

NO STATECRAFT, QUESTIONABLE JURISPRUDENCE: HOW THE SUPREME COURT TRIED TO KILL SENATE REFORM[†]

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SUMMARY

In the Senate Reform Reference of 2014, the Supreme Court of Canada declared the Harper government's proposed reforms to the Canadian Senate unconstitutional. The court ruled that the Federal Government could not legislate non-binding, consultative elections for selecting senators, nor legislate term limits for senators without the consent of at least seven of the 10 provinces. It also ruled that abolishing the Senate would require the unanimous consent of all 10 provinces. The court's ruling is widely understood to have put an end to the Senate reform movement of the past three decades and to have constitutionally entrenched the Senate status quo. My analysis criticizes the court for failing to play a constructive role in facilitating the political reform of an institution that has ceased to serve any useful political purpose (other than patronage) and for unnecessarily condemning Canadians to endure this dysfunctional second chamber for at least another generation. In earlier analogous cases of political deadlock and constitutional ambiguity—the Patriation Reference of 1981 and the Quebec Secession Reference of 1997—the court exercised “bold statecraft [if] questionable jurisprudence” to craft compromise rulings that facilitated subsequent resolutions by elected governments. But not in this case. The court could have easily reached a more constructive conclusion following its own “living tree” approach to constitutional interpretation. The court ignored its own “foundational constitutional principles” of democracy and federalism—values that would be enhanced by provincial Senate elections. Indeed, the court has now given greater constitutional support for secession referendums in Quebec than it has for democratically elected senators. I suggest that there is still an exit strategy for the Harper government out of this judicially created dead end: simply turn the appointment of future senators over to provincial premiers, and let the dynamics of partisan provincial politics push the future selection of senators toward democratic elections.

[†] The author would like to acknowledge the very helpful criticisms of the two anonymous reviewers.

Reform of the Senate has been a centrepiece of the federal Conservative party's policy platform since the party's inception. A "Triple E" Senate—elected, equal and effective—was a founding policy of one of the party's two predecessors, the Reform party. At the time of the reference, the Harper government had won three successive federal elections in a row, with Senate reform as a policy priority. During this period—2006 to the present—the Harper government has introduced eight Senate reform bills.¹ To explain and to expedite the first of these bills, Prime Minister Stephen Harper volunteered to testify before a Senate committee, the first sitting prime minister ever to do so. Alberta has already held four Senate elections (in 1989, 1998, 2004 and 2012) and Harper has appointed four of the winners of those elections to the Senate.² In recent years, polls consistently show that an overwhelming majority of Canadians—as many as 90 per cent—are ready to either reform the Senate (the Conservative party's position) or abolish it (the NDP's position).³ But the federal Liberal party, Quebec and all four Atlantic provinces oppose the unilateral legislative reforms proposed by the Harper government. The Quebec government had already referred to its own Superior Court the issue of unilateral federal reforms to the Senate. The Quebec court, in turn, ruled against Ottawa.⁴

Faced with a political and constitutional stalemate, the federal government referred a set of six constitutional questions to the Supreme Court of Canada (see sidebar). Harper's objective was to clarify what constitutional reforms the House and Senate acting alone could make *without* involving the provincial governments and the risk of opening the Pandora's box of the Meech Lake and Charlottetown accords, of 1987 and 1993 respectively. The government was looking to the court for some practical guidance on the constitutional issues and a path forward to reforming or abolishing a scandal-plagued institution that is widely viewed as no longer performing any constructive role in Canadian politics.

¹ Of the eight, two are re-introductions of previous bills:
Bill S-4 (May 30, 2006);
Bill C-43 (December 13, 2006);
Bill C-19 (November 13, 2007)—similar but not identical to Bill S-4;
Bill C-20 (November 13, 2007)—same as Bill C-43;
Bill S-7 (May 28, 2009)—some important modifications compared to Bill C-19;
Bill C-10 (March 29, 2010)—same as Bill S-7;
Bill S-8 (April 27, 2010)—quite different from Bill C-20;
Bill C-7 (June 27, 2011)—Part 1 being the same as Bill S-8 and Part 2 almost the same as Bill C-10.

² Bert Brown, Betty Unger, Doug Black, and Scott Tannas. The winner of the 1989 Alberta Senate election, Stan Waters, was appointed by then prime minister Brian Mulroney.

³ Nanos Research poll for CBC News Network's *Power & Politics*, conducted June 8 to 11, 2013: 49 per cent support reforming the Senate; 41 per cent support abolishing it; six per cent support the status quo; and four per cent were unsure (<http://www.cbc.ca/news/politics/majority-wants-senate-changed-or-abolished-poll-suggests-1.1398046>). Also see Éric Grenier, "Canadians want to reform or abolish Senate: polls," *The Globe and Mail*, May 30, 2013, <http://www.theglobeandmail.com/news/politics/canadians-want-to-reform-or-abolish-senate-polls/article12260094/>.

⁴ Project de loi fédéral relative au Sénat (Re), 2013 QCCA 1807 (CanLII).

Harper's Six Reference Questions and the Supreme Court's Answers:

- (1) Can Parliament unilaterally amend the Constitution to set fixed terms for senators? *No.*
- (2) Can Parliament unilaterally amend the Constitution to allow Parliament to enact legislation to provide for consultative elections to identify potential nominees for appointment to the Senate? *No.*
- (3) Can Parliament unilaterally amend the Constitution to enact a framework for provincial governments to provide for consultative elections to identify potential nominees for appointment to the Senate? *No.*
- (4) Can Parliament unilaterally amend the Constitution to abolish the property qualifications for Senators? *Yes, except for Quebec.*
- (5) Can the Senate be abolished through the Section 38 amending formula—i.e., with the support of the federal government plus at least seven provinces with at least 50 per cent of Canada's population? *No.*
- (6) If the answer to Question 5 is negative, does the abolition of the Senate require using the Section 41 amending formula—unanimous consent of all the provinces plus the federal government? *Yes.*

Harper's use of the reference procedure to break this political and constitutional logjam has parallels in the earlier Patriation Reference of 1981 and Quebec Secession Reference of 1998. In the former, then prime minister Pierre Trudeau was confronted with conflicting constitutional claims over his attempt at unilateral patriation of Canada's Constitution. In the latter, then prime minister Jean Chrétien was attempting to block Quebec's attempt at unilateral secession from Canada. Both these references were solid precedents for Harper to send his Senate reform questions to the Supreme Court. In both precedents, the Supreme Court had engaged in what Peter Russell has incisively described as "bold statecraft [if] questionable jurisprudence" to give partial victories to both sides of the conflicts and return the issues to the political arena for resolution. Harper clearly hoped that the court would give him a green light to proceed unilaterally, but these precedents gave him reason to believe that the worst the court would give him would be this kind of "half-loaf" result.⁵

Instead, the court slammed the door shut on Senate reform, save through a formal constitutional amendment involving most of the provinces through Section 38, or all of them, through Section 41. The court's sweeping dismissal of the government's proposed reforms would be completely acceptable if the law on the method of selecting senators were clear and compelling. In fact, the opposite is the case. There was a clear and simple interpretive path to allowing some form of consultative elections and returning the Senate reform issue back to the political forum—as the court has done before, but chose not to do here.⁶

There are no hard "black-letter" constitutional rules that dictated the court's decision. A literal reading of Section 42 of the Constitution Act, 1982—which requires the general amending formula (i.e., at least seven of the 10 provinces with a total of 50 per cent of Canada's population) for any

⁵ Russell used the "bold statecraft, questionable jurisprudence" description for the Patriation Reference, not the Quebec Secession Reference. However, the description also fits the latter, as explained below: the judicial "discovery" of previously unknown "constitutional principles" that, in turn, form the basis for a ruling that gave partial victories to both sides.

⁶ A counter-example to these two precedents is the 1980 Upper House Reference, in which the Supreme Court ruled that the federal government lacked constitutional authority to unilaterally reform the Senate. However this was before the new amending formulas (sections 38 and 44), adopted as part of the Constitution Act, 1982, which overrule this earlier precedent. The analogy also fails because Senate reform was not a priority of the then Liberal government of Pierre Trudeau.

changes to “the method of selecting Senators”—would allow for consultative elections. Subject to three specific qualifications—minimum age, property ownership and residency—all the Constitution says about the “method of selecting Senators” is:

“The Governor General shall from Time to Time, in the Queen’s Name... summon qualified Persons to the Senate; and ... every Person so summoned shall become and be a Member of the Senate and a Senator.”

Consultative elections do not change this process one iota.

Of course, this “method of appointing senators” is governed by the constitutional convention that the Governor General only “summons” individuals whom the prime minister has recommended.

The court says very little about this convention, mentioning it briefly and only once. But its silence may not be surprising.⁷ This constitutional convention is founded on and reflects the court’s own “fundamental constitutional principle” of democracy. The consultative elections proposed by the government would further strengthen this existing convention by making it more democratic. Is it the court’s role to say how much democracy is too much? No. The court has said repeatedly that the development of constitutional conventions—both their waxing and their waning—is the sole responsibility of the elected branches of government, not the courts. So it’s hardly surprising the court chose to ignore the meaning and consequences of this convention. To acknowledge them would have risked leading the court’s reasoning to a result that the justices evidently did not want.

Consultative elections would not change this convention, but they would change the procedure used by the prime minister to recommend names. But even the use of consultative elections would be optional. And even if a prime minister chose to consult voters before recommending a name, he is not required to recommend the winner of such an election. This precedent is already well established. Both former prime ministers Brian Mulroney and Jean Chrétien ignored the winners of Alberta Senate elections, as was their constitutional right.⁸ None of the Senate reform bills proposed by the Harper government would change this.

The court’s response to this argument is that it “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... 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.”⁹

The problem with this argument is that “privileging form over substance”—that is, favouring process over results—is at the core of what a written constitution and the rule of law is all about. A written constitution sends a message to all who exercise government powers, including judges: These are the rules that you must follow, even if they are inconvenient or obstruct what you deem a more just result. Certainly the nine justices on the Supreme Court must know this. And in saying

⁷ Paragraph 50: “In practice, constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada when filling Senate vacancies.”

⁸ Full disclosure: As one of the two winners of Alberta’s 1998 Senate election, I can attest to the prime minister’s prerogative to ignore the results of such elections.

⁹ Canada. Supreme Court of Canada, *Reference re Senate Reform*, 2014 SCC 32 (2014), paragraph 52.

this, I am not advocating that the justices should be blind to the consequences of their decisions (see below and footnote 34). Nor am I saying that it is wrong for judges to engage in “purposive interpretation” of constitutional powers and rights; that is, going beyond the literal meaning of the text. But judicial fidelity to text is also a legitimate option, and so it would have been well within the scope of accepted constitutional norms for the court to have interpreted this issue in a manner that supported the government’s Senate reform initiatives.

It also merits noting that when it comes to “privileging form over substance,” the court is no slouch. Leaving aside the court’s self-righteous huffing and puffing, the justices turn a blind eye to the real world of Senate appointments. What exactly is the policy status quo that the court is so righteously defending in the current Senate selection process? Presumably the nine justices know no more about this process than do the rest of us. Namely, when a vacancy occurs, the prime minister summons the party’s major fundraisers in that province and selects a worthy and generous supporter.¹⁰ So by entrenching the policy status quo, the court in effect prefers a selection process based on consulting with the governing party’s fundraisers and major donors rather than with the people from that province. This hardly advances the “fundamental constitutional principle” of democracy. Ironically, the unintended effect of the court’s ruling may be to perpetuate a de facto privilege for those with property, just as it was discarding the de jure property requirement.

Suffice it to say here that the court could have easily accepted the so-called “narrow approach” of judicial loyalty to constitutional text—of privileging form over substance—and been within the norms of accepted judicial function. Indeed, it did precisely this in its ruling in the Nadon Reference only months earlier—a verbatim, literal interpretation of Section 6 of the Supreme Court Act, blocking the prime minister’s appointment of Marc Nadon to the Supreme Court because he was not a “current member” of the Quebec Bar Association. Why there and not here?

To conclude, the court could have easily upheld the legality of consultative elections, but chose not to. In a case such as this, where a constitutional convention—the appointment by the prime minister—has always supplemented the original textual rule, the court should facilitate, not block, further development of that convention by the political branches of government. If the court is to justify doing the opposite in the Senate Reference, we should expect some strong evidence and persuasive arguments as to why. The Supreme Court’s written opinion provides neither.

Rejecting what it disparages as a “narrow, textual” approach, the court turns instead to judicial fidelity to the “framers’ intent” to justify its blanket dismissal of the proposed reforms. Looking back to the Confederation debates, the court finds that the non-elected Senate was central to the Senate’s “fundamental nature and role” in Canada’s “constitutional architecture.” More specifically, the element of appointment, as opposed to election, is deemed central to ensuring that the Senate serves as “an independent, non-partisan body of sober second thought,” and strengthens Canadian federalism by effectively representing provincial interests in the central government. On what the court wrongly treats as a minor issue (see below), the justices ruled that the framers’ requirement of property ownership for Senate eligibility was not essential to either the independence of senators or their role as regional representatives, and so could be eliminated by simple statutory reform.

¹⁰ See Rand Dyck, *Canadian Politics: Critical Approaches*, 3rd Edition (Toronto: Nelson Thomson Learning, 2000), 570-71; Roger Gibbins, *Conflict and Unity*, 3rd Edition (Toronto: Nelson Canada, 1994), 84. Leading examples would include Harper’s appointments of Irving Gerstein and Nicole Eaton; Paul Martin’s appointment of Rod Zimmer; Brian Mulroney’s appointment of David Angus; and the appointment of Leo Kolber, a longtime Liberal bagman who raised millions of dollars for Trudeau and Chrétien.

Both of these interpretations of the “framers’ intent” are problematic if not simply false, as explained below. But first it must be remarked that the court’s sudden rediscovery of “framers’ intent” as a guide to constitutional interpretation is sharply inconsistent with its own recent practice.

Anyone familiar with the court’s Charter of Rights jurisprudence knows that the justices have routinely ignored “framers’ intent” in cases involving abortion,¹¹ sexual orientation,¹² prisoner voting rights,¹³ labour law¹⁴ and aboriginal rights.¹⁵ The judicial attempt to discern “framers’ intent” has been alternatively rejected as a “mission impossible” undertaking (i.e., which framers? what evidence?); or worse, a “frozen concepts” approach that would render the Constitution a legal straightjacket, incapable of adapting to the economic and social changes that shape and reshape Canadian society.

For several decades now, the court has denigrated this “frozen concepts” approach to constitutional interpretation and embraced instead a broader, more flexible—and yes, more discretionary—approach. Whether under the rubric of “living tree” or “broad and purposive interpretation,” the Supreme Court justices have routinely justified ignoring the framers’ intended meaning of various Charter rights and given themselves a free hand to “discover” new substantive meanings.

This approach to constitutional interpretation has not been limited just to Charter cases. The court has invoked or invented interpretive concepts such as “foundational principles” and “constitutional framework” to facilitate, and in many cases force constitutional reform. As it declared in the Quebec Secession Reference,

“The Constitution is not a straight-jacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution...”¹⁶

So the question must be asked: why, suddenly, in the Senate Reform Reference, is judicial fidelity to “framers’ intent” the Rosetta Stone of constitutional meaning? This question become even more pressing when, in the very same decision, the court rediscovers—however briefly—the interpretive magic of the “living tree” when it comes to removing the current property qualifications for senators.

Advancing under the banner of “framers’ intent,” the court finds that the Canadian founders intended the Senate’s “fundamental role and nature” to be the “independence of the Senators” and how the Senate “engages the interests of the provinces.” Since the unilateral removal of the property qualifications would affect neither, the court reasons, it would simply “update the constitutional

¹¹ When the Charter of Rights was being drafted (1980–81), both sides of the abortion debate lobbied to have their respective positions embedded as a “right” in the Constitution. These requests were rejected by the framers. See F. L. Morton, *Morgentaler v. Borowski: Abortion the Charter and the Courts* (Toronto: McClelland & Stewart, 1992), 111-116.

¹² See F.L. Morton and Rainer Knopff, *The Charter Revolution and The Court Party* (Peterborough, Ont.: Broadview Press, 2000), 43-44.

¹³ See Rainer Knopff and F.L. Morton, *Charter Politics* (Toronto: Nelson Canada, 1992), 298-299.

¹⁴ In Supreme Court of Canada, *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, (2007) 2 S.C.R. 391, the Supreme Court “expressly overruled twenty years of jurisprudence that interpreted the freedom of association as excluding collective bargaining.” Judy Fudge, “The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* case in Canada and Beyond,” *Industrial Law Journal* 37, 1 (2008): 25-26.

¹⁵ Supreme Court of Canada, *R. v. Sparrow*, [1990] 1 S.C.R. 1075; See Morton and Knopff, *The Charter*, 42-43.

¹⁶ Supreme Court of Canada, *Reference re Secession of Quebec* (1998) 2 S.C.R. 217, paragraph 150.

framework relating to the Senate without affecting the institution’s fundamental role and nature.”¹⁷ The court ignores the paramount role that the framers attached to the defence of property rights through an appointed Senate. In so doing, it unwittingly removes what for the framers was the most important reason for having an appointed rather than an elected Senate.¹⁸ Was this because the justices got their history wrong, or just another example of their lack of interest in protecting property rights? More likely, it was both.¹⁹

The Role of the Senate as a Defender of Property Rights

Nineteenth-century reformers in the English-speaking democracies—which include the Canadians who framed the British North America Act, 1867—faced a dilemma. On the one hand, most still shared John Locke’s belief that the primary purpose of the state was to protect the “life, liberty and property” of its citizens. This explains why, in the early decades of liberal democracy, the right to vote was almost always limited to property owners. The impact of this restriction was minimal when most of the population was rural and 75 per cent owned property (i.e., farmers). But as the 19th century unfolded, the combination of industrialization, urbanization and the irresistible demand for greater equality expanded the right to vote to more and more citizens who did not own property. Under these circumstances, property owners now risked being a political minority. Populist politicians could rally support for attacks on property rights with slogans like “making the rich pay their fair share.” The Americans’ solution to this problem was to entrench property rights in their written constitutions—both federal and state—and to arm the courts with the power of judicial review. The Canadian solution was to create a bicameral legislature in which the second—or, “upper”—chamber would only be filled with property owners.*

* The property-ownership figures are drawn from Niall Ferguson, *Civilization: The West and the Rest* (New York: Penguin Press, 2011), 125. Ferguson emphasizes that this trend of widely dispersed (white) property ownership was found in all British colonies, not just the United States. Indeed, property ownership was higher in Canada than in the United States.

Leaving aside the court’s misunderstanding of the importance of property rights and an appointed Senate in the eyes of the founders, suffice it to say here that, if unilateral federal removal of the property requirements for senators is simply a matter of “constitutional updating,” then the court could have just as easily applied the same low bar to consultative elections. But again, it chose not to.

It is difficult not to conclude that the court is guilty here of the same interpretative inconsistencies that Justice Michael Moldaver criticized in his Nadon dissent—“cherry-picking” interpretive rules that support a pre-determined outcome:

“But that, they say, is where the link ends. It does not extend to the fact that under s. 5, both current and past members of the bar of at least 10 years standing are eligible. With respect, this amounts to cherry-picking. Choosing from only those aspects of it that are convenient—and jettisoning those that are not—is a principle of statutory interpretation heretofore unknown.”²⁰

The common thread in both cases is that the court chose interpretive rules that allowed it to reach conclusions that effectively blocked two different initiatives of the Harper government.

¹⁷ *ibid.*, Paragraph 90

¹⁸ See *Canada’s Founding Debates*, ed. Janet Ajzenstat et al. (Toronto: Stoddart Publishing Co., 1999), 78, 81-82, 91-94.

¹⁹ As noted above, by entrenching the policy status quo, the court in effect is privileging consultation with party fundraisers rather than with the people from that province. Ironically (or intentionally?) the court has perpetuated a privilege for those with property.

²⁰ See J. Moldaver’s dissent in Supreme Court of Canada, *Reference re Supreme Court Act, ss. 5 and 6* (2013), paragraph 124.

In addition to being contradictory and self-serving, the court's elaboration of "framers' intent" is also wrong when it comes to both bicameralism and federalism.

The court repeatedly invokes the principle of "constitutional architecture" and the "Senate's fundamental nature and role"²¹ to defend the appointed Senate from the alleged dangers of consultative elections.²² Given the centrality of this concept to its decision, one would expect the court to elaborate on its meaning. But all we get is repeated invocations of that tired refrain used in high school civics courses that the Senate serves Canada as a chamber of "sober second thought."²³ The only time the court actually tries to give specific meaning to this concept is in its assertion that the framers'

"intention was to make the Senate a thoroughly independent body... [from the House of Commons] in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives."²⁴

Suffice it to say that whatever the framers' intentions may have been, the Senate has been neither independent nor non-partisan for the past 100 years.²⁵ (And often not very sober either!) Today's Senate is a political rubber-stamp organized along strict party lines, and its members routinely follow the directions of the prime minister or party to whom they owe their seat.²⁶ Surely the justices who sit on the court must know this, which may explain why they were content to keep their argument at a the very general level of "constitutional architecture" and "sober second thought." But they are defending an institution that doesn't exist today, and may never have existed. As an argument that is at the very core of their decision against allowing consultative elections, this legal fiction utterly fails to persuade.

Similarly, the Senate's "fundamental nature and role" is deemed to "engage the interests of the provinces."²⁷ Again, the court is suspiciously vague about exactly how the Senate "engages the interests of the provinces." According to its reading of the "framers' intent," the Senate was "an

²¹ This is repeated 14 times, usually in conjunction with "sober second thought": Eleven times from paragraphs 48 to 91, and three times in paragraph 78 and 87. Supreme Court of Canada, *Reference re Senate Reform*.

²² Supreme Court of Canada, *Reference re Senate Reform*, paragraphs 54-63.

²³ Thirteen times—most often in conjunction with mentions of the Senate's "fundamental role and nature." Supreme Court of Canada, *Reference re Senate Reform*.

²⁴ Supreme Court of Canada, *Reference re Senate Reform*, paragraph 57.

²⁵ See David E. Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003), 124-125: "In Canberra, as in Ottawa and Westminster, upper house members of the major parties are, by definition, members of their respective party's caucus. Partisan loyalty transcends institutional independence." Also, Ronald G. Landes, *The Canadian Polity: A Comparative Introduction*, 6th Edition (Toronto: Prentice Hall, 2002), 182: "The patronage base of the Senate selection has also meant that many members are not particularly concerned either with checking the work of the Commons or with being effective regional defenders. Few party warhorses at career's end are likely to be political activists, no matter what the intent of the body to which they have been appointed."

²⁶ The exception occurs when there is a "re-aligning" or "critical" election such as in 1988 or 2006, when a new party forms government after a long period of dominance by one of the other parties—which nevertheless retains its majority in the appointed Senate. After both the 1988 and 2006 elections, newly elected Conservative governments faced obstructionist Senates still controlled by Liberal majorities.

²⁷ Supreme Court of Canada, *Reference re Senate Reform*, paragraphs 78 and 82.

integral part of the federal system”²⁸ because it provided “a distinct form of representation for the regions... and “assure[d] their voices would continue to be heard.”²⁹

But again, there is a yawning gap between reality and whatever the framers intended. Today there is virtually no communication between provincial cabinet ministers (and senior civil servants) and their province’s senators. When the former journey to Ottawa, they go to meet with their federal counterparts—ministers and deputy ministers—and not with senators. I say that based on my own experience as a provincial cabinet minister for six years. Similarly, at least in Alberta, it is virtually unheard of for the provincial premier or cabinet ministers to meet with Alberta’s senators to discuss federal concerns.³⁰ Indeed, I doubt that most provincial ministers could even name Alberta’s six senators. I cannot imagine that this is much different in any of the other nine provinces. The truth is that, if the Senate were abolished tomorrow, nobody outside of Ottawa would notice and it would have no material effect on the functioning of Canadian federal politics.

We all understand that our senators received their appointments thanks to the patronage of a current or former prime minister³¹ and that, when it comes to vote on any bills affecting the interests of their province, the whip ensures that party discipline will trump whatever provincial loyalties a senator might have. Ironically, the consultative elections proposed by the Harper government would break, or at least weaken, the yoke of party discipline and make senators *more* effective voices for regional interests. For these reasons, the court’s defence of the Senate status quo on federalism grounds is even less persuasive than its bicameralism argument.

The court can and should also be faulted for failing to live up to its own precedents of “bold statecraft, questionable jurisprudence” to break constitutional gridlock, as it had in the earlier Patriation Reference and Quebec Secession Reference. The parallels between the Senate Reform Reference and these earlier landmark rulings are striking: high political stakes, high policy stakes, and high levels of partisan and regional conflict.

The political stakes were high in all three. In 1980, Trudeau had staked his entire political comeback on his promise of “renewed federalism” as he campaigned in the first secession referendum. The “patriation package” was his attempt to deliver—unilaterally if necessary—on that promise. In 1995, the Parti Québécois had come within one per cent of winning a majority of support for secession in the second Quebec referendum, in part benefitting from the convoluted and confusing wording of the referendum question. Smarting from charges he had almost allowed the separatists to destroy Canada, then prime minister Chrétien responded with the reference challenging the constitutional validity of any unilateral secession of a province from Canada. Reform of the Senate has been on the agenda of every round of mega-constitutional reform since the 1970s, but without resolution. As noted earlier, “Triple E” Senate reform—elected, equal and effective—has been a priority for Harper and the Reform/Conservatives since the 1980s.

²⁸ *ibid.*, paragraph 75.

²⁹ *ibid.*, paragraph 15.

³⁰ In my eight years as an Alberta MLA and six years as a provincial cabinet minister, I recall only one instance of an official meeting with an Alberta senator. In 2006, after the Harper government had introduced its two Senate reform bills, Bill S-4 and Bill C-43, Senator Bert Brown met with the then minister of intergovernmental affairs and several MLAs (including me).

³¹ The exception being Alberta’s four elected Senators.

The policy stakes were equally high. On the table in 1981 were a new Charter of Rights and Freedoms, with enhanced judicial review; a new amending formula; and a new declaration of judicially enforceable rights for anglophones in Quebec, francophones outside of Quebec, and aboriginals. In 1998, the possibility of a Canada without Quebec and an end to Canada as a bilingual nation was at stake. In 2014, the question was whether Canada could join the other major (and not-so-major) federal states of the world with a democratic and functional second chamber, or whether it was time to simply abolish the Senate altogether.

And all three cases featured high levels of partisan and/or regional conflict. Trudeau's attempt at unilateral patriation and reform of the Constitution was strongly opposed by the "Gang of Eight" provinces and both opposition parties. The Quebec Secession Reference pitted a re-energized Quebec prime minister, Jean Chrétien, (and the "Rest of Canada") against the charismatic premier of Quebec, Lucien Bouchard. And while Harper had the support of Alberta and Saskatchewan for consultative elections, his attempts at unilateral Senate reform were opposed by Quebec, Ontario and all four Atlantic provinces.³²

But this is where the parallels end. In the Patriation Reference and the Quebec Secession Reference, the court found a way to give partial victories to both sides, and send the issue back to the political arena for resolution.

The unilateral constitutional changes proposed by Trudeau in 1980 went way beyond the modest "advisory" Senate elections proposed by the Harper government. And the "Gang of Eight" provinces opposed them much more strongly than do the current opponents of consultative elections. Yet the court found a way to facilitate a political compromise. The court's novel and counterintuitive ruling—"unconstitutional but legal"—was hailed as a victory by both sides, and created an incentive for further political negotiations and compromise, which is exactly what happened. When the dust settled, both sides had made concessions, and all the provinces except Quebec agreed to an amended package of constitutional reforms: The Constitution Act, 1982.

In 1998, the court was caught between a separatist government in Quebec that had just come within less than one per cent of winning a secession referendum, and a federal government desperate to prevent this from occurring again. The court escaped this dilemma by discovering/inventing four new "foundational constitutional principles": federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. The court then used these principles to weave a complicated compromise that gave a partial victory to both sides: The federal government got a ruling that unilateral secession would be unconstitutional. Quebec got a ruling that, if the secession option were to receive a "clear majority on a clear question," then the federal government and the rest of Canada would have a "constitutional obligation" to "negotiate in good faith." Both parties claimed victory. The court left the details to be worked out by the respective parties. The result was the federal Clarity Act. It merits quoting the court's parting wisdom in this ruling:

"We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex, and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations."³³

³² Manitoba also intervened to oppose Harper's proposed reforms but, unlike the other provinces, it favoured abolition of the Senate. British Columbia also opposed federal unilateralism, but, unlike the others, supported the view that the Senate could be abolished using the "7/50" formula (Question 5) rather than unanimity (Question 6).

³³ Supreme Court of Canada, *Reference re Secession of Quebec*, paragraph 100.

But in the Senate Reform Reference, there was no such innovation, no giving a half-loaf to each side, no sending the issue back to the political arena for further negotiation and compromise. In short, no judicial statesmanship of the kind that Canadians have learned to expect from the nation's highest constitutional court.³⁴

Before leaving these unflattering comparisons, we should also ask why the court is willing to attach so much constitutional significance to a majority vote in Quebec that would destroy Canada as we know it, but not to a majority vote that might elect a senator. If a “clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on a secession initiative, which all the other participants in Confederation would have to recognize,” then why would democratically elected senators not entail the same legitimacy and same obligation to respect?

Or to put it slightly differently, the clear implication of the court's decision is that Prime Minister Harper's appointment of Bert Brown and three other “elected Senators” from Alberta are all unconstitutional. But if it had been Quebec, not Alberta, that had held Senate elections, would the Supreme Court have ruled against popularly elected senators from Quebec? How could it, given the court's “clear majority on a clear question” precedent? Does the court have a double standard—one for Quebec, another for the other nine provinces?

Indeed, the court's ruling in the Senate Reform Reference has interesting implications for Quebec. If Harper's attempt to legislate relatively modest reforms to the Senate is unconstitutional, then what about the (euphemistically named) Regional Veto Act?³⁵ Passed in 1996 in the wake of the Quebec separatists' near victory in the 1995 secession referendum, the Regional Veto Act “restores” to Quebec what it claims to have “lost” in the 1982 Constitution Act—its “historical” power of unilateral veto over any constitutional amendment.³⁶

The “loss” of Quebec's historic constitutional veto has been fuel for separatist fires in Quebec since 1982. Twice since then, subsequent federal governments tried to use constitutional amendments to “restore” this veto: in the Meech Lake and Charlottetown accords. And twice this was defeated by the rest of Canada. The Regional Veto Act is a transparent attempt to do through the legislative back door what the new amending rules in the Constitution Act, 1982 requires to be done through the constitutional front door. If legislative tinkering with Senate reform is unconstitutional, then legislative amendments to the amending formula must certainly be unconstitutional. To actually test

³⁴ It should be noted that Russell used the description “bold statecraft, questionable jurisprudence” as a criticism of the Supreme Court's ruling in the Patriation Reference, while I am using it as a positive model for both the Quebec Secession Reference and now for my criticism of the court's ruling in this case. Russell argues that to accept this as a model for the court's exercise of judicial review would mean “subscribing to a ‘result-oriented’ jurisprudence which assesses judicial decisions in terms of whether they support one's personal preferences”—which he rejects. I disagree with Russell on this. At least in these three exceptional cases, the court had a legitimate interest in protecting its ongoing authority in the eyes of the partisan combatants. To simply rule wholly in favour of one side or the other would put at risk the court's legitimacy—and thus its authority—in the eyes of the losing side. For the nation's final and highest court to engage in “questionable jurisprudence” to protect its own political capital—and to facilitate a political compromise—is not the same as simply “supporting one's personal preferences.”

³⁵ The Constitutional Amendments Act (1996) creates a “legislative layer” over the general amending process in Section 38 of the Constitution Act, 1982: at least seven of the 10 provinces, with at least 50 per cent of Canada's population. The new act stipulates that, before any federal cabinet minister may introduce a constitutional amendment, he must first ascertain that the amendment is supported by all of the following provinces and regions: Ontario; Quebec; British Columbia; two or more of the Atlantic provinces that have a combined population of at least 50 per cent of the Atlantic provinces; and two or more of the Prairie provinces that have a combined population of at least 50 per cent of the Prairie provinces. Whereas no single province could exercise a veto over a proposed amendment to the Constitution, under the new Regional Veto Act, each of these entities enjoys a legally enforceable veto.

³⁶ See Andrew Heard and Tim Swartz, “The Regional Veto Act and its Effects on Canada's Constitutional Amendment Process,” *Canadian Journal of Political Science* 30, 2 (June, 1997): 339-356.

this hypothesis may be unwise, as it would risk provoking yet another national unity crisis. But it points to yet another deep flaw in the Supreme Court's judgment in the Senate Reform Reference.

While the Supreme Court seems to have slammed shut the constitutional door on consultative elections for senators, the Senate reform/abolition issue is not going to disappear. The trial of Senator Mike Duffy and the results of the auditor general's investigation into the abuse of senators' expense accounts will keep the Senate in the political mix. With a federal election scheduled for later this fall, all the federal parties will be forced to address the future of the Senate.

Prime Minister Harper responded to the court's ruling by declaring that he would not propose any constitutional amendments to reform the Senate and would focus on reducing the costs of the Senate to Canadian taxpayers. He has also refused to appoint any new senators to the second chamber as several mandatory retirements have occurred. The New Democrats will continue to press for the abolition of the Senate—their position for the past several decades—but now with the support of the premier of Saskatchewan, Brad Wall.

Harper's loss in the Supreme Court and subsequent retreat has prompted the new leader of the Liberal party, Justin Trudeau, to wade into the Senate reform issue. Trudeau evicted all senators from the Liberal caucus, and declared that, as prime minister, he would adopt an "open, transparent and public process for appointing and confirming Senators." Whatever this might mean, I agree with Ian Brodie's analysis that Harper "cannot go into the next election ceding the issue of Senate reform to the Liberals."³⁷ Brodie suggests that Harper might capitalize on the anticipated "bad news" auditor general's report by either slashing Senate funding or formalizing his de facto embargo on any new Senate appointments, or both.³⁸

I recommend a different political exit from this judicially created constitutional dead end. If Harper wants to put real pressure on provincial premiers to opt for Senate elections, he should just declare that he is handing over the nomination of Senators to provincial governments to choose however they want—with or without elections. His message: "Send me a name, and I will pass it on to the Governor General."

While this may sound unusual, there are precedents for this approach in other federal states. Members of the United States Senate were chosen by state legislatures until the ratification of the 17th Amendment in 1913. In Germany, this is basically how senators are still chosen today.

If Harper were to try to formalize this method by a statute, the Supreme Court would almost certainly declare it unconstitutional for the same reasons given in the reference. But if Harper were simply to do this as a matter of practice, what could the court say? Presumably the Governor General would accept a name provided through this process. He has already appointed the four elected Alberta senators. Would the court rule against the Governor General's exercise of his discretion "to summon qualified persons to the Senate"? Highly unlikely.

At a minimum, this approach has the negative merit of getting the issue off Harper's plate and making it the problem of provincial premiers. It would also provide the Conservatives with a clear, simple Senate reform policy to counter Justin Trudeau's platitudes about doing appointments differently.

³⁷ Ian Brodie, "Harper's Gitmo: The Sisyphean Task of Senate Reform," *C2C* (September 2, 2014)

³⁸ *Ibid.*

It also has some potential positives. It would bring a broader ideological diversity to the Senate, with the possibility of separatists from Quebec or NDP appointments from other provinces. It would also give real meaning to what, until now, is the Supreme Court's hollow invocation of the Senate as a chamber that provides "a distinct form of representation for the regions... and "assure[s] their voices would continue to be heard."

Most importantly, it has the potential to put in motion a new set of political incentives that could lead to Harper's ultimate goal: popularly elected senators. Up to now, only Alberta has acted on Harper's offer to appoint elected senators. This is not surprising, as there has been no political cost to provincial premiers for ignoring Harper's offer.

This would change if one of the province's Senate seats were sitting empty because of the premier's inaction. Initially, some (maybe most) premiers might use this new power to reward party friends and donors. But those who did so would quickly come under fire from provincial opposition parties and local media for replacing federal patronage with provincial patronage—with the same political stench.

Premiers and opposition parties would be forced to come up with some new policy on how to "nominate" provincial senators. While there are several models to choose from, consultative elections are the most obvious. How many party leaders will want to campaign against democratic elections?

Is this scenario too far-fetched? While it certainly wouldn't happen overnight, this is basically how the United States evolved from an appointed to an elected Senate—through the partisan dynamics of state politics, not pressure from Washington. Starting with Oregon in 1908, 33 states had adopted the use of elections for choosing their senators before Congress proposed the 17th Amendment in 1912. If Harper were to hand over Senate appointments to provincial premiers, it is certainly plausible that a similar dynamic might unfold in Canada. After all, as the Supreme Court has told us, both democracy and federalism are two of our core constitutional values!

To conclude, the court had virtually unfettered discretion to decide this case however the justices wanted. The court could have employed either a "narrow, textual approach" or the "living tree"/"broad and purposive" approach to open the door to some form of political compromise and legislative reform of the Senate. Instead, the court "cherry-picked" its way to a contradictory and unpersuasive judgment and slammed the constitutional door on any incremental reforms. The court failed to live up to its own precedents of "bold statecraft, questionable jurisprudence" to break a constitutional gridlock. Instead, Canadians are stuck with a dysfunctional and discredited second chamber for at least another generation. This is a loss not just for the Harper government, but for Canadian democracy, and the Supreme Court is properly held accountable for its contribution to this sorry state of affairs.

About the Author

Dr. Ted Morton is currently an Executive Fellow at The School of Public Policy at the University of Calgary. He recently served as Minister of Energy for the Government of Alberta (2011-2012). Prior to that, he was the Minister of Finance (2010) and Minister of Sustainable Resources Development (2006-2009). In 2001, he was the Director of Policy and Research for the Office of the Official Opposition in the Canadian House of Commons. Ted is known for his expertise in the energy-environment interface in Western Canada and federal-provincial relations. He holds a BA degree (Phi Beta Kappa) from Colorado College and MA and PhD degrees from the University of Toronto.

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