uncertainties remain about its application to proposals for Court reform. Also at issue are questions about the value and legitimacy of the application of Part V to such proposals, as scholars probe the exercise of "self-entrenchment" in the *Supreme Court Act*

[2] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[3] For a chronology of these proposals, see: Jonathan Aiello, "The Supreme Court of Canada: A Chronology of Change" in Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal & Kingston: Institute of Intergovernmental Relations and McGill-Queen's University Press, 2013) 277 [Verrelli, *Democratic Dilemma*]. See also Erin Crandall, "DIY 101: The Constitutional Entrenchment of the Supreme Court of Canada" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 211 at 212-214, 215-219 [Macfarlane, *Constitutional Amendment*].
[4] Again, see Aiello, *ibid.* For current arguments on the merits and shortcomings of modern reform proposals, see e.g. the contributions to Verrelli, *Democratic Dilemma, ibid.*

Reference,[5] and the turn to architecture in understanding the procedural demands of reform.[6]

This chapter confronts these uncertainties by sketching a general framework for thinking through questions about how to reform the Supreme Court. It starts in Part I by sketching a blueprint of the Court's design. Knowing the features and principles that animate the design of the Court is necessary in order to determine if Part V is triggered by proposals to reform the Court. This understanding of design is particularly important because proposals for Court reform will almost always give rise to hard cases because they will affect the architecture of the constitution rather than its text.

Part II of this chapter builds on Part I by identifying general principles that should inform the interpretation and application of Part V in cases of Court reform. It identifies two principles of particular importance. First, amendments to the Constitution of Canada may arise indirectly, flowing from official actions that do not, on their face, alter the entrenched dimensions of the constitution. To ensure that these indirect, yet formal, amendments can be captured by Part V and that the requisite levels of consensus are satisfied, proposals for Court reform must be assessed qualitatively, with a keen appreciation of their effects on the architecture of the constitution. Second, a reform proposal that seeks only to implement or engage structural principles and dimensions of the constitution, and thus seems to fall outside the ambit of formal constitutional amendment, might still trigger Part V if it has a transformative effect on any other architectural interest. After setting out these two principles, Part II applies them to a case study, namely to

[5] Paul Daly, "A Supreme Court's Place in the Constitutional Order – Contrasting Recent Experiences in Canada and the United Kingdom" (2015) 41 Queen's LJ 1.
[6] See e.g. Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the *Senate Reference,* and the Future of Constitutional Amendment in Canada" (2015) 60:4 McGill LJ 883 [Macfarlane, "Unsteady Architecture"].

legislative proposals for mandatory bilingualism at the Court. I argue that it is unlikely that Parliament alone can lawfully enact a mandatory bilingualism requirement for judges of the Supreme Court. Such a requirement would amount to a constitutional amendment in relation to the Court's composition and therefore require the consent of Parliament and the provincial legislatures.

Part III then situates the analysis of Part V and Court reform in the bigger picture of constitutional change. It explores how the interpretation and application of Part V is enhanced by an awareness of both the opportunities offered by Part V and the multiple modes of constitutional and institutional change. A conclusion that Part V applies to a proposal for Court reform should not exhaust or stifle discussion about reform process or possibilities.

Much of the discussion in this chapter orients around the amending procedure in Part V of the *Constitution Act, 1982*, a formal procedure carried out by political actors exercising their official powers. This focus may seem inconsistent with some of the theoretical underpinnings of this dissertation. Indeed, preoccupations with formal and official processes and actors in law reform often generate criticism amongst legal pluralists.[7] Pluralist analyses of Court reform would most often be concerned with how citizens should be engaged in designing more just dispute-resolution institutions, both official and unofficial, and bringing them to life.[8] However, this chapter's preoccupation with official sites of power is deliberate.[9] A pluralist outlook is not a call to neglect the reformative potential of state actors and processes. Rather, concerns about citizen engagement

[7] See e.g. Roderick A Macdonald, "Law Reform for Dummies (3rd Edition)" (2014) 51:3 Osgoode Hall LJ 859.
[8] *Ibid.*
[9] For other accounts of the institutional significance of the Supreme Court, see e.g. Jean-Guy Belley, "What Legal Culture for the Twenty-First Century?", translated by Nicholas Kasirer (2011) 26:2 CJLS 237; Shauna Van Praagh, "Identity's Importance: Reflections of – and on – Diversity" (2001) 80 Can Bar Rev 605.

and unofficial mechanisms serve as helpful reminders when inquiring into the meaning and significance of iconic parts of an Anglo-American state legal order, a reminder that officials are citizens too and that official channels of reform will always have unofficial, yet still legal, dimensions.[10] It is also a reminder that questions about the circumstances in which Court reform triggers the formal amending process are also inquiries into the promise and limits of reform by less formal means. Each of these reminders informs the analysis in this chapter.

Before turning to the Court's institutional design in Part I of this chapter, it is important to briefly note the basic mechanics of Part V,[11] which plays a big part in the analysis of this chapter. Generally speaking, Part V, the "Procedure for Amending [the] Constitution of Canada", contains multiple amending procedures.[12] Together, the procedures prescribe which orders of government, in what numbers, must consent to which amendments, in what circumstances.[13] The general amending procedure (section 38(1)) provides that an amendment to the Constitution of Canada requires the consent of the houses of Parliament and the legislative assemblies of at least two-thirds of the provinces representing fifty percent of the population. This '7/50 rule' applies to amendments that do not fall within any of the other procedures, as well as to amendments in relation to matters that

[10] On the interaction of multiple types of actors operating within an organization and the value of informality within institutional formality, see Roderick A Macdonald, *Lessons of Everyday Law* (Montreal & Kingston: McGill-Queen's University Press, 2002) at 130-134.

[11] For a clear, detailed analysis of the history and mechanics of Part V generally, see Peter Oliver, "The Patriation and Amendment of the Constitution of Canada" (Ph.D. Thesis, Oxford University, 1992) [unpublished] [Oliver, "Patriation and Amendment"]. See also Peter Oliver, Canada, Quebec, and Constitutional Amendment" (1999) 49 UTLJ 519 ["Quebec and Amendment"].

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

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

are expressly listed in section 42(1), which include the powers of the Senate, the method of selecting senators, and the Supreme Court of Canada. Amendments in relation to the office of the Queen, the use of the English or French language, and the composition of the Supreme Court require the unanimous consent of the houses of Parliament and the provincial legislatures (section 41). There is also a "special arrangement" procedure set out in section 43. It provides that an amendment to any provision of the Constitution of Canada that applies to one or more, but not all, provinces requires the consent of the houses of Parliament and the legislative assembly of the provinces to which the amendment applies. Finally, sections 44 and 45 provide for unilateral amending powers. Section 44 provides that Parliament alone can, with some exceptions amend the Constitution of Canada in relation to the executive, the Senate, and the House of Commons. Section 45 provides that, subject to section 41, the legislature of a province can exclusively make laws amending the constitution of the province.

Given this general account, the key provisions for reform of the Supreme Court are sections 42(1)(d) and 41(d). Pursuant to section 42(1)(d), an amendment to the Constitution of Canada in relation to the Supreme Court must be made in accordance with the general amending procedure set out in section 38(1), the 7/50 formula. Section 42(1)(d) is subject to section 41(d), which provides that an amendment to the Constitution of Canada in relation to the composition of the Supreme Court must have the consent of the Senate, the House, and the legislative assembly of each province. Also important is section 101 of the *Constitution Act, 1867,* which provides:

> The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration

of the Laws of Canada.[14]

Pursuant to section 101, Parliament can unilaterally enact "routine amendments necessary for the continued maintenance of the Supreme Court", as long as those amendments do not alter the "constitutionally protected features of the Court".[15]

With these constitutional provisions in mind, we can begin the inquiry into the structural elements of Court reform.

I. THE DESIGN OF THE COURT

The preceding chapters have spent some time unpacking, and ultimately troubling, the stories of the Supreme Court and the constitution that are held as part of the Canadian legal *mythos* and that were told in the *Supreme Court Act Reference*. In the current chapter, we return to the *Reference,* but our focus shifts to the impact of the *Reference* for Court reform. The circumstances surrounding the *Supreme Court Act Reference* were legally and politically stormy in part because they disclosed gaps in our understanding of the constitutional status of the Court and when the Part V amending procedures apply to proposals that reform the Court, either directly or indirectly.[16] As a result of these gaps, the lead up to the *Reference* witnessed uncertainty not only about the legality of Justice Nadon's appointment to the Court, but also about the constitutionality of amendments to the

[14] *Constitution Act, 1867* (UK) 30 & 31 Vict c 3, s 101, reprinted in RSC 1985, Appendix II, No 5.
[15] *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 at para 101 [*Supreme Court Act Reference*].
[16] See Carissima Mathen, "The Shadow of Absurdity and the Challenge of Easy Cases: Looking Back on the Supreme Court Act Reference" (2015) 71 SCLR (2d) 161 [Mathen, "Shadow"] & Daly, *supra* note 5.

Supreme Court Act that had been enacted in the wake of Justice Nadon's appointment to ensure his eligibility. The *Reference* opinion went some distance in closing these legal gaps, but uncertainty remains. Parts I and II of this chapter confront that uncertainty by outlining a framework for thinking through questions about how to reform the Supreme Court. This Part draws on recent experiences with Senate reform to sketch a blueprint of the design of the Court. This blueprint provides the starting point for the next Part, which identifies a number of general principles that should guide the analysis of questions about when – and how and why - Part V applies to proposals for Court reform.

The Relevance of Institutional Design

Whenever a proposal for reform is assessed against the demands of Part V, the first issue is always one of application: Does the proposal trigger Part V? The answer to this question turns on whether the proposal is an "amendment to the Constitution of Canada" within the meaning of Part V.[17] If yes, Part V applies and the issue becomes which specific amending procedure is triggered. If not, the proposal can be enacted through ordinary legislative channels.[18]

A proposal is an "amendment to the Constitution of Canada" within the meaning of Part V if it alters an entrenched part of the Constitution of Canada. The applicability issue thus raises a

[17] With the exception of section 45, each of the individual procedures set out in Part V starts with a version of "An amendment to the Constitution of Canada in relation to the following matters may be made by…". See e.g. *Constitution Act, 1982,* ss 38(1), 41, 42(1), 43, and 44. See also Oliver, "Quebec and Amendment", *supra* note 11 at 575-83.

[18] Amendments to the Constitution of Canada made by Parliament alone and amendments to the provincial constitutions are implemented through the ordinary legislative process: *Constitution Act, 1982, supra* note 2 ss 44, 45. Newman addresses this point in Warren J Newman, "Putting One's Faith in a Higher Power: Supreme Law, the *Senate Reform Reference,* Legislative Authority and the Amending Process" (2015) 34 NJCL 99 at 111-2, 117-120 [Newman, "Higher Power"].

preliminary question: What is entrenched in the constitution?

The most straightforward part of the answer deals with the constitutional text. The *Constitution Acts, 1867 and 1982* are, without question, entrenched. Section 52(2) provides that the "Constitution of Canada includes (a) the *Canada Act, 1982,* including [the *Constitution Act, 1982*]; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b)". The schedule lists thirty Acts and orders, including the *Constitution Act, 1867,* the *Manitoba Act, 1870,* the *Statute of Westminster, 1931,* and the *Newfoundland Act.* Section 52(3) of the *Constitution Act, 1982* provides that "[a]mendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada". The easiest amendment cases are therefore those involving proposals that modify the words of a Constitution Act or order.[19] The text of the Acts and orders is entrenched and Part V therefore applies to any change thereto.[20]

But answering the entrenchment question is complicated by the nature of the Constitution of Canada. It is well-established that the Constitution includes the texts listed in section 52(2) of the *Constitution Act, 1982*, but that these texts are not exhaustive.[21] Rather, the Constitution has written and unwritten dimensions; it encompasses "the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state".[22] These principles and rules are found in "an understanding of the constitutional text itself, the

[19] These Acts and orders are listed in section 52(2) of the *Constitution Act, 1982, supra* note 2 and the Schedule thereto.
[20] *Constitution Act, 1982*, *supra* note 2, s 52(2), (3).
[21] *Reference re Secession of Quebec,* [1998] 2 SCR 217 at para 32 [*Secession Reference*].
[22] *Reference re Resolution to amend the Constitution,* [1981] 1 SCR 753 at 874 [*Patriation Reference*].

historical context, and previous judicial interpretations of constitutional meaning".[23] Moreover, the constitution has a shape, an "internal architecture" that binds its elements to each other, and aspires to a vision of government and public life that animates the constitution as a whole.[24] Thus, the harder amendment cases are those involving proposals that do not expressly alter the text of the constitution, but which bear on its structure, its assumptions, its meaning, that is, its tacit dimensions that are not set out expressly in the enumerated texts.

For the most part, reform of the Supreme Court falls within this category of harder cases. The difficulty arises because, on the one hand, Part V provides that changes to the Supreme Court and its composition are subject to the multilateral amending procedures. Referring to the Court in Part V suggests that it and at least some of its core qualities are entrenched, thereby shielded from unilateral reform. On the other hand, the Supreme Court is not mentioned elsewhere in the constitutional texts beyond the general authority to establish and maintain a "general court of appeal for Canada" set out in section 101 of the *Constitution Act, 1867*. The Court is established wholly by statute and the history of official Court reform has unfolded through the legislative process.[25] What, then, about the Court is entrenched and therefore protected by Part V?

As noted in Chapter 1, the *Supreme Court Act Reference* was the first case to consider whether the Court is constitutionally entrenched. The majority concluded that the existence of the Court is now guaranteed by the constitution, although this was not always the case:

[23] *Secession Reference, supra* note 21at para 32.
[24] *OPSEU v Ontario (AG)*, [1987] 2 SCR 2 at 57 [*OPSEU*].
[25] Aiello, *supra* note 3.

> …the Supreme Court gained constitutional status as a result of its evolution into the *final* general court of appeal for Canada, with jurisdiction to hear appeals concerning all the laws of Canada and the provinces, including the Constitution. This status was confirmed in the *Constitution Act, 1982* , which made modifications of the Court's composition and other essential features subject to stringent amending procedures.[26]

According to the majority, the "other essential features" include, at a minimum, "the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence".[27] With some exception, the majority offers little reasoning to explain why these particular features are essential, what they capture, how they fit together, and how they can be changed. The paragraphs below aim to start to fill this explanatory gap.

To begin, I turn to the contemporary experience of Senate reform in Canada. This experience forced jurists and political scientists to map the design of the Senate and explore the implications of that design for the application of Part V to proposals for Senate reform. Given that this chapter aims to do the same in the context of Court reform, the Senate example is instructive.

The Senate Reform Reference

While controversial and ultimately unsuccessful, the Senate reform agenda of the first decades of the 21st-century created an opportunity for Canadians to confront foundational questions about the architecture of the Canadian constitution and the operation of Part V. The Conservative

[26] *Supreme Court Act Reference, supra* note 15 at para 95.
[27] *Supreme Court Act Reference, supra* note 15 at para 94.

Government of Prime Minister Harper proposed that senators be selected following consultative elections and for fixed terms (rather than until age seventy-five).[28] The New Democratic Party called for abolition of the Senate.[29] These proposals forced the country, and eventually the Supreme Court, to think through the principles and mechanics of constitutional amendment, both generally and in the specific case of Senate reform. More specifically, from a legal perspective, the proposals forced a determination of when Part V is triggered and when multilateralism is required in order to implement constitutional reform.

Leading up to the *Senate Reform Reference,* the fight over which political actors are authorized to change the constitution in relation to the Senate was fueled by differing interpretations of Part V and an absence of jurisprudence on the issue. Recall the discussion of the amending procedures above. Section 44 provides that Parliament has the exclusive authority to amend the constitution in relation to the Senate. This unilateral power is subject to section 42(1), which provides that amendments to the Constitution of Canada in relation to the powers of the Senate, the method of selecting senators, the number of senators representing a province, and the residence qualifications of senators trigger the general amending procedure. The general amending procedure is set out in section 38(1), which provides that "[a]n amendment to the Constitution of Canada" may be made when authorized by resolutions of the Senate, the House of Commons, and the legislative assemblies of two-thirds of the provinces representing fifty percent of the population of all of the provinces. Finally, section 41 provides that an amendment to the Constitution of Canada in relation to Part V requires the consent of the Senate, Parliament, and the legislative assemblies of all the

[28] See e.g. Canada, 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 (first reading 21 June 2011).
[29] See e.g. Gloria Galloway, "NDP's Mulcair takes aim at Senate abolition", *The Globe and Mail* (22 May 2013), online: <globeandmail.com>.

provinces. In light of uncertainty about the meaning of these provisions of Part V, the proposals for Senate reform gave rise to much debate about basic questions of application: Do the proposals trigger Part V? And if so, which procedure applies?

The Supreme Court was asked these questions in the *Senate Reform Reference*.[30] The Court held that, first, the introduction of fixed-term appointments would alter the text of the *Constitution Act, 1867* and thereby trigger Part V.[31] Further, fixed-term appointments would frustrate a core feature of the Senate's design – its independence. This frustration engaged both federal and provincial interests. It therefore fell outside the scope of Parliament's unilateral amending power and within the scope of the general amending procedure.[32] Second, the proposal for advisory elections would, in effect, "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".[33] This would "change the Senate's role within our constitutional structure from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy".[34] As a result, while not altering the constitutional text, the effects of advisory elections on the structure of the constitution amounted to a constitutional amendment within the meaning of Part V. The amendment was in relation to the method of selecting senators and therefore, the proposed election schemes could be implemented only with multilateral consent under the general amending formula. Finally, the Court held that abolition of the Senate would

[30] *Reference re Reform of the Senate,* 2014 SCC 32 [*Senate Reform Reference*]. The Court was also asked about the constitutionality of repealing the property qualifications for senators set out in sections 23(3) and (4) of the *Constitution Act, 1867, supra* note 14.
[31] *Senate Reform Reference, ibid* at para 71.
[32] *Senate Reform Reference*, *ibid* at paras 72-83.
[33] *Senate Reform Reference, ibid* at para 60.
[34] *Senate Reform Reference, ibid* at para 63.

change the Part V amending procedure and therefore triggered the unanimity procedure.[35]

The Characteristics of the Senate

In order to determine whether Part V applied to the proposals for Senate reform, it was necessary to have a sense of the design of the Senate, both internally and in relation to other public institutions. This familiarity with design helps when determining which of the Senate's features are constitutionally entrenched. To some extent, the Senate is an easy case. Many of its features and powers are set out in the text of the *Constitution Acts.* Section 21 of the *Constitution Act, 1867* provides that the Senate will, in the normal course, consist of 105 members. Section 23 identifies the qualifications of senators, setting out the requisite minimum age, citizenship, and net worth. Section 24 provides that the Governor General appoints ("summons") senators. Part V of the *Constitution Act, 1982* provides that as a general rule, a resolution of the Senate is needed to amend the constitution under the multilateral procedures.[36]

But the *Senate Reform Reference* confirms that the entrenched nature of the Senate is more than what is expressly provided for in the text; it also includes the features of the Senate that are embedded in the architecture of the constitution, the pivotal parts of the vision of government the constitution aims to capture and realize.[37] That which is entrenched by virtue of architectural concerns depends on the position of the Senate within the constitutional order. As a matter of design, the Senate's position is defined by its constitutional roles; these roles then demand that the

[35] *Senate Reform Reference, ibid* at paras 95-110.
[36] See *Constitution Act, 1982*, *supra* note 2, ss 38(1), 41, 42(1), 43, and 44. See also the exception in *Constitution Act, 1867*, *supra* note 14, s 47(1).
[37] *Senate Reform Reference, supra* note 30 at para 27.

Senate manifest several essential features, qualities that are necessary to the Senate's capacity to perform its roles effectively and legitimately.

Let's begin with the position of the Senate in Canada's constitutional order. The *Constitution Act, 1867* names the Senate as one of the three actors in Canadian federal law-making. Parliament, it says, is tripartite, comprised of the Queen, an upper house (Senate) and a lower house (House of Commons).[38] Each actor performs an indispensible role in the legislative process.[39] In light of this position, Canadian constitutional law defines the Senate's "fundamental character" in terms of three roles: complement to the House of Commons, representative of regional interests in Canada, and chamber of sober second thought.[40] The first of these roles – complement to the House - positions the Senate as the politically weaker chamber in relation to the House of Commons, which is home to the elected representatives of the people and serves as the primary initiator of policy and the unrivalled confidence chamber.[41] The second role – protector of regional interests - flows from the provinces' agreement to be "federally united".[42] Allocating Senate membership regionally reflects the conclusion that national interests are not the only markers of identity in the federation and ensure that regional perspectives can be brought into national debates and legislative deliberation.[43] The third role – chamber of sober second thought – aspires to balance and

[38] *Constitution Act, 1867*, *supra* note 14, s 17.
[39] *Constitution Act, 1867*, *supra* note 14, s 91.
[40] See *Senate Reform Reference, supra* note 30; *Reference re Authority of Parliament in Relation to the Upper House* (1979), [1980] 1 SCR 54 [*Upper House Reference*].
[41] David E Smith, "The Senate of Canada and the Conundrum of Reform" in Jennifer Smith, ed, *Reforming the Canadian Senate* (Montreal & Kingston: McGill-Queen's University Press, 2009) 11 [Smith, "Conundrum"]
[42] *Constitution Act, 1867*, *supra* note 14, Preamble.
[43] *Senate Reform Reference, supra* note 30 at para 15; *Upper House Reference, supra* note 40 at 66. See also e.g. Robert A MacKay, *The Unreformed Senate of Canada, Revised Edition* (Toronto: McClelland and Stewart, 1963) at 37-8; David E Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003) at 144 [Smith, *Bicameral Perspective*]; Canada, *Parliamentary Debates on the subject of the Confederation of the British North American Provinces*, 3d Sess, 8th Provincial Parliament of Canada (Quebec: Hunter, Rose & Co, 1865) at 88 (George Brown);

accountability in the framework of Canadian government. As chamber of sober second thought, the Senate as imagined in the constitution is to perform two tasks: careful and dispassionate scrutiny of legislation, and restraint on improper exercises of Cabinet and Commons power. These roles are not expressly listed in the text of the *Constitution Acts* and yet, they are no less constitutional. They are embedded within the structure of public life imagined in the constitution, they are assumptions that need not be expressly articulated because they are implicit in that which is expressly stated.

To fulfill its fundamental roles competently and with legitimacy in the political community, the Senate needs certain qualities, what the jurisprudence calls "essential characteristics" or "essential features".[44] These are the characteristics without which the Senate could not fulfill its primary constitutional role. Canadian constitutional law contends that the Senate has three: equal regional representation, an absolute legislative veto, and independence from a popular mandate.[45] These characteristics bear on the core of the Senate's capacity to perform its roles. For instance, a legislative veto is necessary for the Senate to serve as an effective chamber of sober second thought; it empowers the Senate to put a break on majority excesses when called for. But the Senate's unelected character tempers the possibility of indiscriminate blocking of the work of the House by the Senate. In this sense, it is not a lack of power that prevents the Senate from acting this way, but rather structural forces and concerns about legitimacy.

To some extent, the essential characteristics of the Senate are provided for expressly in the text of

[44] See *Upper House Reference, supra* note 40 at 78; *Supreme Court Act Reference, supra* note 15 at paras 19, 74, 76, 90, 94.
[45] *Senate Reform Reference, supra* note 30*; Upper House Reference, supra* note 40.

the *Constitution Act, 1867* and entrenched as a result. For instance, the ratio of equal regional representation, as among the provinces, is embedded in the allocation of seats in section 22 of the *Constitution Act, 1867*. And section 91 guarantees the Senate's legislative veto ("It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws…"). However, for the most part, these essential characteristics are constitutional not because they are expressly listed in the constitution, but because they are essential to the vision of government that the constitution seeks to implement, in light of the issues and concerns that preoccupy Canadian constitutionalism. As explained, the *Constitution Act, 1867* as a whole imagines a powerful but constrained Senate that advances the quality of Canadian policy and law-making, rather than stymies or sullies it, by virtue of its regional representation, legislative veto and independence.

For the most part, the constitution provides for the Senate's fundamental role and essential characteristics to be brought to life by specific design features, which I refer to as the *supporting* or *secondary* characteristics of the Senate. These are the features that deal with the seemingly quotidian aspects of the Senate's institutional life, such as its operations and personnel, and which appear on their face to be out of place in a discussion about the grander constitutional aspirations of the Senate. But these supporting design features end up being very significant; they serve as signals of the practical ways in which the fundamental nature and roles of the Senate can be brought to life.

As an example of these supporting characteristics and the way in which they are linked to the essential characteristics of the Senate and the Senate's core role, consider the complementarity of the Senate in relation to the House of Common. Complementarity is a core part of the Senate's

nature, but is not expressly provided for in the *Constitution Act, 1867*. Instead, it is provided for in the text by virtue of a number of supporting secondary characteristics. These characteristics include the nominative rather than elective method for selecting senators,[46] the Governor General's authority to appoint additional senators,[47] and the requirement that money bills be introduced in the House of Commons rather than the Senate.[48] These secondary characteristics are textual signals that the formal power of the Senate is limited in practice and by attention to the bounds of institutional legitimacy. The Senate has the same formal authority as the House but its exercise must be attentive to that which is signaled by the distance between senators and the will of the people and the Governor General's power to appointment additional senators to overcome a deadlock between the Senate and the House. These characteristics serve the interest of maintaining the Senate's status as complementary to the House rather than of equal authority and thus they bear on the Senate's capacity to fulfill its essential roles. But they are not core features in and of themselves. They could have been imagined and articulated differently without compromising the Senate's fundamental role within the constitution.

Consider another example. The Senate's role as an independent review body is not expressly provided for in the text of the *Constitution Act, 1867*. However, a collection of features ascribed to the Senate in the text signal the fact and nature of this role. These include the cap on the total number of senators that can sit in the Senate at one time,[49] the limit on the number of additional senators that can be appointed in order to break a deadlock,[50] the (effectively) lifetime tenure for

[46] *Constitution Act, 1867*, *supra* note 14, s 24.
[47] *Constitution Act, 1867*, *supra* note 14, s 26
[48] *Constitution Act, 1867*, *supra* note 14, s 53.
[49] *Constitution Act, 1867*, *supra* note 14, s 28.
[50] *Constitution Act, 1867*, *supra* note 14, s 26.

senators,[51] a nominative rather than elective method for selecting senators,[52] and the prohibition against senators being elected to the House of Commons. [53] Again, these characteristics cultivate independence in the Senate and thus contribute to the Senate's capacity to serve as an effective and legitimate body of legislative review, but their configuration, in their current form, is not essential to the performance of the Senate's role. Thus, they are of a different character than the fundamental characteristics and roles they bring to life.

In sum, this accounting of the features of the Senate, as entrenched in the *Constitution Acts*, shows the relationship between an institution's role, the qualities necessary to perform that role competently and with legitimacy, and the operational features that structure the ways in which the actors within the institution can bring those roles and qualities to life. The role of the Senate and its essential characteristics are entrenched because they are embedded in the architecture of the Constitution of Canada; the supporting characteristics of the Senate discussed above are entrenched because they appear in the text. This is not to say that the blueprint of the Senate's design does not include other features not provided for in the constitutional text; it does. Some, such as those dealing with salaries, conflicts of interest, and administration, are provided for by statute and regulation.[54] Others, such as those dealing with the workings of Parliament and proper channels of communication between colleagues, are matters of convention and internal practice. All of these

[51] *Constitution Act, 1867*, *supra* note 14, s 29.
[52] *Constitution Act, 1867*, *supra* note 14, s 24.
[53] *Constitution Act, 1867, supra* note 14, s 39. Historically, the requirements that senators own real property of net value greater than $4000, that their total net worth exceed $4000 (s. 23(3), (4)) and that their seats would become vacant if they ceased to meet these minimum thresholds (s. 31(5)) were also believed to be a means of protecting independence and enhancing the Senate's capacity for sober second thought. It was believed that a wealthy senator would be less susceptible to influence by the executive's blandishments and would bring more life experience to the process of legislative scrutiny. During the Confederation debates, there was little resistance to constitutionally entrenching the property qualifications. Debate was restricted primarily to the dollar value that should attach in light of wealth inequities across the confederating provinces. That said, the beliefs attached to the wealth requirements are no longer sustainable and are of no measurable link to the Senate's capacity for independence or expertise and review.
[54] See e.g. *Parliament Act*, RSC 1985, c P-1, ss 14, 19.1-20.7, and the regulations made thereunder.

features – and the ways in which they are carried out by the actors within the Senate - contribute to the Senate's capacity – or lack thereof – to realize the aspirations of its position within the constitutional order.

The Characteristics of the Court

A study of Senate reform offers important lessons about institutional design in the Canadian constitutional order. Just as the constitution is not reducible to a collection of textual provisions, the institutions imagined within the constitutional order are not reducible to a collection of features laid out in the constitutional texts. The provisions of the constitution, including those that provide for Canada's public institutions, are attempts to capture, realize, and protect visions of government and public life. They are manifestations of underlying assumptions, aspirations, and agreements, which then provide the scaffolding on which the institutions and institutional relationships provided for in the constitution are built. The specific institutional features provided for in the text of the constitution are attempts to bring these assumptions, aspirations and agreements to life. The text provides for certain features of the institutions, those features are animated by an objective for the institution as a whole, and the objective for the institution as a whole is animated by the aims of the entire constitutional project. Put another way, the forces animating the constitution as a whole give rise to an institution's "fundamental nature and role".[55] That fundamental nature and role is operationalized by a collection of essential and supporting characteristics, the latter of which are captured in various degrees of formality, from statute to the customs of collegial relationships.

[55] See e.g. *Senate Reform Reference, supra* note 30 at para 48.

What does this mean for our understanding of the design of the Court? Consider first the Court's "fundamental nature and role". The *Supreme Court Act Reference* establishes that the Court plays an "essential" role in Canada's constitutional order; it is the "final general court of appeal for Canada".[56] This description of the Court may, perhaps, seem obvious and therefore, trite. But examining this articulation of the Court's fundamental role shows that it is not hollow. In distinguishing the Supreme Court from other Canadian courts, the pivotal designators are 'final', 'general', and 'for Canada'. As a *final* court, the Supreme Court is the last official site of judicial review of a particular issue in any particular case. As a *general* court, it hears appeals concerning all laws, including the constitution. As a court *for Canada*, it hears appeals from across the country.[57]

The nature of the Court's fundamental role responds to the idiosyncrasies of Canadian constitutionalism. The importance of a final and general high court speaks to Canada's federal character, attending to considerations of unity and diversity in both the legal and political spheres. As the majority explained in the *Reference,* Canada's federal configuration entails a need for both an arbiter of the jurisdictional dividing lines the federal units and a judicial body overseeing the preservation of the distinctive elements of Canada's legal traditions and the cultivation of a coherent national system:

> With the abolition of appeals to the Judicial Committee of the Privy Council, the continued

[56] *Supreme Court Act Reference, supra* note 15 at para 95.
[57] See Chapter 3 for a discussion of the significance of these formal descriptions of the status of the Court in Canadian constitutionalism. Though Chapter 3 unsettles the conclusions that often attach to these descriptions in the prevailing accounts of Canadian constitutional law, it does not aim to suggest that the Supreme Court is not the country's final, state-based appellate court.

> existence and functioning of the Supreme Court of Canada became a key matter of interest to both Parliament and the provinces. The Court assumed a vital role as an institution forming part of the federal system. It became the final arbiter of division of powers disputes, and became the final word on matters of public law and provincial civil law. Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system.[58]

Moreover, the status of the Court as the final appellate court and its general jurisdiction over constitutional matters is responsive to Canada's commitment to constitutional supremacy and the status of the *Charter* in the constitutional order:

> Patriation of the Constitution was accompanied by the adoption of the *Canadian Charter of Rights and Freedoms*, which gave the courts the responsibility for interpreting and remedying breaches of the *Charter*. Patriation also brought an explicit acknowledgement that the Constitution is the "supreme law of Canada":
>
> > **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[58] *Supreme Court Act Reference, supra* note 15 at para 85.

> The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause. The judiciary became the "guardian of the constitution" (*Hunter*, at p. 155, *per* Dickson J.).[59]

According to the *Supreme Court Act Reference,* the crucial quality of the Court's role in the constitutional life of the country, and its tethering to the constitution's core aspirations, render the Court a "foundational premise" of the Constitution, an institution deeply embedded in the vision of governance captured in the constitution, an institution whose existence is, therefore, entrenched within the architecture of the constitution.[60] The Court in the *Reference* is unanimous on this point. The judges agree that the possibility of a supreme court was imagined in section 1867 and in section 101 the *Constitution Act, 1867* evolved into an architectural feature of Canada's constitutional order.[61]

The core characteristics of the Court are those without which the Court could not perform its fundamental constitutional role competently, legitimately, or with integrity given the particularities of Canada's political community.[62] The majority in the *Reference* identifies three essential characteristics: composition of the bench, its independence, and its "jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation".[63] It is these characteristics that signify the "essence of what enables the Supreme Court to perform its current

[59] *Supreme Court Act Reference, supra* note 15 at para 89.
[60] *Supreme Court Act Reference, supra* note 15 at para 89.
[61] *Supreme Court Act Reference, supra* note 15 at 101.
[62] *Supreme Court Act Reference, supra* note 15 at paras 93-4.
[63] *Supreme Court Act Reference, supra* note 15 at para 94.

role",[64] and those which are "crucial to [the Court's] ability to function effectively and with sufficient institutional legitimacy as the final court of appeal for Canada".[65] These essential roles are, like the fundamental role of the Senate, embedded within the architecture of the constitution. They comprise the Court's "fundamental nature" as an independent judicial body, with general and final jurisdiction, and a bench that represents Quebec in significant measure.[66]

What, then, are the Court's secondary characteristics? By definition, they are the operational characteristics of the Court's fundamental nature and role. They represent particular choices about how to imbue the Court with the institutional capacity to perform its role. As the Senate example shows, they are characteristics derived from and ultimately serving the constitutional forces that animate the existence and design of the Court.

Consider the characteristics that support the Court's institutional independence as an example. The *Supreme Court Act* sets out a number of rules that distance the judges of the Court from the political fray. These rules provide that judges of the Court are appointed to the bench;[67] that they must retire at age seventy-five,[68] and that they cannot hold another public office while on the bench.[69] These features, individually and together, contribute to ensuring both real and apprehended independence of the Court: the judges are not tethered to an electoral mandate; they have security of tenure, and they cannot be influenced by or beholden to the demands of another public office. Further, the judges' salaries are set by law, not executive decision,[70] and the Court is empowered to run itself,

[64] *Supreme Court Act Reference, supra* note 15 at para 101.
[65] *Supreme Court Act Reference, supra* note 15 at para 93.
[66] *Supreme Court Act Reference, supra* note 15 at paras 92-93.
[67] *Supreme Court Act*, RSC 1985, c S-26, s 4(2).
[68] *Ibid,* s 9(2).
[69] *Ibid,* s 7.
[70] *Judges Act*, RSC 1985, c J-1, s 9.

making rules and orders directed at the administration and procedure of the Court.[71] This statutory matrix of features serves the ideals of independence, provision for the indicators of institutional independence – financial security, security of tenure and administrative independence[72] – by way of statute. These manifestations of independence are not entrenched themselves. Nor are the non-statutory principles, practices, and attitudes that put independence into practice in the daily operations of the Court, including decisions of recusal, public statements addressing allegations of institutional proximity,[73] and judicial commitments to impartiality.[74] However, the codified and non-codified features of the Court equally serve an overarching ideal that is deeply embedded in the institutional make-up of the constitutional vision of Canada's courts, independence.

As a second example, consider the characteristics that give shape to the Court's composition. In the *Supreme Court Act Reference,* the majority contended that the "notion of 'composition' refers to ss. 4(1), 5 and 6 of the *Supreme Court Act*, which codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982".[75] Section 4(1) provides that the Court comprises the Chief Justice of Canada and eight puisne judges. Section 5 provides, "Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province". And section 6 guarantees that at least three of the judges shall be appointed from among the judges of the Quebec Court of Appeal or Superior Court or from among the advocates of Quebec.[76] The

[71] *Supreme Court Act, supra* note 67, s 97(1).
[72] *R v Valente (No 2)*, [1985] 2 SCR 673; *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 2 SCR 3.
[73] Office of the Chief Justice of Canada, News Release (2 May 2014), online: < http://scc-csc.lexum.com/scc-csc/news/en/item/4602/index.do>.
[74] *R v S (RD)*, [1997] 2 SCR 484.
[75] *Supreme Court Act Reference, supra* note 15 at para 91.
[76] Section 6.1 of the *Supreme Court Act* was declared to be unconstitutional in the *Supreme Court Act Reference, supra* note 15 at paras 104-6.

majority explained that the aims animating section 6 bear on core concerns of institutional design. As was discussed in Chapter 2, the majority held that the "central bargain that led to the creation of the Supreme Court in the first place was the guarantee that a significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture. The objective of ensuring representation from Quebec's distinct juridical tradition remains no less compelling today, and implicates the competence, legitimacy, and integrity of the Court".[77]

On one reading, this reasoning suggests that the content of sections 4(1), 5 and 6 of the *Supreme Court Act* is entrenched because it captures, and perhaps exhausts, the constitutional meaning of the Court's composition. Yet this interpretation goes too far. The composition of the Court is entrenched as one of the Court's essential characteristics. But the considerations that bear on the exercise of composing a bench of the Supreme Court that embodies and serves the values of the constitution and the interests of society far exceed what is – or ought to be – entrenched. There is a delicacy to composing a bench with the ideal combination of qualities that can achieve the expectations of legitimacy and competence that attach to the Supreme Court. Not all of these qualities are entrenched and thus the composition contemplated within section 41(d) entails a measure of flexibility in its realization, opening space to navigate and consider the diverse markers of identity that should characterize the bench as a whole and those that should be expressed by each individual judge, all in the service of the legitimacy, competence, and integrity of the Court.

One part of upholding the constitutional conception of composition is through appointments to the Court that comply with the applicable eligibility criteria. But neither logic nor the Court's reasoning

[77] *Supreme Court Act Reference, supra* note 15 at para 93.

in the *Reference* entails that all of the particulars of section 4(1), 5 and 6 are entrenched. Nor do they entail that all alterations of these sections, or all additions of legislative criteria, amount to amendments to the constitution. Rather, the content of sections 4(1), 5, and 6 is entrenched only to the extent that it realizes and preserves the fundamental nature and role of the Court. In other words, it is entrenched to the extent that its alteration would meaningfully undermine the Court's fundamental character.

Reading the *Supreme Court Act,* the *Constitution Acts, 1867 and 1982*, and the *Supreme Court Act Reference* together*,* and being attentive to the design of the Court, indicates that the entrenched notion of composition includes the requirement that the bench be comprised of judges who represent Quebec in significant measure. This representation "reflects the Court's bijural character", ensuring that civil law expertise, Quebec's legal traditions, and the social values of Quebec are represented on the Court.[78] Further, it serves the legitimacy of the Court, aiming to capture and preserve the confidence of Quebec in the Court.[79] The notion of composition also includes the requirement that the judges of the Court be drawn from the community of people with legal training and expertise. This line between those who are eligible and those who are not is meaningful, given the Court's role as Canada's final appellate court and given its constitutional duties to guard the Court's capacity to function both competently and legitimately. Legislation allowing for the appointment of judges without formal legal training or expertise would alter the character of the Court's engagement with this constitutional expectation.

In sum, as in the Senate example, the fundamental nature and role of the Court, along with its

[78] *Supreme Court Act Reference, supra* note 15 at para 49.
[79] *Supreme Court Act Reference, supra* note 15 at paras 56-60, 104.

essential features, are entrenched in the Constitution by virtue of their position in the modern constitutional architecture.[80] According to the *Supreme Court Act Reference,* over the course of Canadian constitutional history, the Court has become a "foundational premise" of the Constitution.[81] Accordingly, its "competence, legitimacy, and integrity" and its "proper functioning" as the final appellate court for Canada are entrenched in the constitution in the form of its fundamental role and essential features.[82] But not all features of the Court are so entrenched. The "routine [matters] associated with the continued maintenance of the Court" and its operation are not.[83] That is, the secondary characteristics that contribute to the Court's capacity to perform its essential roles are not necessarily entrenched. These matters can remain the authority of Parliament acting unilaterally under section 101 of the *Constitution Act, 1867*.[84] As is discussed below, this unilateral authority ends where reform with qualitative effects on the Court's fundamental nature and role begin.[85]

Accounting for Change

This accounting of the features of the Court and what is entrenched does not answer all questions about the design of the Court and the constitutional status of all of its features. But, as noted at the outset, the goal of this analysis is not to map all of the Court's essential features but rather to provide the principles and framework that would guide such an endeavor. This framework establishes that the design of the Court is animated by its fundamental role within the architecture

[80] *Supreme Court Act Reference, supra* note 15 at para 101.
[81] *Supreme Court Act Reference, supra* note 15 at para 89.
[82] *Supreme Court Act Reference, supra* note 15 at paras 93 and 101.
[83] *Supreme Court Act Reference, supra* note 15 at para 101.
[84] *Constitution Act, 1867*, *supra* note 14, s 101.
[85] *Supreme Court Act Reference, supra* note 15 at para 101.

of the Canadian constitution, that is, the country's final general court of appeal. The Court could not perform this role effectively or legitimately without its independence, its jurisdiction in appeals concerning all the laws of Canada, including the constitution, and without the representative composition of its bench. These essential characteristics of the Court are also entrenched within the Constitution of Canada. They make up the fundamental nature of the Court and define the core of the Court's capacity to perform its role with competence, legitimacy, and integrity. This core comes to life through supporting characteristics, some formalized through legislation and regulation, others captured in convention, practice, policy, and attitude. Those that are formalized can be entrenched insofar as their alteration would alter the fundamental nature, role, and essential characteristics of the Court.

Of course, a blueprint of the Court's design – including the meaning of the features of that design - must be sketched in pencil, as it will shift and be renovated over time. It is of note that the majority reasoning in the *Supreme Court Act Reference* sends mixed signals about how to account for these shifts in the constitutional order and in the application of Part V. On the one hand, the majority tells of a constitution that expresses evolving historical attitudes, values and institutional arrangements. On this reading, the constitution is less a text than it is a collection of practices, principles, and experiences. We see this understanding reflected in the majority's story about the Court's evolution within Canada's constitutional architecture, growing incrementally as compromises were made between English and French officials, as access to the Privy Council eroded, and as statutory and constitutional configurations were transformed. We also see this in the Court's conclusion that section 101 of the Constitution Act, 1867 has evolved from a permissive provision to a mandatory one. "The unilateral power found in s. 101 of the Constitution Act, 1867 has been overtaken", the majority writes, "by the Court's evolution in the structure of the

Constitution, as recognized in Part V of the Constitution Act, 1982".[86] This is a constitution of context, inheritance, and practice. It is also a constitution in which shifts and renovations to the Court's entrenched forms may unfold over time and be entrenched by virtue of their architectural embeddedness rather than a formal amendment.

Yet the majority's reasoning also contemplates a constitution that is static. We see this side of the constitution in the majority's descriptions and invocations of the constitutional amending procedures. For instance, the majority explains that the amending formulas protect the essential features of the Court, not as they evolve over time, but as they were understood in 1982.[87] On this reading of the *Reference*, the entrenched dimensions of the constitution – including the architecture of the constitution and the configuration of the Court - are frozen by the intent of the constitution's framers.

This latter reasoning is at odds with the living tree approach to interpretation that is long established in Canadian constitutional law,[88] as well as the purposive approach to interpreting Part V that is counseled in the *Senate Reform Reference*,[89] and in the historical account of the constitution's evolving architecture in the *Supreme Court Act Reference*.[90] The approach that is more consistent with structural interpretation and most juridical understandings of the architecture of Canada's constitution is to be attentive to, but cautious of, developments in the unwritten foundations and assumptions of the constitution and in the institutional roles and relationships that emerge

[86] *Supreme Court Act Reference, supra* note 15 at para 101.
[87] *Supreme Court Act Reference, supra* note 15 at paras 92-94.
[88] *Edwards v Canada (AG)*, [1929] UKPC 86.
[89] *Senate Reform Reference, supra* note 30 at paras 34-48.
[90] *Supreme Court Act Reference, supra* note 15 at paras 76-95.

therefrom, rather than tied to inevitably contrived attributions of framers' intent. Intent can be relevant but is not the only, or the determinative, consideration. Thus, we should keep our drafting pencils out, as the shifts and renovations to the Court's institutional design, including its essential characteristics, will unfold by virtue of formal amendments, legislative reform, policy developments, conventional evolutions, changes to internal practices, and shifting political conditions that emerge as the constitutional living tree continues to live and breathe. This list brings us squarely back to the issue of reform, the issue to which I now turn.

II. PART V AND COURT REFORM

This chapter explores when and why the formal amending procedures set out in Part V should apply to cases of Court reform. The answers to these 'when' and 'why' questions are not obvious because proposals for Court reform tend to raise hard cases, as explained above. In thinking through the routes of formal reform available to Parliament, this question about application is, in essence, a question about the scope of Parliamentary authority to act unilaterally under section 101 of the *Constitution Act, 1867* in relation to the scope of the multilateral requirements set by Part V. According to the majority opinion in the *Supreme Court Act Reference,* section 101 authorizes Parliament to make laws in relation to the routine maintenance and operations of the Court.[91] In the exercise of this authority, Parliament must "maintain – and protect – the essence of what enables the Supreme Court to perform its current role".[92] The multilateral obligations set by Part V kick in as the limits of Parliament's unilateral authority are exceeded. Those limits are drawn by that which

[91] *Supreme Court Act Reference, supra* note 15 at para 101.
[92] *Supreme Court Act Reference, supra* note 15 at para 101.

"change[s] the constitutionally protected features of the Court".[93] More specifically, they are drawn by that which brings about "substantive change"[94] or makes a "qualitative difference" to the architecture of the Constitution of Canada.[95] These types of changes trigger Part V.[96]

As we know, proposals for Court reform primarily give rise to hard cases because the Court is not expressly provided for in the constitutional texts. Moreover, to the extent that its design is officially codified, the Court is a creature of statute.[97] But as is discussed below, the experience of Senate reform provides lessons that help alleviate some of challenges of these hard cases, lessons that demonstrate the importance of understanding an institution's design and its place in the grander constitutional order when assessing whether Part V applies to a particular proposal for reform. The Senate example, along with the general principles and logic of Part V, show that, first, reform of the Court's secondary characteristics can constitute an amendment to the Constitution of Canada within the meaning of Part V if it makes a meaningful difference to the architecture of the constitution. To determine whether this threshold is met, it is necessary to undertake a qualitative assessment of any proposal that might have an impact on the Court, whether direct or indirect, in purpose or effect. Second, a proposal that impacts an interest embedded in the constitutional

[93] *Supreme Court Act Reference, supra* note 15 at para 101.
[94] *Supreme Court Act Reference, supra* note 15 at para 106.
[95] *Senate Reform Reference, supra* note 30 at para 80.
[96] This distinction between Parliament's unilateral and multilateral authority in the context of Court reform replicates the distinction between Parliament's authority to reform the Senate under sections 38 and 42 (multilateral) and 44 (unilateral). The difference is that, in the context of Senate reform, even unilateral reform constitutes an "amendment to the Constitution of Canada" within the meaning of Part V. That is not the case with Court reform, where section 101 is outside the formal amending formula.
[97] See the *Supreme Court Act, supra,* note 67. Note, however, that features of the Court are also set by statutes other than the *Supreme Court Act* and, thus, supporting characteristics can be found in these other statutes. See e.g. the *Official Languages Act,* RSC 1985, c 31, s 16(1); *Judges Act*, RSC 1985, c J-1, and the *Criminal Code,* RSC 1985, c C-46. Proposed changes to those statutes will raise the same concerns as proposed changes to the *Supreme Court Act* and are equally susceptible to amending the constitution within the meaning of Part V. When determining whether Part V is triggered in a particular case, the same analysis applies to proposals implicating the *Supreme Court Act* or another statute.

architecture can be an amendment to the Constitution of Canada even if it simultaneously enhances other architectural interests.

Before turning to these general principles, recall the logic of Part V. The centerpiece of Part V is the general rule, section 38(1). It sets out the amending procedure that applies in the normal course, the 7/50 rule. Sections 41, 42, 44 and 45 identify exceptions to the general rule, specifying the conditions in which the unanimity, bilateral, and unilateral amending procedures apply. Of particular note for the purposes of the analysis below is the line that divides the multilateral and unilateral procedures, a line drawn between that which engages both federal and provincial interests (and therefore calls for multilateral action) and that which engages the interests of only one order of government (and is therefore the proper authority of that order alone). The general amending rule, and indeed all of the multilateral procedures, are animated by the principle that "substantial provincial consent must be obtained for constitutional change that engages provincial interests".[98] Unilateral powers in relation to constitutional and institutional reform reflect the same principle, emphasizing the need to navigate the demands of sovereignty and the limits of autonomy in a cooperatively federal constitutional order. As the Supreme Court explains in the *Senate Reform Reference,* the unilateral amending powers "give the federal and provincial legislatures the ability to unilaterally amend certain aspects of the Constitution that relate to their own level of government, but which do not engage the interests of the other level of government".[99] This limit on the capacity for unilateral change "reflects the principle that Parliament and the provinces are equal stakeholders in the Canadian constitutional design. Neither level of government acting alone

[98] *Senate Reform Reference*, *supra* note 30 at para 34.
[99] *Senate Reform Reference, supra* note 30 at para 48.

can alter the fundamental nature and role of the institutions provided for in the Constitution".[100] Thus, the houses of Parliament and the provincial legislative assemblies can act unilaterally to maintain and even alter these central institutions, but their unilateral authority ends where alterations to the institutions' fundamental nature and role begin.[101]

With these considerations in mind, we can turn to two general principles that assist in determining when Part V applies to cases of Court reform.

Supporting Characteristics and Qualitative Assessments

An amendment to the Constitution of Canada within the meaning of Part V is an amendment to an entrenched part of the constitution.[102] The first principle provides that such amendments can flow from changes to non-entrenched features of the constitution. That is, a change to one of the non-entrenched features of the Court, its supporting characteristics, can constitute an amendment to the Constitution and Canada and thereby trigger the multilateral provisions of Part V. A change to a supporting characteristic will reach this threshold if it makes a meaningful change to the entrenched dimensions of the Constitution of Canada. The goal is to determine whether the proposed legislation makes a meaningful change to the "Constitution of Canada" or, in the context of institutional reform, does the proposed legislative action make a "qualitative difference"[103] or "substantive change"[104] to the entrenched features of the institution?

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[100] *Senate Reform Reference, supra* note 30 at para 48.
[101] *Senate Reform Reference, supra* note 30 at para 48.
[102] Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950).
[103] *Senate Reform Reference, supra* note 30 at para 80.
[104] *Supreme Court Act Reference, supra* note 15 at para 105.

Given that the features of the Court are not provided for in the text of the constitution acts, reform proposals will always entail a qualitative assessment to determine if, in effect, they make a qualitative difference. Institutional design within a constitutional order entails navigating the purposes and effects of a complex network of characteristics, both intra-institutionally as well as inter-institutionally. An institution is created as one part of a much larger constitutional system. Accordingly, its reform could have residual effects on other institutions within the system, as well as on the system itself. Such is the concern with an elected Senate – it disrupts the balance of power in Parliament that is currently provided for. To meaningfully ensure that the federal and provincial legislative bodies are involved in constitutional decision-making that affects their interests, Part V must be capable to capturing these types of structural changes. This requires an attention and appreciation of substance over form,[105] effects as well as intentions, and the interlocking nature of institutional design, which inevitably links essential roles and characteristics to their supporting, operationalizing features. Moreover, an institution is an actor in and of itself. As with any institution, its characteristics are connected. Given the complexity of institutional design, the potential for cascading effects flowing from the amendment of a single essential or secondary characteristic is significant. A qualitative assessment, one focused on substance not form, is needed to identify and appreciate these effects.

Consider an example from the Canadian experience of Senate reform. As explained above, one of the Senate's essential features is independence. This is signaled in the *Constitution Act, 1867* by a set of supporting characteristics, including long tenure for senators. In 1867, senators were

[105] The Court highlighted the importance of substance over form when determining whether a proposal counts as a constitutional amendment in the *Senate Reform Reference, supra* note 30 at para 52.

appointed for life. This was changed in 1965, when life tenure was replaced with mandatory retirement at age 75.[106] This change was not an amendment requiring multilateral agreement under convention or law at the time, and would not be one requiring multilateral consensus under Part V today. It is a change that amounts to "housekeeping" that does "not in any substantial way affect federal-provincial relationships".[107] The change from life tenure to a term that ends at age 75 is not, in effect, a change that affects the essential character of the Senate.[108] The choice of the age of 75 is a signal that the Senate's capacity for independent legislative review would not be altered by the change, as retiring senators would be unlikely to seek re-appointment or other employment when finishing their term. Thus, upon a qualitative assessment of the proposal's effects, we see that this modification to a secondary characteristic (term of tenure) would not impact the fundamental nature and role of the Senate. It is, therefore, within Parliament's unilateral authority.

And yet, the same would not be true of a proposal to lower the retirement age to 50 or to fix the length of Senate terms. Looking to the constitutional effects of these proposals, we see that the fundamental nature and role of the Senate would be altered. In its reasoning on senatorial tenure, the Court confirmed that the key issue is whether the proposed change affects the entrenched role of the Senate. "The Senate is a core component of the Canadian federal structure of government", the Court wrote.[109] "As such, changes that affect its fundamental nature and role engage the interests of the stakeholders in our constitutional design — i.e. the federal government and the provinces — and cannot be achieved by Parliament acting alone".[110] The relevant question is

[106] *Constitution Act, 1965,* 14 Eliz II, c 4, Part I (Can).
[107] *Upper House Reference, supra* note 40.
[108] *Upper House Reference, supra* note 40 at 77.
[109] *Senate Reform Reference, supra* note 30 at para 77.
[110] *Senate Reform Reference, supra* note 30 at para 77.

whether fixed terms would alter the fundamental nature or role of the Senate and, as a consequence, 'engage the interests' of the provinces. "If so", the Court held, "the imposition of fixed terms can only be achieved under the general amending procedure…"[111]

The Court then went on to assess the effects of a change to tenure, finding that significant alteration of the tenure of senators – a secondary characteristic – can have a meaningful impact on the nature and role of the Senate. It must, therefore, be accounted for in the interpretation and application of Part V. The Court explained that the Senate's fundamental nature and role is to be a "complementary legislative body of sober second thought" and that the current length of senatorial terms is "directly linked to this conception of the Senate". [112] The long term, "roughly the duration of [senators'] active professional lives", aims to cultivate and preserve the independence of senators in their legislative review.[113] At some point, a reduced, fixed term could impair the Senate's capacity for independent second thought. "Fixed terms provide a weaker security of tenure", the Court contended. "They imply a finite time in office and necessarily offer a lesser degree of protection from the potential consequences of freely speaking one's mind on the legislative proposals of the House of Commons".[114] As a result, a proposal to implement fixed terms of senatorial tenure falls outside the scope of Parliament's unilateral amending authority and can only be achieved by virtue of the 7/50 formula.

These examples from the Senate case show how the reform of a secondary characteristic can have effects that cascade into the entrenched features of the constitution. These cascading effects must

[111] *Senate Reform Reference, supra* note 30 at para 78.
[112] *Senate Reform Reference, supra* note 30 at para 79.
[113] *Senate Reform Reference, supra* note 30 at para 79.
[114] *Senate Reform Reference, supra* note 30 at para 80.

be accounted for in the application of Part V. Without this capture, political actors would be would be able to formally – and yet indirectly – amend the constitution without the consent of the interested legislative actors. The method of ensuring this capture is straightforward, qualitative assessments of proposals, with a view to their effects on the constitution as a whole, architecture and all.

How do these considerations apply in the context of Court reform? The easy cases of Court reform are those dealing with direct and explicit changes to the fundamental role of the Court or its essential characteristics. These are easy because by directly altering the architecture of the constitution, these proposals constitute "amendments to the Constitution of Canada" and trigger Part V. An example would be a proposal to remove the Court's jurisdiction over private law cases (as has been suggested in past proposals to establish the Supreme Court as a constitutional court). This dramatic change to the Court's role overseeing the development of a coherent legal system would strip the Court of its capacity to fulfill its fundamental constitutional role as the final appellate Court on all questions of law. This directly affects the interests of the provinces and would, therefore, be an amendment to the Constitution of Canada within the meaning of Part V. The 7/50 procedure would apply by virtue of section 42(1)(d).

Another example of an easy case would be a proposal to amend section 101 from the *Constitution Act, 1867*, revoking Parliament's authority to create the Supreme Court. This would, in effect, dismantle the Court. Such a proposal very clearly triggers Part V because it amounts to a change to the constitutional text. But imagine, instead, Parliament repealed the *Supreme Court Act*, again dismantling the Court. This action would not alter the written text of the constitution. However, it would still constitute an amendment to the Constitution of Canada within the meaning of Part V.

First, section 101 does not authorize Parliament to abolish the Court. Rather, as explained above, under section 101, Parliament is obliged to maintain and protect the essence of the Court's fundamental nature and role.[115] Second, abolition of the Court would profoundly renovate the architecture of the Canadian constitution, dismantling one of its "fundamental premises".[116] This is, without question, an amendment to the entrenched constitution.[117]

To explore the harder cases of change to secondary characteristics, let's look again at the "composition of the Supreme Court of Canada" in section 41(d) as an example. We know from the discussion above that the composition of the Supreme Court, as imagined and protected by the constitution, is currently signaled by a set of eligibility criteria provided for in the *Supreme Court Act.* When will Part V apply to proposals that modify or add to these criteria? Again, this is a question about when modification to a secondary characteristic will modify an entrenched part of the constitution such that Part V is triggered.

First, not all modifications to the statutory eligibility criteria will trigger Part V.[118] Rather, a reform

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[115] *Supreme Court Act Reference, supra* note 15 at para 101.
[116] *Supreme Court Act Reference, supra* note 15 at para 89.
[117] In obiter in the *Supreme Court Act Reference, supra* note 15 at para 91, the majority concluded that a proposal to abolish the Supreme Court would warrant unanimous consent under s. 41(d) because abolition would wipe out the Court's composition. While requiring unanimous consent in order to abolish the Court does justice to the profound constitutional transformation that would result, the Court's reasoning does not. It sits uncomfortably with the core of the Court's analysis in the *Supreme Court Act Reference*, which turned on the revelation that the Supreme Court is an entrenched and "essential part of Canada's constitutional architecture" (para. 100). Moreover, the Court's conclusion that abolition of the Supreme Court falls within s. 41(d) is inconsistent with its subsequent holding that abolition of the Senate could not fall within s. 42(1)(b) or (c) because these provisions contemplate the continued existence of the Senate: *Senate Reform Reference*, *supra* note 30 at para. 99. It is not obvious why the same reasoning does not exclude abolition of the Court from the scope of the Court's "composition" in s. 41(d).
[118] Justice Moldaver expressed this view in his dissenting reasons in the *Supreme Court Act Reference, supra* note 15 at para 115, which provides: "I have difficulty with the notion that an amendment to s. 6 making former Quebec advocates of at least 10 years standing eligible for appointment to the Court would require unanimity, whereas an amendment that affected other features of the Court, including its role as a general court of appeal for Canada and its independence, could be achieved under s 42(1)(*d*) of the *Constitution Act, 1982* using the 7-50 formula. Put simply, I am not convinced that any and all changes to the eligibility requirements will necessarily come within 'the composition of the Supreme Court of Canada' in s. 41(*d*)".

proposal will constitute an "amendment to the Constitution of Canada in relation to the composition of the Supreme Court of Canada" only if it makes a "substantive change" to that which is currently entrenched.[119] A change to a secondary characteristic can – but won't always – meet that threshold.

Consider a practical example. As explained above, section 6 of the *Supreme Court Act* provides that at least three judges of the Court must be drawn from the judges and advocates of Quebec. Section 6 "reflects the Court's bijural character and represents the key to the historic bargain that created the Court in the first place".[120] As the majority in the *Supreme Court Act Reference* explained, "the guarantee that one third of the Court's judges would be chosen from Quebec ensured that civil law expertise and that Quebec's legal traditions would be represented on the Court and that the confidence of Quebec in the Court would be enhanced".[121] Accordingly, a legislative proposal that would make a qualitative difference to the representation of Quebec on the Court would trigger the unanimity procedure. An easy case would be a proposal to amend section 6 to reduce the minimum number of judges from Quebec from three to two. Such a proposal would alter the entrenched content of the constitution in relation to the composition of the Supreme Court – the proportion of judges drawn from Quebec would be diminished. Section 41(d) would clearly apply. Another easy case would be a proposal to amend section 4(1) of the *Supreme Court Act* to increase the size of the Court. This proposal would alter the constitution, which currently provides for a nine-member Court, and be aimed at the make-up of the bench. Further, this proposal would dilute the representation of Quebec on the Court by altering the ratio of Quebec to non-Quebec judges. Such a proposal would therefore amount to an amendment to the Constitution of

[119] *Supreme Court Act Reference, supra* note 15 at para 105.
[120] *Supreme Court Act Reference, supra* note 15 at para 104.
[121] *Supreme Court Act Reference, supra* note 15 at para 104.

Canada in relation to the composition of the Supreme Court within the meaning of section 41(d).

A trickier case would be a proposal to amend section 5 of *Supreme Court Act* to allow for the appointment of advocates of at least 9 years standing at the bar of a province (instead of 10). Such a proposal would change the language of section 5. If it is true that all eligibility criteria fall within "composition of the Supreme Court" in section 41(d) and that sections 4(1), 5 and 6 of the *Supreme Court Act* codify the eligibility criteria, when the proposed change to section 5 would seemingly satisfy the "amendment to the Constitution of Canada" threshold with ease. But a closer reading of the jurisprudence indicates that what is entrenched in section 5 is not the number 10 but rather what it signifies, namely that the Court's bench is to be comprised of judges with a certain level of expertise, maturity, judgment, and independence of thought.

Moreover, recall the "qualitative difference" threshold noted above. At some point along the timeline of membership at the bar, a change in the requisite tenure period meaningfully alters the status quo. But it does not follow that all such changes have a meaningful effect. A qualitative assessment is required. Both a reduction from the ten-year threshold to a one year minimum and an increase from ten years to 25 years[122] would be a meaningful change to current understandings of the expertise, maturity, judgment, and independence of thought needed for the Court to function competently and legitimately. A change in numerical thresholds set out in the constitution have the potential to be transformative and these proposals would, therefore, fall within the scope of section 41(d) and require unanimous consent in order to be implemented. Yet, a shift from ten to nine years of bar membership does not signal a substantive change to the constitutionally-protected

[122] Cyr contemplates this example in Hugo Cyr, "The Bungling of Justice Nadon's Appointment to the Supreme Court of Canada" (2014) 67 SCLR (2d) 73 at 106.

dimensions of the Court. There is no magical transformation associated with crossing the ten-year membership mark. The ten-year threshold reflects a policy choice, driven by the underlying goal of ensuring institutional legitimacy and competency. Without clear evidence to the contrary, there is no empirical or conceptual reason to conclude that a shift from ten to nine years would have an effect on the Court's capacity to fulfill its constitutional role or the composition of the Court's bench. It is a matter of legislative policy to determine what the requisite length of membership should be, within the bounds of what bears directly and meaningfully on the constitutionally-entrenched dimensions of the Court.[123] Accordingly, a proposal changing the ten-year requirement in section 5 of the *Supreme Court Act* to a nine-year requirement would be within Parliament's unilateral legislative authority, regardless of the change to the statutory text. Again, the substance rather than the form of legislative proposals and their effect on the constitution is the touchstone of the analysis.[124]

Enhancements and Alterations of Architectural Interests

A second general consideration when interpreting Part V is that a proposal that implements, enhances, or engages a structural principle or interest of the constitution, which on its own might not trigger Part V, will be an amendment to the Constitution of Canada if it also has a transformative

[123] This is similar to the Supreme Court's analysis of proposals to change the length of senatorial tenure in the *Senate Reform Reference, supra* note 30 (see para 82). The difference in the Senate context was that the impugned proposals did not merely alter the length of senatorial tenure. They represented a conceptual change from an (effectively) life-long term to fixed term tenure.

[124] *Senate Reform Reference, supra* note 30 at para 52, which reads: "…the argument that introducing consultative elections does not constitute an amendment to the Constitution privileges form over substance. It reduces the notion of constitutional amendment to a matter of whether or not the letter of the constitutional text is modified. This narrow approach is inconsistent with the broad and purposive manner in which the Constitution is understood and interpreted, as discussed above. While the provisions regarding the appointment of Senators would remain textually untouched, the Senate's fundamental nature and role as a complementary legislative body of sober second thought would be significantly altered".

effect on the architecture of the constitution. This second consideration is a species of the first, as it relies on qualitative assessments of the effects of proposed action in its application. However, it differs from the principle discussed above because it directs our attention to the types of change that can flow from proposals rather than to the character of the analytical approach that Part V demands.

In what ways is this second principle relevant? Some examples will help answer this question. First, a legislative enactment that is declarative of existing constitutional requirements but has no transformative effect on the entrenched dimensions of the constitution will likely not constitute an amendment to the Constitution of Canada; no change has been made. Such was the case with one of the amendments to the *Supreme Court Act* considered in the *Supreme Court Act Reference.* At the time of the *Reference,* Parliament had enacted legislation adding section 5.1 to the *Supreme Court Act*. Section 5.1 provided: "For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province". The majority concluded that enacting section 5.1 was within Parliament's unilateral legislative authority because it was "redundant" rather than transformative.[125] Section 5.1 was an enactment in relation to the composition of the Supreme Court of Canada, a matter contemplated by section 41(d). However, section 41(d) was not triggered because section 5.1 simply stated the law as it already stood. Such legislative restatements, which address – but do not change - constitutionally entrenched interests (like the composition of the Supreme Court), will not trigger Part V.

[125] *Supreme Court Act Reference, supra* note 15 at para 106.

Second, turning to the heart of the principle, a legislative enactment that implements, expresses or engages a structural constitutional principle will constitute an amendment to the Constitution of Canada for the purposes of Part V if it has a transformative effect on other dimensions of the constitutional architecture. This principle is of particular relevance when contemplating the application of Part V to legislation that is constitutional or quasi-constitutional, in the sense that it "bears on an organ of government",[126] and that is intended to enhance or modernize a central institution or enhance the public expression of constitutional principles. Such legislation, like, for example, the *Official Languages Act*,[127] the *Canadian Multiculturalism Act*,[128] and the *Referendum Act*,[129] could be a valid exercise of Parliament's legislative authority under section 91 of the *Constitution Act, 1867* and section 44 of the *Constitution Act, 1982*, and represent opportunities for "constitutional experimentation and innovation" without triggering the amending procedure.[130] However, in some circumstances, such enhancing legislation will have transformative effects on entrenched dimensions of the constitution.

For example, in the context of Senate reform, the Attorney General of Canada argued that the government's proposals to establish advisory elections for selecting senators did not amend the Constitution of Canada but rather advanced a core constitutional principle, democracy. Selecting senators by virtue of a process that relied on the democratic process would, it was argued, enhance the democratic legitimacy of the Senate. The Supreme Court rightly rejected this submission. While an elective scheme would advance the democratic mandate of the Senate, it would also have a

[126] *OPSEU, supra* note 24.
[127] *Official Languages Act, supra* note 97.
[128] *Canadian Multiculturalism Act,* R.S.C., 1985, c. 24 (4th Supp.).
[129] *Referendum Act,* S.C. 1992, c. 30.
[130] Warren J Newman, "Constitutional Amendment by Legislation" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 105 at 117-21 [Newman, "Legislation"].

transformative effect on the architecture of the constitution. Enhancing the democratic mandate of the Senate 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".[131] This transformative effect on the architecture of the constitution rendered the election proposals an amendment to the constitution, despite their enhanced expression of the democratic principle.[132]

This same analysis applies to proposals for fixed-term Senate appointments. Again, fixed-term appointments could heighten the expression of democracy and the rule of law in the design of the Senate by infusing the senatorial role with conceptions and mechanisms of accountability. And yet, any such enhancement of the constitution's core structural principles cannot be determinative of the Part V analysis. Looking to the effects that would flow from the implementation of fixed-term appointments, we see that changes to security of tenure jeopardize senatorial independence, and thereby put the Senate's constitutional mandate at risk. When compromised independence is built into the design of the Senate, the institution's capacity for sober second thought is undermined. This amounts to a transformative effect on the architecture of the constitution and thus triggers Part V.

Before turning to a final example that deals with reform in relation to the Supreme Court, we should pause for a moment to notice that the examples dealing with Senate reform reinforce the importance of analyzing both the purposes and effects of a proposal when determining whether Part V is

[131] *Supreme Court Act Reference, supra* note 15 at para 60. On the *Official Languages Act*, see also *Jones v. A.G. of New Brunswick,* [1975] 2 SCR 182.
[132] *Supreme Court Act Reference, supra* note 15 at para 60.

engaged, and to consider them qualitatively. Examining legislative purpose alone risks seeing only the intended (or articulated) goals of a proposal, which might very well enhance constitutional considerations, like democratic legitimacy or the rule of law. It may be that the altering and impairing effects of the proposal are revealed only by a qualitative assessment of the proposal's effects. Moreover, both of the above examples dealing with Senate reform – advisory elections and tenure - also establish that the relevant effects can be either internal to the institution being reformed, or external to that institution and found in the relationships, design, or power structures of the institutions around it.

Legislating a bilingualism requirement

We can now consider a final example, that of a legislated bilingualism requirement for judges of the Supreme Court. At present, there is no such requirement.[133] The Supreme Court is exempt from the duty resting on every other federal court to ensure that every judge who hears a case is able to understand the language chosen by the parties for the proceedings, whether English and/or French, without the assistance of an interpreter.[134] And the private members bills that have been introduced in recent years to formalize a bilingualism requirement have died on the order paper.[135] But not

[133] On the linguistic competency of judges generally, see *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549; *R v Beaulac*, [1999] 1 SCR 786.
[134] *Official Languages Act, supra* note 97, s 16(1).
[135] Bill 203, *An Act to amend the Supreme Court Act (understanding the official languages)*, 1st Sess, 42nd Parl (2015) (Introduction and First Reading in the House of Commons); Bill 208, *An Act to amend the Supreme Court Act (understanding the official languages)*, 2nd Sess, 41st Parl (Defeated at 2nd Reading); Bill 208, *An Act to amend the Supreme Court Act (understanding the official languages)*, 1st Sess, 41st Parl (reinstated in subsequent session); Bill C-232, *An Act to amend the Supreme Court Act (understanding the official languages)*, 3d Session, 40th Parl, (2010) (Referred to Standing Senate Committee on Legal and Constitutional Affairs); Bill C-232, *An Act to amend the Supreme Court Act (understanding the official languages)*, 2nd Session, 40th Parl, (2009) (re-instated in subsequent session); Bill C-232, *An Act to amend the Supreme Court Act (understanding the official languages)*, 1st Session, 40th Parl, (2008) (re-instated in subsequent session); and Bill C-559, *An Act to amend the Supreme Court Act (understanding the official languages)*, 2nd Session, 39th Parl, (2007) (Introduction and first reading in the House of Commons). See also Bill C-548, *An Act to amend the Official Languages Act (understanding the official languages —*

before sparking a polarized debate.

The most effective way to implement a statutory bilingual requirement would be to amend the *Supreme Court Act* or the *Judges Act*. Removing the exemption in the *Official Languages Act*, while important for parties, would not ensure that all Supreme Court judges be bilingual, as only a quorum of the Court would have to be functionally bilingual in order to comply with the *Act*.[136] That said, regardless of the effectiveness of a legislative solution, Parliament likely cannot unilaterally legislate a mandatory bilingual requirement for Supreme Court judges; a constitutional amendment is required.

In any amendment analysis, the first question is always: is the proposal an "amendment to the Constitution of Canada" within the meaning of Part V?[137] A legislated French-English bilingualism requirement would change the existing eligibility criteria for judges of the Supreme Court. The trickier issue is whether such a requirement is a qualitative change to an entrenched part of the constitution.

The answer to this question is contested. One argument is that the *Supreme Court Act Reference* confirmed that the eligibility criteria set out in sections 4(1), 5 and 6 of the *Supreme Court Act* are entrenched in the Constitution of Canada and that any change to those criteria – whether by

judges of the Supreme Court of Canada), 2nd Sess, 39th Parl (2007) (Introduction and First Reading in the House of Commons).

[136] Pursuant to section 25 of the *Supreme Court Act, supra* note 67, "[a]ny five of the judges of the Court shall constitute a quorum and may lawfully hold the Court".

[137] With the exception of section 45, each of the individual procedures set out in Part V starts with a version of "An amendment to the Constitution of Canada in relation to the following matters may be made by…". See e.g. *Constitution Act, 1982, supra* note 2, ss 38(1), 41, 42(1), 43, and 44. See also Oliver, "Quebec and Amendment", *supra* note 11 at 575-83.

addition, deletion, or modification – amounts to an amendment in relation to the composition of the Supreme Court.[138] Section 4(1) provides that the Court comprises the Chief Justice of Canada and eight puisne judges. Section 5 provides, "Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province". And section 6 guarantees the representation of Quebec on the Court. It establishes that at least three of the judges shall be appointed from among the judges of the Quebec Court of Appeal or Superior Court or from among the advocates of Quebec.[139] On this view, a statutory bilingualism requirement would be a new eligibility criterion for appointment to the Court and therefore can be implemented only with the consent of Parliament and the provincial legislatures under the unanimity procedure set out in section 41(d) of the *Constitution Act, 1982*.

One opposing position starts by defining the scope of section 41(d). The claim is that "composition of the Supreme Court of Canada" in section 41(d) protects a "core" of matters related to composition from unilateral change.[140] This core includes some, but not all, criteria used to determine who is eligible to be appointed to the Supreme Court. The challenge is then to find the boundaries of the core. The literature offers two possible maps of the core of section 41(d), both

[138] See e.g. Emmett Macfarlane, "The Uncertain Future of Senate Reform" in Macfarlane, *Constitutional Amendment, supra* note 3, 228 at 242. See also Léonid Sirota, "The Comprehension of 'Composition'" (16 May 2016), online: Double Aspect <https://doubleaspectblog.wordpress.com/2016/05/16/my-comprehension-of-composition/>; Paul Daly, "Administering Constitutional Change: the Case of Bilingual Supreme Court Judges" (16 November 2015), online: Administrative Law Matters <https://doubleaspectblog.wordpress.com/2016/05/16/my-comprehension-of-composition/>.

[139] Section 6.1 of the *Supreme Court Act, supra* note 67 was declared to be unconstitutional in the *Supreme Court Act Reference, supra* note 15 at paras 104-6.

[140] Sébastien Grammond, "Can Parliament enact a requirement that Supreme Court judges be bilingual?" (13 May 2016), online: Administrative Law Matters <http://www.administrativelawmatters.com/blog/2016/05/13/guest-post-sebastien-grammond-can-parliament-enact-a-requirement-that-supreme-court-judges-be-bilingual/>. See also Cyr, *supra* note 122 at 104-9. The amending procedures both permit amendments when the procedural requirements have been followed and protect the constitutional status quo from alteration when the applicable procedures have not been met: see Warren J Newman, "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada" (2007) 37 SCLR (2d) 383 at 386 [Newman, "Prospects"].

of which stake the boundaries according to a purposive interpretation of "composition". The first claim is grounded in framers' intent and the fundamental character of the Court. The argument is that "composition" in section 41(d) is intended to protect the representation of Quebec on the Court, as well as the Court's role as the guardian of the constitution against court-packing and abolition, from unilateral reform. Eligibility criteria fall within the scope of section 41(d), but only to the extent that they are directed to the representation of Quebec and the Court's fundamental role. Grammond outlines this view in a short essay.[141] He concludes that this approach offers a defence to Parliament for unilateral action. A legislated bilingualism requirement would not affect the protected core of composition; Quebec's seats on the bench and the Court's position remain untouched. As a result, section 41(d) is not triggered.

Cyr offers a different way to define the scope of section 41(d), which turns on the extent to which the criteria for appointment to the Court are constitutionally protected.[142] Cyr contends that sections 4(1), 5, and 6 of the *Supreme Court Act* set a minimum threshold for eligibility. Any alteration to the specific requirements of these sections could not be altered without triggering section 41(d), as it would, in effect, amount to a reform of the constitutional text.[143] However, Cyr contends, Parliament could unilaterally add criteria to the minimum, as long as the additional qualifications "refer to the *actual capacities* required to carry out the highest judicial functions of the land".[144] Here, Cyr distinguishes between "[c]apacities related to the actual conduct of judicial proceedings", such as literacy and mental competence, and capacities associated with political standards of

[141] Grammond, *ibid*.
[142] Cyr, *supra* note 122 at 104-9.
[143] Cyr, *supra* note 122 at 106.
[144] Cyr, *supra* note 122 at 105 [emphasis in original].

legitimacy, such as citizenship and respect for the rule of law.[145] He argues that the former would be readily justified as lawful unilateral action because they are "directly connected to the act of judging".[146] In this sense, they are implied by the nature of the judicial office. The latter could also be justified as unilateral additions by Parliament, as long as they do not interfere with the "ability of the regions to be adequately represented".[147] On this analysis, Parliament is authorized to establish a statutory bilingualism requirement for judges of the Supreme Court. The requirement would not "rais[e] the level of qualification already specified" in sections 4(1), 5 or 6 and bilingualism is an issue of competence, bearing on the judge's capacity to perform the duties of his or her office.[148] It is, therefore, directly connected to the act of judging and a justified unilateral enhancement of the constitutional minimum for eligibility. This is a form of the claim, consistent with Newman's account of constitutional legislation,[149] that a bilingualism requirement would implement and enhance existing constitutional interests, without upsetting the fundamental nature and role of the Court or the basic structure of the Constitution, and therefore falls within Parliament's unilateral legislative authority. Indeed, this argument could be extended to encompass a claim that the bilingualism requirement enhances the institutional expression of Canada's constitutional commitment to its two official languages and is therefore an exercise in constitutional implementation rather than amendment.[150]

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[145] Cyr, *supra* note 122 at 105.
[146] Cyr, *supra* note 122 at 105.
[147] Cyr, *supra* note 122 at 105-6. Cyr does not provide further explanation for his reliance on the regional representation criterion here. While the representation of Quebec must be preserved by virtue of statute and the constitution, Cyr's language suggests that he is also invoking the regional representation protected by convention.
[148] Cyr, *supra* note 122 at 106.
[149] See Newman, "Legislation", *supra* note 130 and Newman, "Higher Power", *supra* note 18.
[150] This point is alluded to in Macfarlane, Emmett. "Conclusion: The Future of Canadian Constitutional Amendment" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 290 at 295 [Macfarlane, "Conclusion"].

The given accounts differ in their interpretation of the *Supreme Court Act Reference* and "composition of the Supreme Court of Canada" in section 41(d) of the *Constitution Act, 1982.* Yet none of the claims is fully persuasive. One analysis reads the *Reference* and 'composition' too broadly, the others, too narrowly.

The mapping of the boundaries around section 41(d) of the *Constitution Act, 1982* differs from the boundary-setting exercises outlined in the literature and described above. While the approaches outlined by Grammond and Cyr are properly qualitative in their assessments of what constitutes an amendment to the Constitution of Canada within the meaning of Part V, those two mappings of section 41(d) are too narrow. The scope of section 41(d) proposed in Grammond's essay fails to account for the principles of legitimacy and competence that inform the Court's constitutional character and go beyond concerns of abolition and Court-packing. The boundaries contemplated in Cyr's account are also too constraining. They allow for unilateral reform on matters of competency and legitimacy, the very issues that the *Supreme Court Act Reference* indicates are guarded against federal incursions by virtue of constitutional evolution and the text of Part V.

The approach to understanding the constitutional status of the Court and the scope of Part V offered in this chapter draws insight from constitutional structure and principle. It is consistent with constitutional jurisprudence and the institutional architecture imagined within Canada's constitutional order. In the *Senate Reform Reference*, the Court held that the Part V amending procedures apply to substantive changes to the architecture of the constitution.[151] This is a logical consequence of the nature of Canadian constitutionalism, which understands the Constitution of

[151] *Senate Reform Reference, supra* note 30 at para 27.

Canada to be more than textual provisions. As has been explained in Chapter 2, the architecture of the constitution captures the "structure of government that [the constitution] seeks to implement".[152] It includes the institutions and institutional relationships that are necessary to achieve the constitution's goals of governance, as well as the principles and aspirations that those institutions and relationships are intended to realize and on which they are built. Understanding Canada's constitution therefore requires attention to its systematic and holistic qualities, and to the demands and insights derived from the "assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another".[153]

The *Senate Reform Reference* establishes that the Senate is embedded within the structure of Canadian constitutionalism as a "complementary legislative body of sober second thought".[154] Legislative proposals that would make a "qualitative difference" to this "fundamental nature and role" of the Senate constitution an amendment to the constitution and can be implemented only by virtue of the Part V amending procedure, regardless of whether such proposals contemplate alterations of the existing text of the *Constitution Acts.*[155] By altering this fundamental role of the Senate, the proposals engage the interests of both Parliament and the provinces; multilateral amendment is thus required.[156] This approach relies on substantive understandings of Canadian constitutionalism and qualitative assessments of the purpose and effect of legislative proposals. On this approach, appointing senators following consultative elections amounts to an amendment to the Constitution of Canada despite no textual change, because senators endorsed by a popular

[152] *Senate Reform Reference, supra* note 30 at para 26.
[153] *Senate Reform Reference, supra* note 30 at para 26.
[154] *Senate Reform Reference, supra* note 30 at paras 52, 54-63.
[155] *Senate Reform Reference, supra* note 30 at paras 26, 52, 80.
[156] *Senate Reform Reference, supra* note 30 at paras 75, 78, 82.

mandate would undermine the Senate's responsibility for independent review of policy, legislative proposals, and issues of public concern. Moreover, it would offer a principled justification for an expanded mandate of senatorial blocking of the House agenda.[157]

The implications of this reasoning for the institutional design of the Court are considered above. Here, we are interested in its relevance to the specific issue of eligibility criteria for judges of the Supreme Court. Let's return to the question that started this section: Is Parliament authorized to unilaterally impose a statutory bilingualism requirement for judges of the Supreme Court? On this point, the accounts of section 41(d) offered by Grammond and Cyr adopt a qualitative approach but lead to the wrong result, and the broader readings of the *Supreme Court Act Reference*, while they reach the correct outcome, namely that a statutory bilingualism for judges of the Supreme Court likely amounts to a constitutional amendment, they are too formalistic in their approach.

Requiring French-English bilingualism for judges of the Supreme Court would enhance the Court's legitimacy within a constitutional culture that is officially bilingual and the Court's competence as the final court of appeal. As noted above, this might be taken as legislation that "enhances, rather than transforms" the Court or "implements and advances structural constitutional principles" such that it is "constitutional in *character* without being constitution in *status*".[158] Such a characterization would, under Newman's analysis, render the legislation a valid exercise of Parliamentary authority under either section 91 or 101 of the *Constitution Act, 1867*, akin to the *Official Languages Act* or the *Multiculturalism Act*.[159]

[157] *Senate Reform Reference, supra* note 30 at paras 60-3.
[158] See Newman, "Legislation", *supra* note 130 at 117.
[159] See Newman, "Legislation", *supra* note 130 at 117.

But of ultimate importance for determining whether Part V is triggered in the case of a legislative bilingualism requirement is whether it would bring about a qualitative change to the composition of the Court and a qualitative assessment of the mandatory bilingualism proposals seems to suggest that it would. This conclusion would not, as others have suggested, simply be a consequence of the proposal's addition to the existing eligibility criteria. Rather it would be a consequence of the proposal's substantive effect on the conception of composition of the Court, as set out in section 41(d) of the *Constitution Act, 1982*. A legislated bilingualism requirement would introduce a new marker of identity that all judges of the Court must possess. By formally prioritizing that marker over others, a bilingualism requirement would seem to impose a new constraint on the flexibility that currently attaches to the exercise of composing the Supreme Court bench. While this flexibility has failed in most ways to realize a bench that can be said to be representative, formalizing a requirement that all judges must be bilingual diminishes this flexibility by adding another small measure of homogeneity to a constitutional conception of composition that does not currently contemplate it.

The composition of the Court will always have individual and institutional dimensions. Some qualities, such as membership in the legal profession, are justifiable requirements for all members of the Court. Other qualities, such as the guaranteed seats for judges from Quebec, are directed at the institutional dimensions of composition, ensuring that the legal traditions and values of Quebec are properly represented on the bench as a whole. As explained in Chapter 3, the constitution demands Indigenous representation as well. The current constitutional configuration of composition is open as to how other communities and qualities will be represented. It seems that formally privileging one such measure, and at the same time potentially limiting diversity and the

representation of other constitutionally significant values and aspirations within the composition of the Court as a whole, represents a qualitative change to the current entrenched constitutional configuration governing 'composition' of the Court. If this is the case, a formal bilingualism requirement can be lawfully implemented only by virtue of the unanimity procedure set out in section 41(d) of the *Constitution Act, 1982*; Parliament acting alone lacks the authority to legally formalize such a requirement.

Addressing the amendment question at stake in the bilingualism debate is timely given current legislative proposals and executive policy. But it is also a case study that does important analytical work for thinking through the meaning and application of Part V in both the general and particular case. With respect to the specific issue of Court reform, the bilingualism issue is an opportunity to think through the status of the Court and its features in Canada's constitutional order. It is also an opportunity to think through our expectations of political actors who appoint judges and pursue Court reform. On the issue of interpreting Canada's amending procedure, the bilingualism debate reveals gaps in the doctrine of Part V and the difficulties in determining both what is entrenched in the Constitution of Canada and what amounts to an amendment.[160]

That said, a discussion of the procedural question at stake in the bilingualism debate should not

[160] On the issue of bilingualism as an eligibility criterion, a general practice of appointing bilingual judges to the Court by political actors might not trigger the amending formula, notwithstanding the effect of legislation achieving pursuing the same goal. Uncertainty arises when a general practice is codified in policy, but not legislative, form. For instance, does a written policy indicating that the Prime Minister will only appoint bilingual candidates trigger the amending formula? This informal method of action is different from the enactment of "organic" constitutional statutes contemplated by Newman in "Higher Power", *supra* note 18 at 112-3, which are ways of testing out policy initiatives before pursuing the formalities required for amendment. Moreover, this is not a general claim that practices can never constitute a constitutional amendment. One possibility of a practice that could, over time, amount to an "unconstitutional constitutional amendment" is former Prime Minister Harper's refusal to appoint senators. On unconstitutional constitutional amendments in Canada generally, see Richard Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada (2015) 41 Queen's LJ 153.

eclipse continued reflection on the appeal and desirability of pursuing a bilingualism requirement for judges of the Supreme Court. Many of the considerations raised in this dissertation, including pluralism, agonism, and multijuralism, suggest that while there is much virtue in a strong general rule of appointing bilingual judges, a strict application of that rule without room for exception could, at least for now, undermine attempts to ensure that the composition of the Court can best – and most fully - reflect constitutional aspirations of legitimacy, competence, and representation. Continued reflection on the merits of a bilingualism requirement must include a more robust analysis of how mandatory bilingualism reconciles with representation and diversity on the Supreme Court bench more generally.

III. THE COMPLEXITY OF PART V

So far, this chapter has raised considerations that should guide the interpretation and application of Part V in cases of Court reform. This final part of the chapter continues to explore the interpretation and application of Part V, but raises some considerations that are of a more general character and that speak more to the attitude that should underlie approaches to Part V. These considerations serve as reminders that the history of Part V and the levels of consent set by Part V should not stifle conversations about, or the pursuit of, formal constitutional reform. Moreover, conversations about Part V must not exhaust our thinking about the process by which central institutions can and should change within Canadian constitutional life.

Overcoming the complexities and impossibilities of Part V

The conclusion that Part V applies to a proposal for reform is usually taken as a death sentence for

the proposal. This is present in the discourse about the implementation of the bilingualism requirement for judges of the Supreme Court. But a responsible approach to reform means no longer relying on claims about Canada's constitutional amending formula as a crutch for stagnation. Despite rhetoric to the contrary, the amending formula is not responsible for stalled progress on reform. To be sure, the formula is intricate, detailed, and sustains multiple reasonable interpretations. It was difficult to entrench and requires widespread support to be changed; it calls on political actors to reach some measure of consensus in order to achieve certain constitutional reforms. However, the amending formula is neither impenetrable nor incomprehensible. It is neither a Rubik's cube nor an instruction manual. And, it should not be cast as the scapegoat for the effects of partisanship or failures of leadership in implementing reform.

Discussions of the interpretation and application of Part V have often oriented around two claims. The first is that Part V sets thresholds of multilateral consent that are politically impossible to satisfy. On this view, successfully amending the Constitution of Canada using the multilateral procedures "requires constitutional politics to perform heroics."[161] I call this the "impossibility claim." The second claim is that Part V is complicated and confusing in its design and is therefore difficult to interpret, analyze and apply. This view starts from the observation that Part V is "probably the most complex [amending formula] in the world."[162] I call this the "complexity claim."

We see the operation of these two claims as frames of analysis in recent experiences with Senate reform. A simple example of the complexity claim is witnessed in the political discourse leading

[161] Richard Albert, "Constitutional Amendment by Stealth" (2015) 60:4 McGill LJ 673 at 687.
[162] Oliver, "Quebec and Amendment", *supra* note 11 at 520.

up to the *Senate Reform Reference*. The federal government argued that Parliament could unilaterally reform the Senate; many provinces and territories disagreed, arguing that multilateral agreement is required. The interpretive challenges of Part V were blamed for the disagreement and grounded repeated calls for a reference to the Supreme Court. After the Court released its opinion in the *Reference*, the Prime Minister invoked the impossibility claim. He announced that the Harper government would not pursue its Senate reform agenda because Part V's demands for consensus, as set out in the Court's opinion, were impossible to reach.[163]

In the months following the *Reference*, the impossibility claim was undermined somewhat by insistent calls for then Prime Minister Harper to meet with the provincial premiers about Senate reform and for the provincial premiers to negotiate on their own.[164] At the same time, there were concessions to the impossibility claim that diminished its importance in the conversation about the future of the Senate, as the reform agenda shifted to proposals that do not trigger Part V. One such proposal came from the federal Liberal party, which expelled all senators from its caucus.[165] Other proposals called for the Senate to implement change internally. Some imagined the Senate as a reflective body that draws on popular deliberation and consultation.[166] Others argued that the Senate should change its approach to legislative review[167] and/or implement rules that would

[163] Leslie MacKinnon, "Stephen Harper says Senate reform is off the table", *CBC News* (25 April 2014), online: <http://www.cbc.ca/news/politics/stephen-harper-says-senate-reform-is-off-the-table-1.2622053>.
[164] See e.g. Mia Rabson, "Sit down with the premiers on Senate", *Winnipeg Free Press* (10 April 2015), online: <http://www.winnipegfreepress.com/opinion/analysis/sit-down-with-the-premiers-on-senate-299297291.html>.
[165] CBC News, "Justin Trudeau statement: 'Senate is broken, and needs to be fixed'", *CBC News* (29 January 2014), online: <http://www.cbc.ca/news/politics/justin-trudeau-statement-senate-is-broken-and-needs-to-be-fixed-1.2515374>.
[166] See e.g. Kate Glover & Hoi Kong, "The Canadian Senate & the (Im)Possibilities of Reform", (12 October 2014), Online Symposium on Bicameralism, *Verfassungsblog* (blog), online: <http://www.verfassungsblog.de/en/>.
[167] Andrew Heard, "Andrew Heard: Let the Senate reform itself", Full Comment, *National Post* (16 March 2015), online: <http://news.nationalpost.com/full-comment/andrew-heard-let-the-senate-reform-itself>.

reduce partisanship and enhance internal transparency.[168]

The complexity claim has also suffered blows since the *Senate Reform Reference* and the *Supreme Court Act Reference*, and these blows help ground an argument for why we should abandon the current iteration of it in our thinking about Part V. When we start from the position that Part V is unclear and difficult to apply, political actors can too easily avoid the hard work of negotiating multilateral reform. They can rely on interpretive uncertainties to fuel claims about political impossibilities and to challenge alternative proposals. Further, when understandings of Part V are framed in terms of complexity, the courts, often the Supreme Court, become the default site for resolving disputes about formal amending procedure. The courts' involvement has benefits, many of which have already been noted in this dissertation. It ensures that the issues are canvassed in a public forum. It provides the opportunity for a range of perspectives to be heard. And, it can provide an analysis that parties can work with and use to move forward, either by ultimately settling the legal question at issue or by accounting for the constitutional tensions at play. But there are downsides, which have also been canvassed in earlier chapters. A judge-centric approach to understanding Part V grounds constitutional legitimacy in judicial interpretation rather than in the effective action of government or the lived experience of the community. That is, it shifts beliefs about where governance happens. Moreover, when procedural issues are resolved judicially, the actors involved in the amending process miss out on the potential benefits of working through problems of procedure cooperatively before sitting down to negotiate the merits of particular reforms. The potential benefits include building collegiality, articulating common ends, narrowing issues, enhancing political investment in the amending process, learning others' positions,

[168] Adam Dodek, "Adam Dodek: How the Senate can fix itself", Full Comment, *National Post* (7 April 2015), online: <http://news.nationalpost.com/full-comment/adam-dodek-how-the-senate-can-fix-itself>.

adjusting expectations, constructing frameworks for further negotiation, accommodating competing interests, reconciling rights and responsibilities, suspending absolutes, agreeing to disagree, and so on.[169]

All of the downsides of the complexity claim might be necessary evils if Part V lived up to its reputation as complicated and mystifying, but this part of the complexity claim is also inaccurate — Part V is not as arcane or byzantine as it has often been made out to be. There is judicial, scholarly, textual, and practical guidance on the meaning, application, and logic of Part V. Moreover, the complexity claim is difficult to sustain when Part V is viewed within the bigger constitutional picture, as Part V fits with many of the principles, structures, and preoccupations of Canadian constitutionalism, including federalism, constitutionalism, the rule of law, and constitutional integrity.[170]

There remain, of course, lingering questions and difficulties in the interpretation and application of Part V.[171] This is both unsurprising and unproblematic. The doctrinal questions about Part V that linger are questions with which law deals on a regular basis — questions of interpretation, conceptualization, allocation, increment, and limits. The questions endure because law is a human endeavor. They will get worked out, as constitutional matters do, in the future conduct, processes, disputes and judgments of citizens, scholars, officials and institutions. They are, in other words, not sufficient to sustain a unique or particularly troubling complexity claim.

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[169] These types of benefits might have informed the Supreme Court's decision in the *Secession Reference, supra* note 21 which was framed in terms of a constitutional obligation to negotiate rather than in terms of the amending formula.
[170] On this point, see e.g. Kate Glover, "Complexity and the Amending Formula" (2015) 24:2 Const Forum Const 9 at 12-13; Carissima Mathen, "The Federal Principle: Constitutional Amendment and Intergovernmental Relations" in Macfarlane, *Constitutional Amendment, supra* note 3, 65; Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59 McGill LJ 225.
[171] See e.g. Glover, *ibid* at 11-12; Macfarlane, "Conclusion", *supra* note 150.

A revised complexity claim

And yet, there is a different way in which Part V continues to be complex, one that does not turn on the absence of judicial interpretations or the mechanics of Part V. Rather, the richness and quandaries of Part V are found not in its rigidity, but in the elasticity it contemplates; not in its prescriptions, but in its possibilities. In other words, even though Part V is the only entrenched procedure for amending the Constitution of Canada, it is not a complete account of the process of formal constitutional amendment. The factual and analytical accounts found in the Court's *Reference* opinions, and the frameworks and principles set out above, are much more sterile and ordered than any experience of constitutional amendment will be in practice.[172] Canada's constitutional history with patriation, the Charlottetown Accord and Meech Lake (and so on) shows that the road to formal constitutional amendment is never as ordered or coherent as the algorithm embedded in Part V suggests.[173] The messiness of reality emerges in part because the actors involved exceed those named in Part V and because they bear obligations that exist beyond Part V.[174] To pursue and achieve the outcomes prescribed by Part V, the actors must formulate positions, negotiate, exercise discretion, resolve disputes, advocate, and so on. To do so, they must attend to the many normative forces operating upon them and the many logics through which claims of reform are raised and reckoned with. Here, in the interactions through which the demands of Part V are pursued and the agonistic tensions of the constitution are navigated, we find a rich

[172] On the sterility of judicial decisions, see Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2011).
[173] See e.g. the collection of accounts in Lois Harder & Steve Patten, eds, *Patriation and its Consequences: Constitution Making in Canada*, (Vancouver: UBC Press, 2015).
[174] See e.g. *Secession Reference, supra* note 21; *Constitution Act, 1982, supra* note 2, s 35.1; *An Act respecting constitutional amendments,* S.C. 1996, c. 1.

opportunity for observing and discerning the law and procedure of constitutional amendment and the space that Part V opens for working through some of the country's most profound constitutional issues, regardless of whether the aim of a formal amendment is ultimately reached. This is the more complex story of Part V than that told by the tidy allocation of powers set out in the text of the *Constitution Act, 1982*.

The complexities of this story are a reminder that formal amendment is one of many mechanisms of constitutional change. It is, for certain, an important one. As F.R. Scott explains, "[c]hanging a constitution confronts a society with the most important choices, for in the constitution will be found the philosophical principles and rules which largely determine the relations of the individual and of cultural groups to one another and to the state."[175] But Part V has not been — and never will be — the primary way by which the constitution – or the Court - changes. There are many other important routes of change, each governed by a logic of procedure, argumentation, and analysis, some deliberately invoked in the pursuit of Court reform and others not. We find these routes of change by looking to custom, executive policy, legislation, judicial decision, constitutional culture, civic action, intergovernmental agreement, internal procedures, and so on. Forces of change are both formal and informal, and are generated both externally and internally to the Court. These forces intersect and interact, dependent on each other for success in some measure. For example, legislative, constitutional, and regulatory frameworks bear on the institutional morality of the Court, but that morality shapes, and is shaped by, the workings of the Court in the everyday. Recall, as an example, the 1975 amendments to the *Supreme Court Act,* discussed in Chapter 1. The success of the new jurisdictional threshold for accessing the Court, one of public importance, in

[175] Frank R Scott, *Essays on the Constitution: Aspects of Canadian law and politics* (Toronto: University of Toronto Press, 1977) at ix.

transforming the Court into a supervisory and forward-looking court depended on the internalization of that threshold and vision by those who interpret and apply the threshold, namely the judges in their exercise of authority over applications for leave to appeal.

Further, any attempt at reform is subject to the uncertainties that accompany institutional design. A map of an institution's characteristics and a well-informed understanding of their relationships will always be insufficient to fully anticipate the intricacies and unknowns associated with designing an institution, or reforming that design. The design of the Senate is instructive, showcasing two challenges – predicting the future and anticipating the impact of external factors on institutional evolution. While Canada's "founding fathers" were experienced statesmen and familiar with past, present and possible forms of government, they could not (or, at least, did not) accurately predict the political context in which the Senate would operate after Confederation. As a result of unanticipated developments (such as, long single-party rule, the prominence of interstate federalism over intrastate federalism, the institutionalization of executive federalism, the public and political ambiguity about second chambers that flowed from dismantling bicameralism in the provinces), the original vision of the Senate – as expressed in the constitutional debates and manifested in the assumptions animating the constitutional text - has not yet been fully realized. The same uncertainties would inevitably attach to attempts at major Court reform.

Acknowledging the multiplicity and diversity of mechanisms by which the constitution and Court evolve does not render Part V irrelevant to Court reform. Rather it offers some perspective to the reform exercise and highlights the range of considerations that must be attended to when thinking about the future of the Court in Canada's constitutional order.

CONCLUSION

This chapter explores issues of Court reform. It focuses on formal processes of reform, exploring boundaries and opportunities of the amending procedure set out in Part V of the *Constitution Act, 1982*. In Part I, I explain the importance of institutional design for understanding the meaning and application of Part V in the context of Court reform. In light of this importance and relying on the lessons learned from Canada's experience with Senate reform, I then start to sketch a blueprint of the design of the Court, pointing to its key roles and qualities, their expression in text and structure, and their position in the greater constitutional scheme. In Part II, I present some of the principles that are particularly relevant to the application of Part V in cases of Court reform. The first principle provides that proposals must be assessed qualitatively and with regard for their effects, remembering that Part V can be triggered indirectly. The second provides that Part V applies to constitutional amendments, even if those proposals also enhance an interest embedded within the structure of the constitution. The third, set out in Part III, is a reminder that Part V is just one process by which the constitution can change and its application in any particular case can be both an opportunity and a challenge.

The discussion in this chapter highlights how lessons about the boundaries of Part V are also lessons in what falls on and pushes up against the other side of these lines and that these matters and processes provide the context in which Part V should be interpreted and applied. For example, discerning the scope of the entrenched constitution stakes boundaries around what types of change warrant the protection and opportunities that come with multilateral consensus. Similarly, setting the boundaries around what counts as an 'amendment' within the meaning of Part V bears on what

counts as legitimate instances of change by alternate means. Further, interpreting the reach of the multilateral amending procedures is simultaneously an exercise in interpreting the grants of unilateral authority to amend the constitution.

Ultimately, in discerning the boundaries of Part V and applying it in particular cases, we are forced to identify whose interests are put at stake by a proposal for reform. This question implicates another inquiry: whose interests could possibly count? That is, what are the relevant constituencies to choose from? As the law currently stands, Part V is concerned only with the interests of the central and provincial legislatures. This dissertation asks us to query what other interests might be relevant and should, as a matter of constitutional expression, be considered when thinking through the merits of reform and the processes of implementation. I take up this issue further in the Conclusion of this dissertation.

Conclusion

In the final days leading up to submission of this dissertation, the federal government announced the process it will follow when appointing judges of the Supreme Court.[1] Its process breaks from tradition in many ways. Unlike the *ad hoc* processes of the past, it relies on a non-parliamentary Advisory Board and sets functional bilingualism as a prerequisite for appointment. Further, it provides that interested lawyers and judges must apply for a position on the Supreme Court and encourages applications from across the country, rather than only from the region of the retiring judge. The government explained its intent for this process in terms of enhancing transparency and accountability. Further, it announced that it was seeking "to ensure that Supreme Court of Canada nominees are jurists of the highest calibre…and representative of the diversity of this great country".[2]

The new process tests some of the most sensitive parts of our stories about the Court. It suggests that the government has a notion of the Court's 'composition' that resists some of the strongest pulls of convention and practice. For example, it seems that the government's understanding of composition is shaped by an appreciation of, but not a strict commitment to, the convention of regional representation on the bench. And, as it has made clear, unlike assessments of the past, this government's vision of the Court and of its composition demands functional bilingualism of all its judges at the time of appointment.

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[1] Prime Minister of Canada, News Release, "Prime Minister Announces New Supreme Court of Canada Judicial Appointments Process" (2 August 2016), online: Prime Minister of Canada <www.pm.gc.ca>.
[2] Office of the Commissioner for Federal Judicial Affairs Canada, "SCC Appointments – Frequently Asked Questions", online: < http://www.fja-cmf.gc.ca/scc-csc/questions-eng.html>.

The new selection process also challenges what is known about the legal demands of Canada's formal amending procedure. For example, in the new process, the Prime Minister has retained final say in the selection of the judge, but has indicated an intention to choose from the list of candidates provided by the Advisory Board.[3] A similar non-binding strategy was found to be unconstitutional in the context of Senate reform.[4] Moreover, the new process has been implemented by virtue of executive policy rather than legislation. That said, the policy has qualities of codification and formalization, and has been released to the public online.[5] This informal-but-formal approach raises a question about the types of conduct that can amount to an "amendment of the Constitution of Canada" and trigger the Part V amending formula. Can a policy or practice constitute an amendment or is legislation required? While a legislated approach would almost certainly trigger litigation to test the validity of the new appointment protocol, the government's policy-based approach raises an issue that has not yet been addressed by the courts and with which constitutional scholars and jurists must grapple.

The questions and tensions that emerge from these features of the new process strike at core concerns that also drive this dissertation. In these pages, I too have addressed the issues of judicial bilingualism, composition, and amendment in relation to the Court. Sorting through these issues entails, it seems, a grappling with the ways in which composition necessarily implicates matters of representation and, in turn, a confrontation with the ways in which an appointment process, and an understanding of 'composition', privileges certain markers and communities of identity over others. One of the opportunities of a diverse society is to deeply engage with the difficult questions

[3] *Ibid.*
[4] *Reference re Senate Reform,* 2014 SCC 32, [2014] 1 SCR 704.
[5] Office of the Commissioner for Federal Judicial Affairs Canada, "The Independent Advisory Board for Supreme Court of Canada Judicial Appointments", online: < http://www.fja-cmf.gc.ca/scc-csc/index-eng.html>.

at stake when it comes to identity and representation. Historically, representation of the civil law tradition and the regions of the country have been privileged over other matters. To the extent that the national identity of the country has been expressed through the composition of the Court, bijurality and regionalism have stood out as constants. There has been a flexibility available to Prime Ministers of the past in the exercise of composing the bench, a freedom to ensure diversity and representation of multiple communities given the few statutory and conventional demands on composition. And yet, as we have seen over the course of history, that freedom has been invoked in the service of some, but not much, diversity.

The government's new process might be particularly disconcerting for some because the uncertainty and change it embodies introduce a measure of instability into understandings of constitutional identity. If regional representation is no longer to be privileged in choosing Supreme Court judges, what will replace it? And, what does this mean for regionalism more broadly? The composition of the Senate is also defined in terms of the country's regions, an attempt to ensure the Senate, as a central institution, could still make a claim of national reach. Regionalism in the Senate context, and so too historically with the Supreme Court, has been attached to institutional legitimacy.[6] This dissertation has suggested that we need to reflect on the foundations of our notions of constitutional legitimacy and their implications for institutional authority, morality, and practices. With the announcement of the government's new appointment process, it seems that such a public conversation is inevitable.[7]

[6] David E Smith, The Canadian Senate in Bicameral Perspective (Toronto: University of Toronto Press, 2003).
[7] On the need for a conversation, see also Lorne Sossin, "The Supreme Court's long road to transparency and inclusiveness", (9 August 2016) Policy Options, online: <http://policyoptions.irpp.org>.

Thinking through issues of representation, amendment and judicial appointment through the lens of structure and pluralism that shapes this dissertation points us toward another matter of concern that is not taken up in Chapter Four, but which requires further attention – the under-inclusivity of Part V. As noted in Chapter Four, the amending procedures set out in Part V resonate in many ways with the logic of the constitution, infused as they are with commitments to federalism, constitutionalism, and the rule of law. However, when we take multijurality seriously, as Chapters Two and Three have shown we must, we come to see a constitutional incoherence of a general amending principle that mandates the consent of interested orders of government in Canadian constitutionalism but that does not account for the consent of Indigenous orders of governance. Section 35.1 of the *Constitution Act, 1982* commits the federal and provincial governments to inviting Indigenous representatives to participate in the discussion of any proposed amendment to section 91(24) of the *Constitution Act, 1867* or to sections 25, 35, or 35.1 of the *Constitution Act, 1982* at the relevant constitutional conference.[8] This commitment lies outside of the 'Amending Procedure' set out in Part V and is characterized by its limits, namely it entails only the right to participate in discussions rather than any measure of consent or veto, and to participate only when amendments in relation to certain enumerated sections of the constitution are under consideration.

As the constitutional conversation inquires into the meaning of "composition of the Supreme Court of Canada", the associated eligibility criteria for appointment to the Court, and the appointment process itself, it seems that we are at a particularly apt juncture for noticing the effects of these limits. It seems that these issues, in particular their implications for the claim of Indigenous

[8] *Constitution Act, 1982*, s 35.1, being Schedule B to the *Canada Act 1982* (UK). For an account of the history of participation by Indigenous peoples in the discussion of constitutional amendment at the time of patriation and since, see John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 115-125.

representation on the Court, are a timely example of how the interests of Indigenous communities are engaged by constitutional reform well beyond changes to sections 91(24), 25, 35, and 35.1. These issues also show one side of what is at stake in failing to live up to the obligations of consultation and consent that seem to be embedded in the structure of Canada's constitution.

Oliver has explained that Part V is revealing of the sensitive spots of Canada's constitutional order:

> The process of constitutional amendment provides important information about the political culture of a country. The discussion which preceded selection of the formula and the negotiations which accompany each attempt to use the formula once in place often expose the stress spots and irregularities in a country's overall political structure. While the politics of constitution making and amending are very revealing, the amending formula itself is usually slightly unforthcoming…In Canada such is not and was never likely to be the case [given t]he federal nature of the country, the numerous differences between the provinces of the federation and the extended process of finding an appropriate amending formula…[9]

As we continue to work through institutional and constitutional expressions of multijurality, federalism, sovereignty and identity, Part V – and the communities of inclusion and exclusion defined and imagined within it – will continue to call for attention.

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

Structuralism and Pluralism

This dissertation has been a study of the Court not only to better understand the Court, but also as a way to better understand the constitution. My approach has been to inquire into these issues by first looking to the constitutional concerns that bear on the form and operations of the Court and then to explore their implications for the significance and role of the Supreme Court in the grander constitutional order. There are, to be certain, forces and demands that operate on the Court, and the individuals working within and around it, other than those of the constitution. These are issues of politics and economics, for example, and will bear on the Court with varying measures of operative force. But my focus has been on the constitutional concerns and the ways in which the constitution in particular, though not alone, shapes the institutional morality of the Court.

My primary way of exploring these concerns and to puzzle through their impact for the Court, has been to focus on the structural dimensions of the constitution. This focus draws attention to the expansive set of institutions on which we rely in the pursuit of a flourishing public life, and the shifting relationships of power, dependence, and influence between them. Further, it directs our energies towards the principles and traditions that inform the structure of the constitution, those principles and traditions that give the constitution somewhat of a compass. In the Canadian context, we see that the compass often points in multiple directions at the same time, guiding us simultaneously down divergent paths with no obvious middle ground. This is the nature of an agonistic constitutional order. It is also the nature of a multijural constitutional order, one that perhaps has multiple compasses.

A structural analysis runs the risk, I suppose, of becoming so enamoured with the stable and fixed image of architecture that it forgets the perpetual dynamism of a constitution or assumes that structure sits above the fray of the messy, moving parts of the constitution. But such an approach to structure would continue to perpetuate the descriptive inadequacies of the conventional accounts. This perpetuation is sought to be avoided in this dissertation by a turn towards legal pluralism. A pluralist ethos ensures that we seek to understand the Court within the diverse society in which we live and in light of the contingent nature of law. It is, in essence, a lens that helps us avoid using the structural perspective as an opportunity to step back from, or believe ourselves to be removed from, the constitutional project. We are each involved in the shared project of constitutionalism, in its continued unfolding. This is one of the insights that pluralism offers. In this way, the pluralist ethos helps us see that the structural dimensions of the constitution contribute as much mess to the constitution as do its non-structural features. Our understandings of federalism, for example, and the duties and opportunities that flow from this foundational principle have undergone pervasive change over the course of Canada's constitutional history and continue to be a contested and persistent quandary of the Canadian constitutional order.[10] The transformation of this principle over time does not render it any less structural, it is simply in the nature of being constitutional.

The turn towards structure and institutional forms in this dissertation, one rooted in the open and contextual character of law, has loosened the tethers of rights adjudication on the stories we tell about the Supreme Court and encouraged a modest but material alteration in the way that we conceive of its authority and roles. Given the traditions of North American legal education and the primary place given to the judgments of the Supreme Court in the study of law in law faculties,

[10] See e.g. Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 133-172.

this dissertation opens a window for re-thinking, or at least reflecting upon, practices and approaches of legal education.[11] In the realm of teaching a course on constitutional law as just one example, the analysis of this dissertation suggests that we should be wondering whether matters of Aboriginal and Indigenous law are best taught in a separate set of class sessions on section 35 of the *Constitution Act, 1982* or as integrated into discussions throughout the course on federalism, sovereignty, institutional design, and constitutional traditions. We should further be wondering whether identity is a matter only to be discussed in sessions on *Charter* rights or whether constitutional identity is also fundamentally captured and expressed – as discussed above – through our public institutions and structures. And we could be exploring the ways in which understandings of the rights and responsibilities expressed in the *Charter*, which itself marks a major renovation of the architecture of the constitution, are illuminated (or obscured) by structural reasoning. These questions are just the beginning. While a focus on constitutional structure is not a solution to all of the challenges of legal education, it marks an opportunity for reflection that should not be lost.

Aspiring for better

At the heart of this dissertation is a weariness with the stories that we have been telling about the Supreme Court and the claims that we make about the constitution through those stories. Conventional accounts turn our attention away from pressing questions about the contributions of the Court to social and political life, questions about authority, constitutional meaning, and the value of disputes. In so doing, they undermine our capacity to demand more and less of the Court, distracting us from seeing the virtue in certain forms of judicial patience, temperance, and ease

[11] On this issue, see Roderick A Macdonald, "Post-Charter Legal Education: Does anyone teach law anymore?" (Feb 2007) Policy Options 75.

with abiding constitutional tension. In the same ways, these accounts discourage us from asking more of ourselves and our officials. There may be comfort in this less demanding role, a placating of the anxieties that come with participation in the shared project of constitutionalism. But in this comfort we risk a loss of agency and a loss of opportunity, responsibility perhaps, to participate in the exercise of adapting our public institutions to serve the vision of constitutionalism to which we aspire.

This dissertation rests on the premise that the goal of legal theory is to remind us of the contingency of what we think are the best or only ways of knowing and doing when it comes to law, and to consider whether there are other ways of knowing and doing that are better suited to what we aim to achieve. It is to bolster our capacity to imagine and assess alternatives that are suited to our aims and aspirations. It is to reflect on how best to live together and relate to one another. The re-telling of stories about the Supreme Court that is offered in this dissertation is in the service of these goals.

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