McGill Law Journal
Revue de droit de McGill

The Supreme Court in a Pluralistic World: Four Readings of a *Reference*

Kate Glover

Volume 60, Number 4, June 2015

Democracy, Federalism, and Rule of Law: The *Senate Reference* Revisited
La démocratie, le fédéralisme, et la primauté du droit : Revue du *Renvoi sur le Sénat*

URI: https://id.erudit.org/iderudit/1034055ar
DOI: https://doi.org/10.7202/1034055ar

See table of contents

Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)
1920-6356 (digital)

Explore this journal

Cite this article

Glover, K. (2015). The Supreme Court in a Pluralistic World: Four Readings of a *Reference*. *McGill Law Journal / Revue de droit de McGill*, *60*(4), 839–881. https://doi.org/10.7202/1034055ar

Article abstract

Dominant narratives about the institutional life of the Supreme Court of Canada pay too little attention to the empirical and theoretical insights of legal pluralism. They do not say enough about the Court's place in a world in which the nature and experience of law are often understood without reference to state sources or institutions. As a result, the prevailing narratives do not speak to many social realities, fail to build on rich pluralist critiques of the Court's jurisprudence, and disregard the aims and promise of doing legal theory.

Relying on the *Reference Re Senate Reform* as a case study, this article points to shortcomings of contemporary understandings of the Court and proposes a way to overcome them. Part I presents four readings of the Supreme Court's opinion in the *Reference*. Each focuses on a different dimension of the case—the doctrinal, the metaphorical, the institutional and the contextual. The readings are an invitation to notice the assumptions embedded in interpretations of the *Reference* and to explore the larger narratives of which they are a part. Part II takes up that invitation. It shows that the dominant narratives often reflect state-centric traditions of legal theory and impede inquiries into the Court's place in a legally and institutionally plural world. It then presents a research agenda that maps a route toward filling this gap. Drawing on lessons of legal pluralism, the agenda encourages us to confront what we think we know—and what we tend to ignore—about the morality of the Court's institutional design, about the Court's place in Canada's constitutional imagination, and about the significance of the Court in light of the myriad ways in which we access and pursue justice.

McGill Law Journal — Revue de droit de McGill

THE SUPREME COURT IN A PLURALISTIC WORLD: FOUR READINGS OF A *REFERENCE*

*Kate Glover**

Dominant narratives about the institutional life of the Supreme Court of Canada pay too little attention to the empirical and theoretical insights of legal pluralism. They do not say enough about the Court's place in a world in which the nature and experience of law are often understood without reference to state sources or institutions. As a result, the prevailing narratives do not speak to many social realities, fail to build on rich pluralist critiques of the Court's jurisprudence, and disregard the aims and promise of doing legal theory.

Relying on the *Reference Re Senate Reform* as a case study, this article points to shortcomings of contemporary understandings of the Court and proposes a way to overcome them. Part I presents four readings of the Supreme Court's opinion in the *Reference*. Each focuses on a different dimension of the case—the doctrinal, the metaphorical, the institutional and the contextual. The readings are an invitation to notice the assumptions embedded in interpretations of the *Reference* and to explore the larger narratives of which they are a part. Part II takes up that invitation. It shows that the dominant narratives often reflect state-centric traditions of legal theory and impede inquiries into the Court's place in a legally and institutionally plural world. It then presents a research agenda that maps a route toward filling this gap. Drawing on lessons of legal pluralism, the agenda encourages us to confront what we think we know—and what we tend to ignore—about the morality of the Court's institutional design, about the Court's place in Canada's constitutional imagination, and about the significance of the Court in light of the myriad ways in which we access and pursue justice.

Les discours principaux sur la vie institutionnelle de la Cour suprême du Canada prêtent trop peu d'attention aux avancées empiriques et théoriques du pluralisme juridique. Ils n'en disent pas suffisamment sur le rôle de la Cour dans un contexte où la nature et l'expérience du droit sont en grande partie compris sans faire appel à des sources ou à des institutions gouvernementales. Conséquemment, les discours dominants ignorent plusieurs réalités sociales, ne tiennent pas compte des critiques pluralistes traitant de la jurisprudence de la Cour, et négligent le potentiel de la théorie du droit.

Cet article se base sur le *Renvoi relatif à la réforme du Sénat* pour faire ressortir les lacunes des conceptions actuelles concernant la Cour et propose une façon d'y remédier. La première partie de l'article présente quatre analyses du *Renvoi* qui traitent des dimensions doctrinale, métaphorique, institutionnelle et contextuelle de celui-ci. Ces analyses font ressortir les présomptions au sein de chaque interprétation du *Renvoi*, et nous invitent à explorer le discours encadrant chacune d'elles. La deuxième partie répond à cette invitation et démontre que les discours dominants reflètent une approche théorique centrée sur le rôle de l'État qui nous empêche de remettre en question la place de la Cour dans un monde marqué par le pluralisme institutionnel et juridique. L'article présentera alors un plan de recherche pour combler ce vide. S'appuyant sur les leçons enseignées par le pluralisme juridique, ce plan nous pousse à nous confronter à ce que nous pensons savoir – et ce que nous avons tendance à ignorer – concernant la moralité de la conception institutionnelle de la Cour, la place de celle-ci dans l'imaginaire constitutionnel canadien, et l'importance de la Cour étant donné la multitude de façons dont nous pouvons chercher à obtenir justice.

* Assistant Professor, Faculty of Law, University of Western Ontario; Doctoral Candidate and Vanier Scholar, Faculty of Law, McGill University. Junior counsel for the *Amicus Curiae* in the *Reference Re Senate Reform* before the Supreme Court of Canada (2013). Sincere thanks to Hoi Kong, Jocelyn Stacey, Alexander Pless, an anonymous peer reviewer, and the editors of the *McGill Law Journal* for insightful comments on earlier drafts. Thank you also to the *McGill Law Journal* for generously hosting the Symposium on "Democracy, Federalism, and the Rule of Law: The Implications of the *Senate Reference*", at which the papers in this Special Issue were presented and discussed. Further, I am grateful for the support of the Vanier Canada Graduate Scholarship Program, administered by the Social Sciences Humanities Research Council, and for a visiting fellowship at the University of Toronto's Faculty of Law during the preparation of this paper. All errors are my own.

Citation: (2015) 60:4 McGill LJ 839 — Référence : (2015) 60 : 4 RD McGill 839

Introduction

The aim of a special issue of a law journal is to examine a single thing—a case, a question, a problem, a person—from multiple perspectives. By presenting different accounts of the same thing, a special issue invites readers to consider the multiple frames and theoretical lenses through which one slice of social experience can be understood and analyzed.[1] In this sense, a special issue is as much a lesson in the variability and contingency of how we understand events in the world, as an opportunity to measure a legacy.

In this paper, I embrace the animating spirit of a special issue to argue for a particular approach to thinking about the Supreme Court of Canada, an approach that helps us think about the Court in a world of legal diversity and complexity. To make this argument, I present several ways to read the Court's opinion in the *Reference Re Senate Reform*[2] and then reflect on what these readings reveal about our understanding of the Court. I start from the premises that the *Reference* is one of the Court's most significant constitutional decisions in the contemporary era and that each opinion issued by the Court is an institutional artifact. From these premises, I accept a third, that it is equally important to ask what the *Reference* reveals about the Supreme Court as it is to ask what the Court's opinion foreshadows for the Senate.

I present my argument in two parts. In Part I, I offer four readings of the *Reference*, each focusing on a different dimension of the case—the doctrinal, the metaphorical, the institutional, and the contextual. On the one hand, I present multiple readings of the Court's opinion to contribute to a deeper understanding of the case. On the other, I use this methodology to remind us that when we read the *Reference* our interpretation depends on many factors—social experience, professional affiliation, disciplinary background, theoretical commitments, and so on. These factors shape and colour the lenses we wear when we read any text, including the legal lenses we wear when we read the *Reference*. These lenses determine

---

1 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). Analyzing a single issue or case from alternate or multiple perspectives is not an uncommon methodology in legal scholarship (see e.g. Lon L Fuller, "The Case of the Speluncean Explorers" (1949) 62:4 Harv L Rev 616; Peter Suber, *The Case of the Speluncean Explorers: Nine New Opinions* (New York: Routledge, 1998); *Special Issue: Rewriting Equality*, (2006) 18:1 CJWL 1).

2 2014 SCC 32, [2014] 1 SCR 704 [*Reference*]. The choice of a generic short form is deliberate, intended to indicate that the methodological claims of this article apply to the reading of any case. That said, the context of constitutional amendment and Senate reform provide a particularly rich case study for thinking through the lessons and limits of legal pluralism.

whether we focus on the jurisprudential dimensions of the case or the political concerns. They influence whether a reader cares most about the historical narrative the judges tell or the theory of unwritten constitutionalism on which the judges rely. They inform whether we assess the Court's work from the perspective of the state or the citizen. In other words, what we think is important about the Court's opinion is shaped by the assumptions we make, the beliefs we hold, and the interests we pursue when reading it, including our interests in, assumptions of, and beliefs about law. Confronting multiple ways to read the *Reference* is therefore a chance to notice the assumptions embedded in our interpretations, reflect on why we find them meaningful, consider their implications, and explore the larger narratives of which they are a part.

In Part II, I reflect on the four readings and ask what we can learn from their juxtaposition. I argue that the readings demonstrate the value of thinking about the Supreme Court through a lens that accounts for the contemporary landscape, characterized by social and legal diversity. I contend that looking through such a theoretical lens, one shaped by an "ethos of pluralism",[3] opens up lines of inquiry into the Court's institutional dimensions that can easily be obscured or overlooked by some dominant narratives. I sketch a research agenda that is constructed from these lines of inquiry and argue that this agenda is worth pursuing. It is an opportunity to advance conversations about the responsiveness and inner morality of our public institutions. Further, this agenda poses questions about the roles of our institutions, and our expectations of them, within a constitutional structure that takes plurality and diversity seriously. Finally, it provides a framework for thinking about the significance of the Court—and the *Reference*—from the perspective of citizens and communities, that is those who live law. This research agenda admittedly raises more questions than answers. Yet it does so with good reason. The aim is to suggest that pluralist hypotheses about law have something to offer our understanding of the Court, without closing any doors on what those offerings are or where they might lead.[4]

---

[3] An "ethos of pluralism" is found wherever there is a challenge to the claim that law is autonomous and separate from society and to the belief that law is a coherent and neutral system of norms derived from state authority (Margaret Davies, "The Ethos of Pluralism" (2005) 27:1 Sydney L Rev 87 [Davies, "Ethos"]).

[4] I take up the research agenda set out in this paper in my doctoral dissertation, "The Stories We Tell: The Supreme Court of Canada in a Pluralistic World" [in progress, on file with the author].

I. Four Readings of the *Reference*

In this Part, I present four readings of the Court's opinion in the *Reference*. Each is oriented around a particular interest or issue. First, the doctrinal reading assesses the coherence of the Court's reasoning and the place of the *Reference* in the canon of Canadian constitutional law. Second, the metaphorical reading examines the way the *Reference* opinion reflects and contests the metaphors often used to describe the constitutional role of the Supreme Court. Third, the institutional reading asks what factors might influence the judges when deciding the *Reference*. Finally, the contextual reading considers where the *Reference* fits within—and what it adds to—the grand scheme of norms that govern constitutional change.

Of course, these four readings are neither mutually exclusive nor exhaustive. The lenses we wear are always multifocal; when we read the *Reference*, we simultaneously pursue many interests and communicate many theoretical commitments. In addition, the many foci of our lenses can be combined and configured in countless ways. This means that the four readings offered here are simply representative of the many possible ways of reading the *Reference*. The point in setting out these different readings side-by-side is not to say all there is to say about the *Reference*, but rather to encourage reflection on why we say what we say and what we are actually saying when we say it.

A. The Doctrinal

The *Reference* is a case about constitutional interpretation. In February 2013, the Court was asked to advise on six questions, each dealing with the scope of Parliament's authority to reconfigure the Senate. In April 2014, it released its answers. The Court's opinion in the *Reference* is a significant contribution to Canadian constitutional law because it provides an authoritative interpretation of Canada's constitutional amending formulas, as set out in Part V of the *Constitution Act, 1982*.[5] While the Court has resolved disputes about the amending procedure in the past,[6]

---

5 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

6 See e.g. *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*]; *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753, (*sub nom Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)*) 125 DLR (3d) 1 [*Patriation Reference*]; *Reference Re Objection to a Resolution to Amend the Constitution*, [1982] 2 SCR 793, (*sub nom Re Attorney-General of Quebec and Attorney-General of* Canada) 140 DLR (3d) 385 [*Veto Reference*]; *Reference Re Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54, (*sub nom Reference Re Legislative Authority of Parliament to Alter or Replace the Senate*) 102 DLR (3d) 1 [*Upper House Reference*]; *OPSEU v Ontario (AG)*, [1987] 2 SCR 2, 41 DLR (4th) 1 [*OPSEU*]; *Jones v AG of New Brunswick*, [1975] 2 SCR 182, 45 DLR (3d) 583.

the *Reference* was the Court's first opportunity to comprehensively interpret and apply Part V,[7] thereby filling a gap that has fuelled political controversy and legal uncertainty for decades.

In its interpretation of the Part V formulas, the Court restated the principle that formal constitutional amendment is not a unilateral undertaking in Canada.[8] The federal and provincial governments must work together, engaging in dialogue about the future of Canada's constitutional configuration. The Part V procedures are intended to foster this dialogue by requiring substantial provincial consent for any constitutional change that engages provincial interests.[9] In the context of Senate reform, this means that Parliament alone cannot alter the fundamental nature or role of the Senate.[10] Any such alteration would engage the provinces' interests as "equal stakeholders in the Canadian constitutional design"[11] and would therefore require substantial provincial consent.

On this interpretation of Part V, the Court concluded that most of the federal government's proposals for Senate reform require provincial consent.[12] First, creating advisory elections would endow Senators with a "popular mandate which is inconsistent with the Senate's role as a complementary legislative chamber of sober second thought."[13] Such a change would alter the architecture of the constitution, thereby triggering the

---

7 In the *Reference Re* Supreme Court Act*, ss 5 and 6*, 2014 SCC 21 at paras 88–106, [2014] 1 SCR 433 [*Supreme Court Act Reference*], the majority of the Court provided guidance on the meaning of sections 41(d) and 42(1)(d) of the *Constitution Act, 1982*, *supra* note 5. The *Supreme Court Act Reference* was heard after the *Reference* but the Court's decision in the former was released a month before its decision in the latter.

8 See e.g. *Patriation Reference*, *supra* note 6; *Veto Reference*, *supra* note 6; *Upper House Reference*, *supra* note 6; *Secession Reference*, *supra* note 6.

9 See *Reference*, *supra* note 2 at paras 31, 34.

10 See *ibid* at paras 45–48.

11 *Ibid* at para 48.

12 The Court held that Parliament alone could repeal the provisions of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*] that compel senators to meet a minimum net worth threshold and, with one exception, to own real property worth at least $4000 in the province for which they are appointed (see *ibid* at paras 87–94). The exception pertains to Québec. Unique amongst the provinces, Québec is divided into electoral divisions for the purposes of appointing senators. One senator must be appointed from each district (*Constitution Act, 1867*, s 22). These senators must either fulfill their real property qualification in the district for which they are appointed or live in the district. If the real property qualification were repealed, senators from Québec would necessarily have to live in the district for which they were appointed. Given this unique impact on Québec, the Court held that a full repeal of the real property qualification would require Québec's approval under the bilateral amending procedure (see *ibid* at paras 91–94).

13 *Ibid* at para 70.

amending formulas and the need for substantial provincial consent. Similarly, implementing fixed terms for senators would make a "qualitative difference"[14] to the Senate's independence and capacity for dispassionate legislative review. Such a change to the Senate's fundamental nature and role would engage provincial interests and therefore require provincial input. Finally, abolition of the Senate would renovate Canada's constitutional architecture and the reform process contemplated by Part V. Such change would be an amendment to the Constitution of Canada in relation to Part V and would therefore require the unanimous consent of Parliament and the provincial legislatures.[15]

In its reasoning, the Court restated the general principles that govern constitutional interpretation, affirming that any interpretation must be attentive to the text, its historical, philosophical, and linguistic contexts, and to past judicial interpretations.[16] Further, it offered an important statement on the constitutional status and interpretive role of "constitutional architecture".[17] Drawing on theories of unwritten constitutionalism and precedent, the Court concluded that the constitution must be interpreted in light of the structural aspirations and assumptions embedded within it. According to the Court, these structural concerns include the foundational principles on which the constitution is based (e.g. democracy, federalism, rule of law) and the structure of government that the constitution seeks to implement. Moreover, the individual elements of the constitution—textual, institutional, conceptual, theoretical—are linked. These links give rise to the "basic structure" or "internal architecture" of the constitution as a whole.[18] According to the Court, the constitution must be understood and applied in light of this structure and the way that its elements are intended to interact.[19]

The Court's reasoning in the *Reference* has been criticized for its reliance on constitutional architecture. As I discuss below, some of these critiques are justified, especially given the uncertainties that remain and the implications of the Court's structural conclusions. It is unfair, however, to argue that constitutional architecture is a new concept or interpretive tool. In fact, the structure of the constitution and its interpretive force are

---

14 *Ibid* at para 80.

15 See *Constitution Act, 1982*, *supra* note 5, s 41(e).

16 See *Reference*, *supra* note 2 at para 25.

17 *Ibid* at paras 25–26.

18 *Ibid*.

19 See *ibid* at para 26. On forms of structural reasoning, see Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*" (2014) 67 SCLR (2d) 221.

established in Canada's constitutional jurisprudence. For example, the Court has repeatedly invoked unwritten constitutional principles—the pillars on which the constitution rests[20]—to fill textual gaps, inform textual interpretation, and ground substantive obligations.[21] Moreover, structural reasoning is implicit in all federalism jurisprudence and other cases in which the courts look to constitutional relationships and institutional arrangements when determining the balance of legislative authority between Parliament and the provinces.[22] Further, ensuring the harmonious interaction of individual constitutional elements—for example, between section 96 and the *Charter*, between the *Charter* and the common law, and between Aboriginal rights and the Crown prerogative—is an established interpretive objective in constitutional cases.[23] In this sense, the Court's structural reasoning in the *Reference* sits within a line of cases in which the judges look to the normative force of architecture in order to interpret and apply the constitution.

At the same time, however, the *Reference* takes constitutional architecture further. The Court introduced the concept into the specific contexts of Part V and Senate reform. It established that, for the purposes of Part V, an "amendment to the Constitution of Canada" can include changes to constitutional text as well as to constitutional architecture.[24] This conclusion means that at least some of the constitution's "basic structure" is constitutionally entrenched and therefore subject to change only

---

20 See *Secession Reference*, *supra* note 6 at para 51.

21 See *ibid* at paras 52–54; Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1&2 Can Bar Rev 67. For examples, see also *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 150 DLR (4th) 577; *Secession Reference*, *supra* note 6; *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 100 DLR (4th) 212; *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 at paras 38–40, [2014] 3 SCR 31 [*BCTLA*]. On the limits of the unwritten principles in constitutional interpretation, see e.g. *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paras 65–67, [2005] 2 SCR 473; *Reference Re* Employment Insurance Act *(Can), ss 22 and 23*, 2005 SCC 56 at para 10, [2005] 2 SCR 669; and *BCTLA*, *supra* note 21, at paras 81–82, 91–102, Rothstein J, dissenting.

22 See e.g. *Secession Reference*, *supra* note 6 at paras 55–60; *Reference Re* Securities Act, 2011 SCC 66, [2011] 3 SCR 837; *Upper House Reference*, *supra* note 6; *Supreme Court Act Reference*, *supra* note 7 (interpretation of the *Constitution Act, 1867*, *supra* note 12, s 101 and *Constitution Act, 1982*, *supra* note 5, ss 41(d), 42(1)(d)); *OPSEU*, *supra* note 6, Beetz J (interpretation of the *Constitution Act, 1867*, *supra* note 12, s 92(1)).

23 See e.g. *BCTLA*, *supra* note 21 at paras 24–37, McLachlin CJC; *R v Demers*, 2004 SCC 46 at paras 80–86, 90–93, [2004] 2 SCR 489, LeBel J; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

24 *Reference*, *supra* note 2 at para 27.

in accordance with the Part V procedures.[25] For example, according to the Court, the federal government's proposed advisory election schemes triggered Part V even though they did not change any constitutional text. The relevant change was architectural; the proposed election schemes would equalize the power of the Senate and the House of Commons. Such equalization would be inconsistent with the assumption, implicit within the constitution's existing structure, that the Senate is complementary—rather than equal—to the House.

The Court's conclusion that parts of the constitution's architecture are entrenched brings the principle set out in *OPSEU*[26] into the Part V era. In *OPSEU*, decided under the amending regime that immediately preceded Part V, Justice Beetz concluded that the constitution has a basic structure that neither order of government could unilaterally override. The *Reference* confirms that the same is true today. Part V entails that some of the constitution's architecture cannot be altered unilaterally by either order of government; it requires the consent of Parliament and the provincial legislatures.

It was always the case that the courts would be involved in the application of Part V. Its design requires interpretation of politically loaded issues, and in Canada's constitutional democracy, that task falls to the courts.[27] After the *Reference*, some of these interpretive uncertainties have been resolved, but others remain or have emerged anew.

We can see a number of the unknowns when we try to identify the conditions in which Part V is triggered. For example, in order to apply the amending formulas, we must know what falls within the "Constitution of Canada" for the purposes of Part V. After the *Reference* and the *Supreme Court Act Reference*, the line between the entrenched and unentrenched parts of the constitution's architecture is not well defined. The uncertainty arises because the Court held that the "entire process" of selecting senators was entrenched by virtue of section 42(1)(b) of the *Constitution Act, 1982*[28] but did not specify whether that entire process includes only the legal parts of the process or also includes the conventional and informal ones. If the latter, admittedly an unlikely conclusion, does this mean that introducing any element of Prime Ministerial consultation into the Senate selection process alters the constitution's architecture and therefore trig-

---

25 *Ibid* at paras 27, 53–63.

26 *Supra* note 6, Beetz J.

27 See Glover, *supra* note 19 at 254–55.

28 *Reference*, *supra* note 2 at para 65.

gers Part V?[29] What would be the implications for constitutional conventions generally? We must be cautious of the overentrenchment of conventions, both because of democratic concerns about entrenchment through judicial interpretation and because of concerns about the crystallization of the constitution.

Another uncertainty to be examined after the *Reference* is what type of conduct can amend constitutional architecture for the purposes of Part V. The questions in the *Reference* dealt only with legislative action. But certainly other types of conduct—practices, policies, and decisions—can have transformative constitutional effect. In what forms and at what point can this conduct sustain an amendment? In the context of Senate reform for example, is the Prime Minister's failure to recommend candidates to the Governor General for appointment reviewable under Part V?[30]

Further, the Court's architectural reasoning in the *Reference* lends itself to questions about the limits of Part V. If parts of the architecture of the constitution are entrenched, are there limits to the architectural amendments that are possible under Part V? At some point, the continuity of the constitution runs out. Surely the meaning of the constitution's animating principles and assumptions can evolve over time, but they are not "infinitely pliable".[31] Can the internal structure of Part V, designed to capture all possible amendments to the Constitution of Canada,[32] contemplate revolutionary change such as repeal of the *Charter* or the abolition of bicameralism?[33] Or would such change unfold outside Part V and out-

---

29 See e.g. David Schneiderman & Matthew J Burns, "A Recipe for Deadlock", Editorial, *National Post* (13 Nov 2013), online: <news.nationalpost.com/2013/11/13/schneiderman-burns-a-recipe-for-deadlock/>. The answer is likely no. The Court's conclusion that the proposed advisory elections constituted an "amendment to the Constitution of Canada" did not turn on the fact of consultation by the Prime Minister, but rather on the effect that the elections would have on the Senate itself, namely a shift in institutional power and role. A consultation scheme that does not have such an architectural effect would not, without more, constitute an "amendment to the Constitution of Canada" and therefore Part V would not apply (see Glover, *supra* note 19 at 246–51). That said, given the Court's conclusion that Part V protects the "entire process" of selecting senators, a non-elective consultation proposal could trigger Part V by altering selection in ways that do not have architectural effects.

30 This issue is raised by an application for judicial review currently awaiting hearing at the Federal Court. See *Aniz Alani v Prime Minister of Canada and the Governor General of Canada* (15 January 2015), FC T-2506-14 (notice of application).

31 The term "infinite pliability" is borrowed from Roderick A Macdonald, "Was Duplessis Right?" (2010) 55:3 McGill LJ 401 at 431.

32 See Glover, *supra* note 19 at 238–44.

33 On the latter, the Court clearly held that abolition of the Senate requires unanimous consent because it would alter Part V (see *Reference*, *supra* note 2 at paras 95–110). But see Glover, *supra* note 19 at 243, n 108 on the inconsistency in reasoning on abolition of

side the procedural supervision of the courts?[34] Moreover, does the constitution's architecture, constructed on a foundation of assumptions and principles, sustain an argument for a Canadian basic structure doctrine?

Ultimately, the *Reference* went far in resolving political and legal disputes about whether Parliament can act unilaterally to implement the federal government's Senate reform agenda. The answer is generally no. Further, it advanced the procedural law of constitutional amendment and established a framework for interpreting Part V, confirming that substance will trump form when applying the amending formulas. That said, within the amending framework, many unknowns and questions remain to be worked out in future cases. Given these questions and Canada's political history of megaconstitutional reform, these future cases are likely to be more concerned with what can be achieved outside the formal Part V regime altogether than with which amending formula applies to any particular proposal.

B. The Metaphorical

In the *Reference*, the Supreme Court served the roles that it is expected to play in constitutional judicial review—umpire, guardian, and advisor.[35] As umpire, the Court set out the "rules" for amending the constitution, identifying the baseline procedural obligations that government officials must respect in order to reform the Senate within constitutional bounds. The disputes to be refereed dealt with the division of powers under Part V. The Court was asked to decide when Parliament and the provinces must act jointly. As guardian, the Court protected its charge (the constitution) from improper interference (procedurally invalid reform). Interpreting amending procedures is the ultimate task of a constitutional guardian because the procedures safeguard the constitution against illegitimate attempts at change. Finally, as advisor, the Court counseled the federal executive on the proper procedure for amending the constitution.

---

the Supreme Court and the Senate in the *Reference*, *supra* note 2 and the *Supreme Court Act Reference*, *supra* note 7.

[34] The *Patriation Reference*, *supra* note 6 suggests that the courts can play a role in resolving procedural disputes about revolutionary constitutional change.

[35] The umpire metaphor is used to describe the Court's role in federalism cases, while the guardian metaphor is used in the *Charter* context. Both the division of powers and constitutional protection from unlawful interference are at stake in the *Reference.* Further, with respect to the Court's role as advisor, references need not deal with constitutional issues (see *Supreme Court Act*, RSC 1985, c S-26, s 53), but usually do. For non-constitutional references, see e.g. *Reference Re Steven Murray Truscott*, [1967] SCR 309, 62 DLR (2d) 545; *Reference Re Broome v Prince Edward Island*, 2010 SCC 11, [2010] 1 SCR 360.

Such advice was needed to resolve political disputes about the legality of the federal government's methods for pursuing Senate reform.

The umpire, guardian, and advisor metaphors are relational. They describe the Court's role in relation to other official actors, namely the institutions of the legislative and executive branches of government at the federal and provincial levels. In this sense, they mirror another metaphor—institutional dialogue—that often frames conversations about the Court's institutional relationships.[36] But each of these descriptions has limits. For example, the metaphors of constitutional guardian and umpire are at odds with dialogue. A dialogue is an interaction between equals. Yet as guardian, the Court is obliged to shield the constitution from improper government action. The nature of the guardian role creates a hierarchical relationship between the Court and other government actors, a relationship inconsistent with institutional equality.[37] Similarly, an umpire is to be dispassionate in its enforcement of rules. The neutrality expected of an umpire does not sit well with the direct engagement required of a participant in a dialogue.[38]

The *Reference* highlights another limit, this one to the description of the Court as constitutional advisor.[39] An advisor provides guidance or rec-

---

[36] The traditional conception of the dialogue metaphor in Canada, in which courts review legislation for *Charter* compliance and legislatures respond through statutory or policy reform, inaction, or the notwithstanding clause, does not apply directly to the *Reference*. While the Court in the *Reference* reviews statutory and policy proposals for constitutionality, the *Charter* is not engaged and the range of legislative and executive available responses is constrained. For a sample of the literature on this traditional conception, 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) 35:1 Osgoode Hall LJ 75; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall LJ 1; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); FL Morton, "Dialogue or Monologue?" in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montréal: McGill-Queen's University Press, 2001) 111; Christopher P Manfredi & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37:3 Osgoode Hall LJ 513. That said, the dialogue metaphor can also be used in a broader sense to describe interactions between "various branches of government ... in the area of constitutional decision-making" (Wade K Wright, "Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada" (2010) 51 SCLR (2d) 625 at 628). This meaning of dialogue is more in line with the interactions to be measured in the *Senate Reform Reference*.

[37] See Donna Greschner, "The Supreme Court, Federalism and Metaphors of Moderation" (2000) 79:2 Can Bar Rev 47 at 55.

[38] For additional limits of the umpire metaphor, see *ibid* at 62–64.

[39] Formally, the Court's role as advisor is not a metaphorical one. In a reference, the Court provides an advisory opinion in response to questions posed by the Governor in Council

ommendations to its principal, who is then free to accept or reject the advice given. Yet in effect, the Court's opinions in reference cases are not advisory; they are given the same binding and precedential weight as the Court's appellate decisions.[40] Moreover, in the *Reference*, the Court's answers to the procedural questions effectively doomed the fate of the federal government's Senate reform agenda. This outcome was not unexpected. Given political realities in Canada, whenever a reform proposal triggers multilateral obligations, the procedural analysis effectively determines the practical outcome, namely preservation of the status quo.[41] Again the effects of the Court's decision extend beyond simply giving advice.

Questions about whether the Court is an advisor also come up when the Court describes its advisory role as outside the judicial function.[42] If the judges are not adjudicating when they hear a reference, what are they doing? And if the Court's reference role is not adjudicative, should we have concerns about democracy, legitimacy, and ethics given the binding and precedential effects of a reference opinion?[43] Are these concerns overcome by the formalities and procedural dimensions of a reference?

The Court's constitutional roles have been generating debate since long before the *Reference* and will undoubtedly continue to do so. But the *Reference* marks an opportunity to ask whether contemporary descriptions of the Court's roles adequately capture the range of expectations and aspirations to which we hold the Court. At a minimum, the advisory label requires more nuance to accurately capture and theorize the character of contemporary reference cases at the Court, the institution's role within them, and their usefulness within Canada's constitutional order. As a starting point, we should better understand where the Court's advisory

---

(see *Supreme Court Act*, *supra* note 35, s 53; *Secession Reference*, *supra* note 6 at paras 12–15, 24–31).

40 See Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960) 6:3 McGill LJ 168 at 175–80; *Canada (AG) v Higbie*, [1945] SCR 385 at 403, [1945] 3 DLR 1, Rinfret CJC. *Contra Canadian Pacific Railway Co v Estevan (Town of)*, [1957] SCR 365 at 368–69, 7 DLR (2d) 657, Locke J; *Reference Re Legislation Respecting Abstention from Labour on Sunday*, [1905] 35 SCR 581 at 594–606, 1905 CanLII 54, Idlington J.

41 Consider the *Upper House Reference*, *supra* note 6 and the outcomes of the Meech Lake and Charlottetown constitutional conferences. *Contra* the ten amendments to the Constitution of Canada that have been proclaimed under Part V (see Parliament of Canada, "The Constitution Since Patriation: Chronology", online: <www.parl.gc.ca/parlinfo/compilations/constitution/ConstitutionSincePatriation.aspx>).

42 See *Secession Reference*, *supra* note 6 at paras 15, 25.

43 Rubin discusses ethical concerns arising from the effects of references on private rights (*supra* note 40 at 185–87).

role stands in relation to its adjudicative function.[44] Further, we should consider whether the Court's advisory role is better understood through the frame of a constitutional court.[45]

In seizing the chance to examine the Court's roles, new metaphors can be imagined. Scholars have already proposed some options, such as a "partner in an ongoing dance"[46] and a facilitator of intergovernmental dialogue,[47] and they have rejected others such as "mirror" and "engineer".[48] From the *Reference* emerges another possible metaphor. The prominence of constitutional architecture in the Court's reasoning in the *Reference*, alongside the structural concerns fuelling other contemporary constitutional disputes, point to a need to examine the Court's role both inside the constitution's architecture as a "constitutionally essential institution"[49] and outside as one of the constitution's interpreters. Here, three questions come to the fore: Is the Court a constitutional architect? Is this a metaphor that we would want to describe the Court? And is there a problem of mixing metaphors when we focus on "constitutional architecture" within the "living tree"?

C. The Institutional

The *Reference* was heard by eight judges: six appointed by Conservative Prime Ministers, two by Liberals; two judges from Québec, three from Ontario, one from Atlantic Canada, one from the Prairies, one from British Columbia; three women and five men; all over the age of fifty-five; and no Aboriginal judges, no judges from visible minorities, and no judges who came to the Supreme Court bench directly from practice. There were eighteen parties who made submissions in the case: the Attorney General of Canada; the Attorneys General of all the provinces and territories except the Yukon; two senators; the Fédération des communautés francophones et acadienne du Canada; the Société de l'Acadie du Nouveau-Brunswick; and an *amicus curiae* appointed by the Court to make sub-

---

44 See e.g. Kate Glover, "Navigating Constitutional Crises: The Reference Power as a Tool of Transition" (Paper delivered at the Symposium on Constitution-Making and Constitutional Design, Clough Centre for Constitutional Democracy, Boston College, 31 October 2014) [on file with author].

45 In the American context, see Jamal Greene, "The Supreme Court as a Constitutional Court" (2014) 128:1 Harv L Rev 124.

46 Shauna Van Praagh, "Identity's Importance: Reflections of – and on – Diversity" (2001) 80:1&2 Can Bar Rev 604 at 618.

47 See Wade K Wright, *supra* note 36.

48 Van Praagh, *supra* note 46 at 617.

49 *Supreme Court Act Reference*, *supra* note 7 at para 87.

missions on the merits. Forty lawyers appeared on behalf of these parties. All the parties made both oral and written submissions.

The *Reference* opinion was authored *per curiam*, drafted first in English. In its reasons, the Court referred to fifteen cases, all judgments of appellate-level courts. It cited three constitutional texts (*Constitution Act, 1867*, *Constitution Act, 1982*, and *Constitution Act, 1965*, SC 1965, c 4), one statute (*Supreme Court Act*), and four bills. It cited ten texts commissioned or produced by federal government actors. It cited twenty-two academic texts and twenty-three academic authors. Seven of those texts were written in French; three of the authors are women. The Court did not cite any of the expert reports that were included in the record or any sources of foreign law.[50] The opinion was 112 paragraphs long and was issued five months after the *Reference* was heard. The hearing was held over three days, ten months after the Governor in Council issued the Notice of Reference. It was the only reference heard by the Court in 2013.

It is hard to know whether any of these numbers are meaningful without situating them within broader trends. On some issues, such analysis is possible. The Supreme Court releases statistics of the Court's work over ten year periods[51] and there has been a trend in the scholarly literature toward empirical study and theorization of the Court's decision-making process in the modern era.[52] As a result, the *Reference* opinion can be read in light of existing studies of whether American models of strategic and attitudinal decision making resonate in the Canadian context (they do not)[53] or whether there is a relationship between the party of a Prime Minister who appoints a judge and the judge's voting patterns (there is not).[54] Further, in the empirical spirit, the *Reference* could be read against the range of existing studies on the Court's decision making. Among other things, these studies investigate who intervenes in the

---

50 The Court cited one judgment of the Privy Council, *Edwards v Canada (AG)*, [1930] AC 124, but given that this was an appeal from the Supreme Court of Canada and decided under Canadian law, I do not classify it as a foreign source.

51 See Supreme Court of Canada, "Statistics, 2004 to 2014", online: <www.scc-csc.gc.ca/case-dossier/stat/index-eng.aspx>.

52 See e.g. Thaddeus Hwong, "A Review of Quantitative Studies of Decision Making in the Supreme Court of Canada" (2004) 30:3 Man LJ 353.

53 See e.g. *ibid*; 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* (Montréal: McGill-Queen's University Press, 2012).

54 See Benjamin Alarie & Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada" (2009) 47:1 Osgoode Hall LJ 1.

Court's cases and what effects they have,[55] how a particular judge influences the Court,[56] how a judge's role conception affects his or her decision making,[57] which jurisprudential theories are reflected in the Court's decision making,[58] whether a judge's biographical features have any explanatory force,[59] and who the Court cites in its reasons.[60]

Thinking about the *Reference* in relation to empirical trends reveals that scholars who study the Court using quantitative methods have not shown any particular interest in the Court's advisory role. While this may be explained by the belief that "reference questions make up a negligible part of the court's docket,"[61] it is somewhat surprising given the political context of many constitutional references and contemporary scholarly interests in the ideological influences on decision making.

It is also surprising because some empirical study of Supreme Court references could provide a richer framework for understanding individual reference cases. For example, such research could explore the contribution

---

55 See Benjamin RD Alarie & Andrew J Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48:3/4 Osgoode Hall LJ 381; Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany, NY: State University of New York Press, 2002).

56 See Peter McCormick, "Assessing Leadership on the Supreme Court of Canada: Towards a Typology of Chief Justice Performance" (1993) 4 SCLR (2d) 409; Peter McCormick, "Follow the Leader: Judicial Power and Judicial Leadership on the Laskin Court, 1973-1984" (1998) 24:1 Queen's LJ 237; Peter McCormick, "The Most Dangerous Justice: Measuring Judicial Power on the Lamer Court, 1991-97" (1999) 22:1 Dal LJ 93.

57 See Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013). See also Marie-Claire Belleau, Rebecca Johnson & Christina Vinters, "Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson" in Jamie Cameron, ed, *Reflections on the Legacy of Justice Bertha Wilson* (Markham, Ont: LexisNexis, 2008) 53; Marie-Claire Belleau, Annie Packwood & Rebecca Johnson, "L'honorable Charles D. Gonthier: une analyse jurisprudentielle quantitative comparée" in Michel Morin, ed, *Responsibility, Fraternity and Sustainability in Law: In Memory of the Honourable Charles Doherty Gonthier* (Markham, Ont: LexisNexis, 2012) 51.

58 See Daved Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007).

59 See Macdonald, "Was Duplessis Right?", *supra* note 31; George Adams & Paul J Cavalluzzo, "The Supreme Court of Canada: A Biographical Study" (1969) 7:1 Osgoode Hall LJ 61; Michael Bader & Edward Burstein, "The Supreme Court of Canada 1892-1902: A Study of the Men and the Times" (1970) 8:3 Osgoode Hall LJ 503.

60 See Peter McCormick, "What Supreme Court Cases Does the Supreme Court Cite?: Follow-Up Citations on the Supreme Court of Canada, 1989-1993" (1996) 7 SCLR (2d) 451; Peter McCormick, "The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview" (1997) 8 SCLR (2d) 527; Peter McCormick, "Do Judges Read Books, Too? Academic Citations by the Lamer Court 1991-96" (1998) 9 SCLR (2d) 463.

61 Songer et al, *supra* note 53 at 73.

that individual parties make to the Court's reasoning in references, tracing the impact of submissions by particular provincial Attorneys General, intervening interest groups, and *amici curiae*. This work could shed light not only on who has made an impact in the past, but also on whose voices are missing and which perspectives should be heard when the Court answers constitutional questions.

Quantitative analysis could also measure the extent to which constitutional concepts emerge or qualitatively develop in references and the impact of reference opinions on both lower court reasoning and government policy agendas. It could also reveal whether the frequency of calls for references and the nature of the reference questions posed have changed over time and whether such changes correlate to historical fluctuations in attitudes toward the Court. This research would help us assess the significance of the Court's reference jurisprudence and inform conversations about when a reference is warranted or desirable. Further, it would help in assessing the value of a reference procedure as a mechanism for managing constitutional disputes. The insights gained from all of this longitudinal knowledge could then contribute to comparative conversations, helping to build cases for or against the inclusion of a reference jurisdiction in constitutional design.

Finally, in contrast to the high courts in some other common law countries, including the United States and Australia, the Canadian Supreme Court is authorized to provide advisory opinions and has a well-established history with references. Accordingly, the Court's reference cases could be a manageable but meaningful data set for building and testing models of decision making particular to the Canadian Court. Rather than adopting American starting points, these models would start from Canada's legal, political, philosophical, linguistic, and historical cultures. At the same time, they could aim to account for comparative methods and cross-border institutional interaction in the Court's reasoning.

Overall, empirical study of references would both contribute to existing areas of research and illuminate new paths of inquiry. It would all contribute to analyses of the advisory jurisdiction's place in the Court's institutional design and the Canadian constitutional order. One part of this analysis could assess whether the advisory jurisdiction is one of the Court's constitutionally entrenched "essential features",[62] protected from unilateral reform by the Part V procedures.[63] Another part could consider what might have been, asking what the Canadian constitutional land-

---

62 On the Court's "essential features", see the *Supreme Court Act Reference*, *supra* note 7 at paras 94–95.

63 *Constitution Act 1982*, *supra* note 5, s 42(1)(d).

scape would look like if the Court did not have an advisory jurisdiction[64] or if certain references had never been decided. Yet another could look at the experience of upper house reform around the world,[65] and compare the Canadian experience of judicial involvement to the purely political processes of other jurisdictions. Together, these analyses would provide a frame through which to consider whether the *Reference* is as significant as it is believed to be.

D. The Contextual

The Court's opinion in the *Reference* is an important statement of law but not a final or exhaustive one. It binds political officials seeking to implement a reform agenda; an amendment will be constitutional only with compliance. At the same time, there is much more to the law of constitutional amendment than the rules and principles set out in the judges' opinion.

These rules and principles exist within a grander normative universe.[66] The thresholds of consent specified in Part V and interpreted in the judgment sit alongside multiple sources and types of law. These laws interact. This entire universe bears on actors who try to reform the constitution. Some rules are attributable to official written sources. For example, under section 35.1 of the *Constitution Act, 1982*, the federal and provincial governments must convene a constitutional conference if they intend to amend section 91(24) of the *Constitution Act, 1867* ("Indians and lands reserved for Indians") and they must invite "representatives of aboriginal peoples of Canada" to discuss the amendment. Similarly, pursuant to the *Regional Veto Act*,[67] a Minister of the Crown can only initiate an authorizing resolution under Part V if a majority of the provinces has consented to the amendment.[68] The *Act* has a broad definition of what "majority" means.[69]

---

64 This could have been the case if the Privy Council held that the advisory jurisdiction was unconstitutional in *Ontario (AG) v Canada (AG)*, [1912] AC 571, 3 DLR 509.

65 For summaries of recent attempts to reform second chambers around the world, see Online Symposium on Bicameralism, *Verfassungsblog* (blog), online: <www.verfassungsblog.de/category/schwerpunkte/bicameralism-an-its-discontents/>.

66 The language of "normative universe" is from Robert M Cover, "Foreword: *Nomos* and Narrative" (1983) 97:1 Harv L Rev 4.

67 *An act respecting constitutional amendments*, SC 1996, c 1.

68 *Ibid*, s 1(1).

69 The majority must include Ontario, Québec, BC, two or more of the Atlantic provinces with combined populations of at least fifty percent of the population of all the Atlantic

Other sources add to the terrain—common law duties, constitutional conventions, codes of conduct, the expertise of experienced counselors, and so on. Within this landscape, government actors seeking constitutional reform have a duty not to unilaterally interfere with the basic structure of the constitution[70] and a duty to bargain in good faith when called to the negotiating table.[71] They are expected to respect the conventions of responsible government, the customs of party discipline, and the codes of conduct that structure constitutional conferences.[72] They feel the authority of advice from seasoned statespeople; they are led by the example of experienced negotiators; they are influenced by the duties of their office; they have personal moral compasses.[73]

Within this normative universe, the *Reference* opinion makes an important contribution. It offers official interpretations of law, which are associated with defined institutional processes of enforcement and dispute resolution. It presents reasons for why certain procedures must be followed to lawfully reform the Senate and for why we should think through future cases in particular ways. It offers a public framework for talking about constitutional amendment. It constitutes fodder that could facilitate the negotiation of Senate reform among the provinces or foment existing tensions along federal-provincial lines.[74] It broadcasts the message that our constitution calls for consensus.[75]

But for all that the *Reference* opinion might offer, its normative force is not fixed. Legal normativity is not that simple. It is not just transmitted

---

provinces, and two or more of the Prairie provinces with combined populations of at least fifty percent of the population of all the Prairie provinces (*ibid*, s 1(1)(a)–(e)).

70 See *OPSEU*, *supra* note 6 at 57; *Reference*, *supra* note 2 at paras 48, 52–70.

71 See *Secession Reference*, *supra* note 6 at paras 88–104.

72 Customary law is that which finds "direct expression in the conduct of men toward one another." It is a "language of interaction" and an "unwritten 'code of conduct'" that develops in the space between people as they interact (Lon L Fuller, "Human Interaction and the Law" (1969) 14 Am J Juris 1 at 1–3 [Fuller, "Human Interaction"]). Galanter's concept of "indigenous law" is similar. It too emerges from interaction, capturing the "concrete patterns of social ordering" found in institutional settings (Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 J Leg Pluralism 1 at 17).

73 These types of norms are "latent" because they are both implicit and inferential (see Roderick A Macdonald, "Les *Vieilles Gardes*: Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives" in Jean-Guy Belley, ed, *Le droit soluble: Contributions québécoises à l'étude de l'internormativité* (Paris: Librarie générale de droit et de jurisprudence, 1996) 233).

74 On the bargaining and regulatory endowments of judicial decisions, see Galanter, *supra* note 72 at 6–10.

75 On the special, general, facilitative, mobilizing, and communicative effects of court decisions, see *ibid* at 11–14.

from state to citizen or court to political actor. The framework, reasons, rules, and principles contemplated in the *Reference* opinion acquire their meaning as they are put into practice. The forms that they take get worked out as legal actors carry out the duties of their offices and interact with each other in the course of their work. Institutional pressures are exerted; normative arguments are made; they interact, converge, and are transformed; assumptions are adjusted; conduct continues. In any situation, the actors navigate the obligations and influences that weigh on them.[76] They comply, resist, and adjust their actions and expectations. By doing so, they communicate with other actors and observers.[77] The meaning of the judgment, its messages, and its effects depend on the diverse capacities and cultures of the legal subjects who receive them.[78] The meanings and effects are therefore fluid; they are shaped, channelled, and expressed by assertions, interactions, aspirations, and narratives.[79]

This fluidity of the law of constitutional amendment pre-existed the *Reference* and it will continue despite the rhetoric of certainty associated with a Supreme Court judgment. For example, the scope of Part V will continue to be worked out as government actors pursue institutional reform in the future. By witnessing the proposals that are raised and the responses that are given, we will come to make sense (or not) of what triggers the Part V procedures. From this perspective, we can ask, for instance, why the *Regional Veto Act*, which arguably changes the thresholds of consent imposed by Part V, was accepted as constitutionally valid but the *Senate Reform Act* was not. While the reasons are surely not just legal, context would help us to determine how the law can reconcile these outcomes. Further, as actors continue to try to reform the Senate without triggering Part V, whether from inside or outside the Senate,[80] the boundaries of Part V will be staked as challenges are raised (or are not) and defences mounted (or not). These boundaries will be provisional, restaked over time with new cases, new actors, and new arguments. Moreover, with each proposal and each negotiation we will come to assess the customs, conventions, and latent norms of constitutional amendment. This fluidity is not unique to the *Reference*; it simply reflects the nature of law.

---

76 See Martha-Marie Kleinhans & Roderick A Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS 25.

77 See Cover, *supra* note 66 at 7–10.

78 See Galanter, *supra* note 72; Cover, *supra* note 66.

79 *Ibid*.

80 See two examples raised in Kate Glover & Hoi Kong, "The Canadian Senate & the (Im)Possibilities of Reform" (12 October 2014), Online Symposium on Bicameralism, *Verfassungsblog* (blog), online: <www.verfassungsblog.de/en/canadian-senate-impossibilities-reform/#.VMZ2KMZHbDM>.

In this way, the demands of the constitution in the context of constitutional amendment are "worked out through a multi-faceted interaction of understandings and beliefs and commitments"[81] and the Court is "but one...partner in the formulation of those understandings."[82] The *Reference* must always be read—and its significance always assessed—within this broader normative scheme. This is a humbling reading of the *Reference*, one that reminds us that the Court's judgment is just one part of a much larger conversation about the process for achieving Senate reform. Being humbled by the scope and complexity of the law of formal constitutional amendment might be daunting. Its daunting character could be amplified when we consider that formal constitutional amendment is just one part of constitutional change writ large.

But in whatever way this reading of the *Reference* is daunting it is also an opportunity. It is a chance to think about the work of the Supreme Court in context, in light of the diverse legal terrain in which the Court operates and from which disputes emerge. It is also a chance to see a messier side of normative experience at home in the legal sphere and to ask what this messiness means for our assessments of the Court's significance. Further still, it is an opportunity to see how the most seemingly state-centric, public law issues and institutions are inextricably tied to social life and human agency. To the extent that this is not the usual starting point for thinking about the Court and its work, that which is humbling or daunting also points to further routes of inquiry. I examine these routes of inquiry, and the need for them, in Part II.

II. Reading the Readings

The four readings set out in Part I focus on one opinion of the Supreme Court. But in focusing on the work of the Court, the readings also say something about the Court as an institution. More specifically, they say something about how the Court as an institution is understood. In this Part, I explore those understandings, arguing that contemporary dominant narratives do not say enough about the Court as an institution in a world in which the nature of law and the experience of legal normativity are not defined by proximity to the state. I contend that this gap should be filled in order to get a better grasp on why and in what ways we should care about the Court today. I propose a research agenda aimed at securing that grasp. The claim is that pursuing this agenda can help us to consider the ways in which the Court matters—and does not—in our diverse social realities and complex legal landscapes.

---

[81] Van Praagh, *supra* note 46 at 618. See also Cover, *supra* note 66.

[82] Van Praagh, *supra* note 46 at 618–19.

A. Dominant Narratives

There is no universal understanding of the Court as an institution. The contemporary written record about the Court is vast.[83] It tells many stories from various perspectives. Some have taken hold in popular discourse and legal culture, while others have not. Some have oriented around common themes, while others have resisted. Within the broad strokes of these stories and themes, two storylines are particularly prominent.

The first is a story about how the Court came to be a significant institution in Canada. As the story goes, the Court was quiet for a century.[84] It was "anonymous",[85] "captive",[86] and a "minor blip on the Canadian political scene."[87] It suffered the effects of political ambivalence and public doubt.[88] It deferred to the Privy Council;[89] it lacked support from the legal profession;[90] and it made the provinces nervous with its power of centralization.[91] Yet according to the story, the Court became prominent and loud in the latter half of the twentieth century. This Court shed its timid reputation gradually: appeals to the Privy Council ended; the Court gained

---

83 For the purposes of this paper, I look to the written record from 1990 to the present.

84 See Ronald I Cheffins,"The Supreme Court of Canada: The Quiet Court in an Unquiet Country" (1966) 4:2 Osgoode Hall LJ 259. See also 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; 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 5.

85 Ian Bushnell considered naming his book, "The Anonymous Lawmakers" (see *The Captive Court: A Study of the Supreme Court of Canada* (Montréal: McGill-Queen's University Press, 1992) at xii).

86 *Ibid*; Bora Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29:10 Can Bar Rev 1038 at 1075.

87 Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company, 2000) at 3 [McCormick, *Supreme At Last*].

88 See House of Commons, *Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, 37th Parl, 3rd Sess, No 4 (23 March 2004) at 1116 (Jacob Ziegel); *Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, 37th Parl, 3rd Sess, (23 March 2004) at 1130 (Peter Russell).

89 See Bushnell, *supra* note 85 at 369; McCormick, *Supreme At Last*, *supra* note 87; R Blake Brown, "The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff" (2002) 47:3 McGill LJ 559 at 564–75.

90 See James G Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press for the Osgoode Society, 1985) at xiii–xiv, 23; Bushnell, *supra* note 85 at 268, 282–95, 369–79, 477, 486–94; Brown, *supra* note 89 at 565; Lamer, *supra* note 84 at n 63.

91 See Snell & Vaughan, *supra* note 90 at 23–24; Brown, *supra* note 89 at 568–73.

control over its docket; and the *Charter* and the principle of constitutional supremacy were entrenched.[92] The modern Court's voice is powerful, heard in homes, workplaces, churches, elections, and schools across the country. This is the "constitutionally essential" Court,[93] home to the "most important decision-makers in Canada."[94]

The second dominant storyline recounts what is thought to be important about the Supreme Court today. It is a storyline that tells of the Court's power, its judges, their judgments, and their processes of decision making. It tells of a Court that is one of Canada's most vocal and powerful public institutions. It recounts stories about the many hats the Court is expected to wear—final court of appeal, constitutional umpire, national advisor, policy maker,[95] symbol of national pride, centralizing force, and guardian of rights—and about the Court's many successes and failures in performing these roles. Along this storyline, the Court either runs our lives or is largely irrelevant. It is either a bulwark against abuses of majority power or an unwelcome interloper in the policy agenda of elected officials. Its judges are either respectful of interested parties or colonized by interest groups. It should both be reformed and stay the same. Whatever the case, the Court is legally, socially, and politically significant.

These narratives and the individual contributions from which they are constructed reflect (either implicitly or explicitly) certain beliefs about law. This makes sense. The way that we think about law informs our inquiry into it.[96] It bears on the way that we design our legal procedures and

---

92 See Peter McCormick & Ian Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: James Lorimer & Co, 1990) at 196; Patrick J Monahan, "The Supreme Court of Canada in the 21st Century" (2001) 80:1&2 Can Bar Rev 374; Peter W Hogg, "The Law-Making Role of the Supreme Court of Canada: Rapporteur's Synthesis" (2001) 80:1&2 Can Bar Rev 171; Lamer, *supra* note 84 at 27–28; Bushnell, *supra* note 85; Snell & Vaughan, *supra* note 90 at 252; *Supreme Court Act Reference*, *supra* note 7 at paras 76–95.

93 *Supreme Court Act Reference*, *supra* note 7 at para 87.

94 Philip Slayton, *Mighty Judgment: How the Supreme Court of Canada Runs Your Life* (Toronto: Allen Lane Canada, 2011) at xviii.

95 See Benjamin Perrin, "The Supreme Court of Canada: Policy Maker of the Year", *Inside Policy* (December 2014) 7.

96 In law, as in all things, "the only difference between a person 'without a philosophy' and someone with a philosophy is that the latter knows what his philosophy is" (FSC Northrop, *The Complexity of Legal and Ethical Experience: Studies in the Method of Normative Subjects* (Boston: Little, Brown and Company, 1959) at 6). Northrop's formulation is a variation on a common theme in legal scholarship. Dworkin says that law is "drenched" in theory (Ronald Dworkin, "In Praise of Theory" (1997) 29:2 Ariz St LJ 353 at 360); Macdonald writes that all human activity has an "intellectual frame" (i.e. a "temporal field" and a "theoretical orientation") (Roderick A Macdonald, "Here, There ... and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden" in

institutions. It shapes our expectations of these institutions and our calls for their reform. Moreover, it coalesces in the legal narratives that we tell ourselves and that we find persuasive.[97] It follows that the way we think about law shapes the way that we think about the Supreme Court, the way that we study it, the way that we read its cases, and the stories we tell to make sense of them.[98] It informs the questions that we ask about the Court and the range of answers that we conceive of as possible. This relationship is reciprocal; by asking certain questions and considering certain answers, we reinforce the beliefs about law that shape the questions and answers.

The contributors to the modern written record about the Court do not all hold the same beliefs or assumptions about law. The record is theoretically and methodologically rich. But despite this richness, the dominant narratives exist against a background of common basic beliefs and assumptions about law. These basic beliefs and assumptions coalesce into a dominant "ethos" or paradigm.[99] When authors and readers share basic assumptions about law, a story can take certain starting points for granted and a dominant narrative can emerge. The corresponding ethos need not line up precisely with well-defined theories. Rather it can embody a set of prominent values, attitudes, and aesthetic commitments.[100] The ethos then makes sense of the narratives and the narratives make sense within the paradigm.[101]

Lynne Castonguay & Nicholas Kasirer, eds, *Étudier et enseigner le droit: hier, aujourd'hui et demain* (Cowansville, QC: Yvon Blais, 2006) 381 at 386 [Macdonald, "Here, There"]); Devlin says that there is "no such thing as presuppositionless decision-making" (Richard F Devlin, "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27:1 Queen's LJ 161 at 168 [Devlin, "Jurisprudence for Judges"]).

97 For examples that reveal the power of dominant narratives, see Brian Z Tamanaha, *Beyond the Formalist-Realist Divide*: *The Role of Politics in Judging* (Princeton: Princeton University Press, 2010); Brown, *supra* note 89. 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; Kleinhans & Macdonald, *supra* note 76 at 43.

98 See Cover, *supra* note 66.

99 Davies, "Ethos", *supra* note 3. Arthurs uses the language of "paradigm" rather than ethos in HW Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) at ch 1.

100 See Davies, "Ethos", *supra* note 3 at 90.

101 The beliefs captured within the paradigm might not be the result of conscious reflection or choice. As Kleinhans & Macdonald contend, when we speak of certain basic beliefs, such as the belief that the state is the source of law, we may be overstating the consciousness of action. Certain things are so basic that we haven't actually formulated beliefs about them. This is "not because we doubt them, but because we are too busy rely-

In thinking about prevailing legal paradigms and the study of the Supreme Court, two lines of thought in twentieth-century Anglo-American legal theory are of particular interest. The first is the entrenchment of legal centralism, the belief that law is a centre around which events unfold and that the state, its institutions, and its officials are at the centre of law.[102] In Anglo-American orthodoxy, centralism is often associated with monism, the belief that law is a coherent, autonomous system, and positivism, the view that law's validity flows from its source (i.e. the state).[103] Together, these beliefs have contributed to an ethos that values order, authority, objectivity, and formality when it comes to law.[104]

The second line of thought is a manifestation of the first. It reflects a preoccupation with judges and judicial decision making within conversations about the nature of law. This preoccupation can be seen in intellectual lineages connecting Austin to Gray and the legal realists at midcentury through to the Hart-Fuller and Hart-Dworkin debates in the latter half of the twentieth century.[105] Along these lineages, theories of judicial

---

ing on them as we go about believing and doubting other things." The trouble arises when we forget that these are, at their root, matters of belief and that "today the truth conditions of claims made about law are not empirical, but directly rely upon this belief" (*supra note* 76 at 41–42).

[102] Many authors have identified this theme as the defining paradigm of Western legal philosophy and the orienting philosophy of Western legal scholarship. See e.g. *ibid* at 41; Arthurs, *supra* note 99 at ch 1; Davies, "Ethos", *supra* note 3 at 91–93; Galanter, *supra* note 72 at 1; Mark Greenberg, "The Standard Picture and Its Discontents" in Leslie Green & Brian Leiter, eds, *Oxford Studies in Philosophy of Law*, vol 1 (Oxford: Oxford University Press, 2011) 39 [Greenberg, "Standard Picture"]; Mark Greenberg, "The Moral Impact Theory of Law" (2014) 123:5 Yale LJ 1288 [Greenberg, "Moral Impact Theory"].

[103] See Davies, "Ethos", *supra* note 3 at 91–93; Roderick A Macdonald, "Custom Made: For a Non-chirographic Critical Legal Pluralism" (2011) 26:2 CJLS 301 at 309 [Macdonald, "Custom Made"].

[104] See Davies, "Ethos", *supra* note 3.

[105] See e.g. John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (London: Weidenfeld and Nicolson, 1954); John Chipman Gray, *The Nature and Sources of the Law*, 2nd ed (New York: MacMillan, 1924); Karl N Llewellyn, "A Realistic Jurisprudence: The Next Step" (1930) 30:4 Colum L Rev 431; Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930); Karl N Llewellyn, "Some Realism about Realism: Responding to Dean Pound" (1931) 44:8 Harv L Rev 1222. See also the writings collected in William W Fisher III, Morton J Horwitz & Thomas A Reed, eds, *American Legal Realism* (New York: Oxford University Press, 1993). For the debates with Hart, see e.g. HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1997); HLA Hart, "Discretion" (2013) 127:2 Harv L Rev 652; HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983); HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593; Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630; Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986). See also Ronald Dworkin, *Justice in Robes* (Cambridge,

decision making were blended into theories of the nature of law. In addition, it became commonplace to explore the relationship between law and values in terms of the judicial method and role.

These two currents of twentieth century Anglo-American legal thought resonate in the dominant narrative of the Court. When the standard account is preoccupied by state law and when the nature of law is tied to what judges say and do, it makes sense for us to be particularly interested in the paraphernalia of official law—judges, legislators, courts, constitutions, statutes, and judgments. Further, it can be taken for granted that the Supreme Court and its judges are worth studying and that the judgments of the Court are authoritative and normative. It makes sense to focus on adjudication as the primary mode of decision making at the Court. This focus seems to be justified even though the Court operates through multiple decision-making processes, methods, and forms. It makes sense for us to be preoccupied with power struggles between official institutions and to frame inquiries about the Court's influence in terms of institutional relationships rather than interaction among citizens. Further, it makes sense that we look to the Court rather than communities to learn the meaning of the constitution. Collectively, it makes sense to focus on these particular issues because this is where the prevailing understanding of law encourages us to look.

These currents resonate in some of the ways we read the *Reference*. For example, they draw our attention to the power dynamics between the Court and other institutions of governance. When reading the *Reference*, we then ask questions about the effects of the Court's *Reference* decision on legislative and executive agendas. The dominant narratives and beliefs also draw our attention to the Court's judges and their process of decision making. We then collect qualitative and quantitative data on certain issues that are important within the paradigm (e.g. voting patterns, adherence to *stare decisis*, attitudinal and strategic influences) but not others (e.g. the normative effects of interacting legal orders). Moreover, the dominant paradigms compel us to analyze the coherence of the Court's jurisprudence. Accordingly, we examine the *Reference* in light of the doctrinal significance of constitutional architecture and interpretive ambiguities that must be worked out in future cases of constitutional amendment.

Ultimately, an ethos of centralism and judge-centricity makes sense of the prominence of the Supreme Court in the study and scholarship of law generally. In both legal education and scholarship, it is rarely necessary to justify the study of the Court or its judgments—the importance of the

---

Mass: Harvard University Press, 2006); Geoffrey C Shaw, "H.L.A. Hart's Lost Essay: *Discretion* and the Legal Process School" (2013) 127:2 Harv L Rev 666.

exercise is immediately obvious because it is consistent with basic premises of our legal paradigms.

B. Theoretical Narratives

Whenever we confront propositions that conflict with the way we usually understand the world, we have choices. We can try to accommodate the conflicting view within our current understanding. Or we can dismiss it as an outlier that need not be explained. Alternatively, we can adopt the conflicting view as our primary explanatory model.[106] Or we can ask what the conflicting view helps us understand about the world and about our current understanding of it.

In the next two sections of this paper, I propose that we think about the Court through a lens that is not the usual one. That is, I argue that there is merit to studying the Court through the lens of legal pluralism. A skeptical reader may be looking for a defence of the pluralist outlook from the outset. This skeptic would ask: What do we gain by expanding the definition of law to include non-state normative orders? Why do we need to include non-state orders within the concept of law in order to study the Court and its work in relation to them?

The skeptic is right to ask these questions. It is true that we need not adopt a pluralist understanding of law in order to see or study unofficial normative orders or to think about the Court's relationship to them. However, reflecting on the skeptic's questions both reveals the pull of legal orthodoxies and reinforces the merit in considering alternatives. Both support the rethinking that this paper seeks to promote.

First, the pull of orthodoxies. Asking what there is to gain from expanding the concept of law to include non-state orders is not a neutral question. When the question is posed in these terms, we presuppose that source is the key feature of law. This brings us into positivist territory from the outset. Understandings of law that do not identify pedigree as the defining characteristic of law are automatically excluded, alienated, or undermined.[107] The question also suggests that centralism is the starting

---

[106] Macdonald identifies a fourth strategy as paradigm revision (see Roderick A Macdonald, "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" in Andrée Lajoie et al, eds, *Théories et emergence du droit: pluralisme, surdétermination et effectivité* (Thémis, 1998) 9 at 12–14).

[107] See e.g. the critical legal pluralist hypothesis in Kleinhans & Macdonald, *supra* note 76; the linguistic focus in Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13:5 Cardozo L Rev 1443; the cultural focus and linguistic metaphors in Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579 [Webber, "Grammar"]; the postmodern conception in Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14:3 JL & Soc'y

point for any discussion of law and that non-state law must always be defended or justified as such.[108] The point here is not that centralism and positivism are incorrect assumptions about law. The point is to remember that they are assumptions. To ask the question in a way that prioritizes source and state presupposes the answer being sought.

Second, the merit of exploring alternatives. The skeptic's questions could, in the tradition of analytical jurisprudence, reflect a primary concern with understanding the nature of law through the analysis of key legal concepts. While the truth seeking and descriptive orientation of analytical jurisprudence can also take us into positivist territory, the more important focus for the purposes of this paper is the understanding of law and legal theory embedded within the analytical approach. Unlike the analytical tradition, this paper rests on the premise that doing legal theory is a way to consider how our beliefs about law shape the way that we see the world. It is also a chance to consider how those beliefs help us pursue our goals or hinder our pursuits. In this sense, the goal of doing legal theory is not to uncover universal truths about law. Rather it is to remind us that what we think are the best or only ways of understanding law or acting in relation to law are contingent. Further, it is to encourage us to explore whether there are better ways of understanding and acting when it comes to law given our particular aims and aspirations.[109]

In this paper, therefore, I am not trying to persuade the skeptical reader that a pluralist outlook necessarily captures the true conception of law. A conception of law is neither true nor false. Rather it has either more or less merit when measured against one or more other criteria. When it comes to the study of institutions then, the question for theorists should be whether thinking through a particular lens can help us realize the institutions that we want and need, in light of the world that we have and to which we each aspire.

At the end of the day, the skeptic can find value in the methodology of this paper without accepting a pluralist outlook. By juxtaposing the dominant narrative of the Court against an alternative narrative that is grounded in a different conception of law, we can come to see the domi-

---

279; the academic commitments in Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13:1 Soc & Leg Stud 57; and the form and human agency concerns in Fuller, "Human Interaction", *supra* note 72. On Fuller, see also Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart, 2012) [Rundle, *Forms Liberate*].

108 See Arthurs, *supra* note 99 at 1–12.

109 Devlin makes a similar claim in the context of advocating for social context education for judges (Devlin, "Jurisprudence for Judges", *supra* note 96 at 183). See also Richard F Devlin, "The *Charter* and Anglophone Legal Theory" (1997) 4:1 Rev Const Stud 19.

nant narrative and the assumptions of law that sustain it more clearly. Such is the essence of a comparative exercise of jurisprudence. In this sense, the exercise might help us to better articulate justifications of the status quo. Or, it might help us take advantage of the "great merit of legal pluralism," which is that "it demands that we surrender the privileged epistemic perspective of our own law, and use the insights provided by others' to consider our own afresh."[110]

C. Pluralist Narratives

The dominant narratives about the Court, and the beliefs about law that they reflect, help us think about some institutional aspects of the Court. As noted above, they draw our attention to power dynamics between the branches of government, to the legal and ideological influences on judicial decision making, to jurisprudential coherence, and to the doctrinal and social impact of the Court's work. However, the dominant narratives and paradigm are not helpful for understanding all aspects of the Court or its institutional life. They encourage us to accept rather than question the legal authority and normative force of the Court's judgments. In particular, they encourage us to accept the legal authority and normative force of these judgments in official processes like constitution making or constitutional reform.

Moreover, when it is assumed that official law is at the top of the legal hierarchy and that its importance is justified within the rational democratic state,[111] there is little motivation within law to explore how various legal orders (state, family, work, indigenous, customary, global, and local) freely interact and have reciprocal normative effects both before, during, and after a case at the Court. Rather, we most often focus on how the state legal order should either accommodate or dismiss non-state norms. This approach may promote certainty and predictability within law, but it does not resonate with the individual experience of navigating a range of rules in everyday life or making legal arguments or decisions.[112] Nor does it do justice to the complexity that characterizes today's legal landscape.

Further, when state law is prioritized over other legal orders, we are not compelled to study the customs and internal ordering of the Court as

---

[110] Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 at 198 [Webber, "Human Agency"].

[111] See Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39:1 Queen's LJ 175 at 199.

[112] See Roderick Alexander Macdonald, *Lessons of Everyday Law* (Montréal: McGill-Queen's University Press for the Law Commission of Canada and the School of Policy Studies, Queen's University, 2002) [Macdonald, *Lessons*].

issues of law. As a result, we miss out on asking about the "inner morality" of the Court as an institution, about how the institutional form of the Court measures up against the criteria of legality.[113] Moreover, we tend not to inquire into what work the institutional form of the Court does in "shaping the lives, roles, expectations and agency of those participating within it."[114]

Some of the issues that are of little importance within the dominant paradigm are those that come to mind in particular with the fourth reading—the contextual reading—of the *Reference*. This reading conjures an image of the Court that is supreme within the judicial pyramid of the official legal order, but which does not have the final word on the meaning of the constitution. On this reading, the Court's judgment is one legal artifact among many that weigh on legal decisions and actions. In the context of the *Reference*, the contextual reading suggests that government actors must respect the Court's interpretation of Part V, but that the ways in which the interpretation gets meaning, the way in which the prescribed thresholds of consent are reached, and the ways that the process of constitutional amendment actually unfold get worked out by the actors involved. The law is not contained within the Court's judgment and the *Reference* opinion is not a fixed map for how to lawfully amend the constitution. Rather it is one contribution to the evolving legal landscape and to the ongoing enterprise of lawfully pursuing and realizing constitutional change.

The contextual reading reflects a perspective that takes seriously the many different laws and legal orders that operate in any given situation. These laws and legal orders do not always, if often, orient around the state. They are expressed in multiple sources—experience, offices, morality, professional codes, political conventions, the constitution, statutes, legal tradition, and so on. This reading also takes legal actors seriously—the individual is not an abstract entity who is merely subject to law that is imposed from above or outside. Rather, he or she is a legal agent, one who makes law and legal meaning through personal judgment and interaction with others. On this reading, law exists in the spaces within and between people. It is not separate from the cultures, traditions, languages, communities, and realities in which it is lived, practiced, and understood. Rather, law is inextricably tied to context. It is not knowable in the abstract. Accordingly, the normative weight of a particular rule cannot be assumed by virtue of its source or its merit. The authority of a particular institution cannot be assumed by virtue of its status. The constitu-

---

[113] On these criteria, see Lon L Fuller, *The Morality of Law* (New Haven, Conn: Yale University Press, 1964) [Fuller, *Morality*].

[114] Kristen Rundle, "Reply" (2014) 5:1 Jurisprudence 133 at 134.

tional character of a rule cannot be assumed by virtue of its formal entrenchment.[115]

The contextual reading of the *Reference* confronts us with questions about the Court itself. In particular we are confronted by questions about the Court's significance. In a world with so much law, both official and unofficial, and in which legal agents—in all their diversity and normative messiness—are "irreducible site[s] of normativity,"[116] of what significance is a single court, even a "supreme" one? If we then extend the inquiry by looking across the legal landscape, we see that law is both globalized across traditional borders and localized in the diverse lives of individuals. Moreover, we see that there is perpetual disagreement about the rules that govern any particular situation and the claims made to justify various positions on these rules.[117] Within this landscape of legal complexity, it is fair to ask why we should care about the work of a national, domestic court. Moreover, to the extent that we should care, we must also consider the lines along which our caring and attention should be directed.

The contextual reading—and the questions that flow from it—align more closely with a pluralist ethos or perspective than with the dominant paradigm.[118] Legal pluralism as a theory or hypothesis about law comes in many versions—weak and strong, colonial, new, and critical. To cut through the variation, we can think of legal pluralism in terms of themes—the hermeneutic, the plural, the adaptive, and the decentering.[119] We can also think of it as an ethos, as a pluralist method, movement, or attitude. 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."[120] Within this ethos, law is fully embedded in social life, it is

---

115 This understanding of law is informed by the work of many authors. The particularly influential texts include: Fuller, "Human Interaction", *supra* note 72; Macdonald, *Lessons*, *supra* note 112; Macdonald, "Here, There", *supra* note 96; Webber, "Human Agency", *supra* note 110; Webber, "Grammar", *supra* note 107; Galanter, *supra* note 72; John Griffiths, "What is Legal Pluralism?" (1986) 24 J Legal Pluralism & Unofficial L 1; Brian Z Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27:2 JL & Soc'y 296 [Tamanaha, "Non-Essentialist Concept"]; Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30:3 Sydney L Rev 375 ["Understanding Legal Pluralism"]; Arthurs, *supra* note 99.

116 Kleinhans & Macdonald, *supra* note 76 at 39.

117 On disagreement, see Webber, "Human Agency", *supra* note 110.

118 See Davies, "Ethos", *supra* note 3.

119 See Webber, "Human Agency", *supra* note 110 at 183–91.

120 Davies, "Ethos", *supra* note 3 at 110.

historically and politically contingent, and the possibilities for legal decision making are indeterminate and essentially plural.[121]

The merits of thinking of law in pluralist terms will always depend on the inquiry being pursued and the specifics of the pluralist understanding at issue. In general, however, a pluralist perspective is significant (and preferable) both empirically and conceptually. Empirically, it offers a way of thinking about law that is inextricably human. It accounts for the unofficial normative environments of our lives and the "tacit legal regulation" that makes official law possible.[122] At the same time, it accounts for the ways in which official law "reaches into the lives of legal subjects"[123] but posits the individual as a legal agent who can navigate and transform official law.[124] It draws attention to social and normative diversity and difference in social life,[125] highlighting the interaction of various normative commitments in both everyday and official experience. It aims to account for both law as implicit social agreement[126] and law as a moment of settling the fundamental normative disagreements that are inevitable in diverse societies.[127] Conceptually, it recognizes law's openness, contextuality, and limits.[128] It rejects centralism, positivism, monism, and prescriptivism as inherent features of law.[129] It denies that law is knowable only—or even primarily—as objective knowledge.[130]

There is nothing new about pluralism as a legal theory or as an ethos, either as an empirical claim or a theoretical lens.[131] And it is reflected in various forms in existing scholarship about the Supreme Court and even more so in critical analyses of the Court's jurisprudence.[132] The Court is a bijural institution, one that confronts and invokes foreign and interna-

---

121 See *ibid*.

122 Macdonald, *Lessons*, *supra* note 113 at 6. See also Davies, "Ethos", *supra* note 3 at 110.

123 *Ibid* at 103.

124 See Kleinhans & Macdonald, *supra* note 76.

125 See Davies, "Ethos", *supra* note 3 at 103.

126 See e.g. W Michael Reisman, *Law in Brief Encounters* (New Haven: Yale University Press, 1999).

127 See Webber, "Human Agency", *supra* note 110.

128 See Davies, "Ethos", *supra* note 3; Van Praagh, *supra* note 46 at 608, n 11.

129 See e.g. Roderick A Macdonald & David Sandomierski, "Against Nomopolies" (2006) 57:4 N Ir Leg Q 610; Macdonald, "Custom Made", *supra* note 103.

130 See Davies, "Ethos", *supra* note 3 at 107.

131 The history of legal pluralism in social life and in legal scholarship has been traced elsewhere (see e.g. Tamanaha, "Understanding Legal Pluralism", *supra* note 115).

132 See e.g. Jean-Guy Belley, "Le pluralisme juridique comme orthodoxie de la science du droit" (2011) 26:2 CJLS 257; Van Praagh, *supra* note 46; Kislowicz, *supra* note 111.

tional law and which must navigate Canada's civil, common, and Aboriginal law traditions. No one would seriously argue that official law is the only normative order that informs human conduct. The normative force of the family, the religious community, and the workplace are well established. And yet understandings of the Court as an institution often do not account for these other normative orders. The Court is often treated as if it is separate from non-state normativity and as if, when it confronts other normative orders through its cases, judgments, and processes, the "real" legal questions have to do with how the state legal order should deal with those other orders in order to settle the law.

Ultimately, thinking about the *Reference* and the Court from a pluralist perspective draws our attention to legal issues, questions, frameworks, and answers that are not priorities from a centralist or positivist perspective. In the next section, I sketch part of a research agenda that flows from such a perspective, focusing in particular on the constitutional dimensions of the agenda and issues that flow from the *Reference.* In presenting this agenda, I aim to show why pursuing it has merit.

D. Future Narratives

There is no single research agenda that flows from a pluralist study of the Court. Pluralism is itself plural[133] and the possible lines of inquiry are vast. Here I point to six parts of a research agenda. As a whole, the agenda is intended to be suggestive rather than exhaustive. To pursue the lines of inquiry presented here is to pursue an understanding of the Supreme Court of Canada in today's legal world, a world characterized by legal complexity and social diversity, a world in which law is global and local, pervasive and obsolete, in perpetual flux. Further, it is to pursue an understanding of the Court's relationship to law given the theoretical implications of law's empirical complexities. There are many directions in which such an agenda could go. This one focuses on the directions that make sense in the context of the *Reference*, those dealing with the constitutional, the transformational, the normative, the institutional, and the interpretive.

The first area of inquiry deals with normativity. It asks, as Van Praagh has done in the context of issues of identity, how we can reconcile the limited influence that the Court has in our everyday negotiations of life and the "heavy responsibility" that the Court bears as it "chooses and wields concepts" that have an impact on those negotiations.[134] It encour-

---

[133] See Margaret Davies, "Pluralism and Legal Philosophy" (2006) 57:4 N Ir Leg Q 577; Tamanaha, "Non-Essentialist Concept", *supra* note 115.

[134] *Supra* note 46 at 607.

ages us to explore the possibility that the Court's relationship to law is both less and more than is captured by the dominant narrative and to assess the implications of this possibility. On this view, the relationship is less because the Court's legal supremacy dims as its judgments take their place on the crowded map of normative possibilities that weigh on the everyday lives of individuals and communities. Our lives are governed by customs, regulations, and codes outside of official statutes, constitutions, and cases. In any particular social situation, the Court's judgments must be understood alongside claims made by the other legal orders at play. And in practice, the meaning and normative force of the Court's judgments will always depend in part on how individuals navigate the overlapping normative claims that bear on their lives[135] and how communities integrate statements of official law into their everyday practices.[136] The official law cannot be understood without attention to context and social practice.[137]

At the same time, the Court's relationship to law is also more because the crowded map of normative possibilities puts the Court and its judgments in potential interaction with countless other norms and institutions. Moreover, the Court has "a range of interpretive choices as it goes about the task of making decisions."[138] Given the Court's position within the Canadian polity, the stakes of both its more and less positions are high.

This perspective compels us to abandon the assumption that the existence of state law and the institutional legal order explain normativity.[139] Any commitment to this assumption overlooks the fact that the existence of a phenomenon, such as a judicial decision, 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.[140] 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 official pedigree of a judgment of the Court is sufficient justification for its invocation in deci-

---

135 On overlapping claims and individuals as an irreducible site of normativity, see Kleinhans & Macdonald, *supra* note 76.

136 See e.g. Cover, *supra* note 66; Kislowicz, *supra* note 111.

137 See the sources compiled at *supra* note 115.

138 Van Praagh, *supra* note 46 at 607.

139 On the assumption, see Greenberg, "Moral Impact Theory", *supra* note 102; Greenberg, "Standard Picture", *supra* note 102.

140 See Macdonald, "Here, There", *supra* note 96; Macdonald & Sandomierski, *supra* note 129 at 612.

sion making and dispute resolution.[141] Further, it plays out as an assumption that the Court's judgments have normative force and that the content of the "Court's law" is directly determined by the linguistic content of the judgment.[142]

But neither the dominant narrative of the Court nor the standard account of law that underlies it actually explains the force of the Court's judgments in human behaviour and in daily life. By assuming a necessary connection between the existence of official rules and human conduct, the nature of the relationship between normativity and the Court becomes a non-issue. An understanding of the Court shaped by a pluralist conception of law makes the character of this relationship an issue rather than an assumption. Indeed, with its focus on individuals and lived law, a pluralist narrative of the Court calls for an investigation of the normative effects of the Court's work in our lives as individuals, as officials, as office-holders, as members of communities, and so on.

The second area of inquiry deals with the interaction of legal orders, traditions, cultures, and norms. The centralist and monist account of law is not very helpful in addressing the issue of overlapping and interacting normative orders. In the story of the state legal order, official law and its corresponding institutions are at the top of the legal hierarchy and their paramount importance is justified within the rational democratic state.[143] Even though law is only one influence on our relationships and social lives, the internal view often presumes law's "paramount importance."[144]

In contrast, non-hierarchical normative interaction is a main theme of a legal pluralist conception of law. An account of the Court that starts from such a conception is therefore an opportunity to explore movement and interaction within and between normative orders that are relevant to the Court's work and operations. Indeed, it is an opportunity to appreciate this movement and interaction in all realms of the Court's institutional life: in its operations; in its reasoning; in the ways that conflicts are framed; in the arguments made; in the ways the Court's judgments are lived—or not—after they have been released; and in the movement of law across borders of all kinds, whether local, global, or conceptual.

In these ways, seeking out a pluralist understanding of the Court is a chance to investigate the Court's character as a possible site of interaction

---

[141] Macdonald, *Lessons*, *supra* note 112 at 7.

[142] See Greenberg, "Moral Impact Theory", *supra* note 102; Greenberg, "Standard Picture", *supra* note 102.

[143] See Kislowicz, *supra* note 111 at 199.

[144] See Van Praagh, *supra* note 46 at 608.

(and the implications of this character for the judicial role) and as a source of interacting norms and orders (and the implications of this role within the "complex web" of normative factors that guide and influence our behavior and relationships).[145] In this investigation, the objective is not merely to identify the orders and norms that are in flux, but to explore, as Kislowicz does in the context of religious freedom litigation, the nature and normative consequences of the interaction.[146] It is to take seriously the diversity of normative claims at play in society and to consider how to understand, confront, and settle them, to the extent that settlement eases social discord.[147] In the constitutional realm, such inquiries would look not only to competing claims about constitutional meaning but also to competing visions of constitutional thinking, reasoning, and argumentation and the role of "interlegality"[148] in both sustaining and alleviating the resulting conflict.[149] Further, as Borrows counsels, they would look to successful interactions to promote analogous success in other interactions,[150] such as between indigenous and official administrative legal orders, between workplace and religious orders, or between the gamut of orders that comprise the constitutional landscape.

The third area of inquiry calls for an appreciation of the relationship between the Court's institutional forms and the moral ends of law. The claim is that a legal pluralist outlook helps us to ask questions about the integrity of the design and operations of the Court, with an attention to the relationship between official and implicit orders.[151] We can ask how the Court's mandate is promoted or undermined by the quality and character of its internal law. We can ask whether the design of the internal

---

145 *Ibid*.

146 *Supra* note 111. See also Van Praagh, *supra* note 46; Webber, "Grammar", *supra* note 107.

147 See Webber, "Human Agency", *supra* note 110 at 176–82; Jeremy Webber, "A Judicial Ethic for a Pluralistic Age" in Omid A Payrow Shabani, ed, *Multiculturalism and Law: A Critical Debate* (Cardiff: University of Wales Press, 2007) 67 [Webber, "Judicial Ethic"].

148 According to Santos, "[o]ur legal life is constituted by an intersection of different legal orders, that is, by *interlegality*. Interlegality is the phenomenological counterpart of legal pluralism" (*supra* note 107 at 298).

149 See Webber, "Judicial Ethic", *supra* note 147; Webber, "Human Agency", *supra* note 110.

150 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

151 See e.g. Rundle, *Forms Liberate*, *supra* note 107; Roderick A Macdonald, "Office Politics" (1990) 40:3 UTLJ 419; Jeremy Webber, "A Society of Friends" in Richard Janda, Rosalie Jukier & Daniel Jutras, eds, *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (Montréal: McGill-Queen's University Press) [forthcoming in 2015]]; Fuller, *Morality*, *supra* note 113.

processes that structure the Court's daily operations also attends to the forms, limits, and fluctuating moral values that attach to different types of ordering. We can ask if 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—respects the ethos that justifies and sustains the Court's claim to legitimacy as a lawmaker. Ultimately, we can ask what normative order accords with the best sense of the Court as an institution and inquire into how to achieve these ideals.[152]

This interest in the "inner morality" of the Court as one of law's institutional forms follows up on a Fullerian conception of law,[153] as articulated by Rundle,[154] reflected in the work of Macdonald,[155] and explained by Kong.[156] On this conception, law is a special form of social ordering that is "defined not by the imprimatur of the state, but by those formal qualities which evidence a respect for human agency."[157] On this understanding, the Court is a legal institution not because it was created as such by the state. Rather, the Court is a legal institution because of the character and quality of the participation it offers to citizens in the course of fulfilling its law-making and law-interpreting roles.[158] Moreover, on this understanding, the Court's opinion in the *Reference* is law not because it states the views of Canada's highest judges, but rather because it embodies certain formal qualities that respect the agency of citizens and which warrant a reciprocal respect from those citizens.[159] This understanding of law and institutional design offers a framework for assessing the Court's legality in a way that accounts for the idiosyncratic eccentricities of the Court's institutional and human dimensions and which aspires toward access to justice and associated reform.

---

[152] A similar exercise is undertaken with respect to the internal ordering of a law faculty in Macdonald, *ibid*.

[153] Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Oxford: Hart, 2001).

[154] *Forms Liberate*, *supra* note 107.

[155] *Lessons of Everyday Law*, *supra* note 112 at Part 4.

[156] 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* (Montréal: McGill-Queen's University Press) [forthcoming in 2015].

[157] *Ibid*.

[158] See Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353.

[159] On these formal qualities, see Rundle, *Forms Liberate*, *supra* note 107.

As Arthurs reminds us, "[n]othing just happens."[160] That is, "[l]egal institutions and ideas do not simply emerge, evolve, reshape themselves, deteriorate, or disappear of their own accord."[161] This echoes the point of Justice Rand, who told an audience in 1965 that the Supreme Court, in its current form, is not a preordained or universal social institution. Accordingly, Rand urged, we must "take time off occasionally" to question our underlying assumptions about the Court and its existence.[162] On his 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.[163]

Ultimately, all of our legal institutions organize, channel, and facilitate human relationships and social values. This happens not just through the substantive decisions that the institutions render, but also through interpretations of the messages expressed, the procedures established, and the practices that emerge through the configuration of these institutions. This area of inquiry calls for us to ensure that the values and assumptions that are given expression through the Court's institutional design are consistent with the demands of legality and the Court's place in Canada's constitutional order as an institution of justice, a matter which brings us to the fourth area of inquiry.

This fourth line of research directs our attention to the Court's place in the constitutional order and possibilities for Court reform, both inside and outside formal channels of constitutional reform. Following up on the *Supreme Court Act Reference*,[164] this area of inquiry calls for a more comprehensive account of the ways in which the Supreme Court is a "constitutionally essential"[165] institution and how it acquired that status. Further it calls for a more considered analysis of the multiple lenses through which the Court's "essence"[166] can be interpreted and the constitutionally important components of that essence. Going forward, this area of inquiry calls for a map of the essential features of the Supreme Court of Canada

---

160 *Supra* note 99 at 1.

161 *Ibid.*

162 The Honourable 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 at 23. "[I]t 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 ... [w]e 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."

163 *Ibid.*

164 *Supra* note 6 at paras 74–106.

165 *Ibid at* para 87.

166 *Ibid* at para 101.

and an exploration of the implications of this map for the future of the Court. It would explore how values of pluralism and diversity should be reflected within the architecture of the constitution and should inform understandings of role, representation, and process in institutional design. Finally, it would advance contemporary analyses of the constitutional amending formulas set out in Part V of the *Constitution Act, 1982* (Part V), assessing how they can operate for Court reformers, while situating reform agendas within the bigger picture of the full range of processes by which the constitution can change.

The fifth area of inquiry follows up on the fourth. Through a pluralist lens, we may develop a more robust account of the role of the Court, its legitimacy in a diverse world, and a standard by which to assess the Court's functioning in that role. Some legal pluralists have observed that official institutions, including courts, have too long preoccupied the legal landscape and that the legal conversation must change to account for the range of legal phenomena and institutions in our lives.[167] Moreover, Cover argues that judges are always jurispathic, meaning that when confronted with social realities saturated with law, they must "kill" some of that law in order to resolve disputes between parties.[168] Yet Webber's understanding of the judicial role in a plural legal landscape offers a positive frame through which to understand Cover's observations.[169] For Webber, when we pay attention to disagreement in society, we realize the need for mechanisms that help us reach a common result and thereby maintain "peaceable social relations."[170] As a result, the Court (and courts generally) can be understood as one strategy (among many) for overcoming the normative disagreement and plurality that flows from social diversity. On this view, we can posit both a role for the Court and a standard by which to assess its successes and shortcomings:

> [O]nce one takes disagreement seriously, the formal structures for sifting and aggregating arguments represented by democratic institutions carry distinct benefits. They provide concrete and knowable mechanisms for popular participation; they allow citizens to speak in

---

167 Webber makes this observation, noting that legal pluralists have "tended to treat [institutions of the state] with disdain, perhaps because those institutions seem to be characterized by authoritative diktat rather than the deference to context; perhaps because legal pluralists are interested in affirming subcultures and subaltern groups, and for these groups the state can appear to be homogenizing and hegemonic; or perhaps because some pluralists yearn for the unforced and natural unity that is manifestly not present in state institutions" ("Human Agency", *supra* note 110 at 180). See also Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869.

168 *Supra* note 66 at 53–54.

169 "Human Agency", *supra* note 110 at 180–81.

170 *Ibid* at 181.

> their own voice; and they do so on the basis of rough equality ... Moreover, they deal with residual disagreement through elections and voting, in a manner that again observes a rough equality.[171]

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.[172] Thus this account compels us to confront the basic questions of the Court's functioning, rather than assuming they have already been answered or are resolved by definition.

Finally, law is a way of imagining the world. It is a lens through which we can see or a filter we use to organize our social experience. Thus, any question that has already been asked about the Court within the dominant narrative can be reposed and re-examined in light of legal pluralist assumptions about law. While a legal pluralist outlook is not a panacea for resolving entrenched debates or nagging questions about the Court, it offers the possibility of reframing inquiries, reimagining issues, reconfiguring methodological options, and reassessing the scope of possible answers. This exercise of rearticulating some part of the debates about, for instance, the appointment process or the linguistic capacities of appointees, might be sufficient to break new fertile ground in the discourse.[173] Moreover, attention to the pluralist understanding of law may inform our understanding of substantive issues in the cases before the Court, urging particularly helpful structures of reasoning, possible outcomes, or ways of seeing the issues.[174]

Ultimately, the Supreme Court will always matter as long as its judgments can be the basis of material consequences for citizens—whether an accused receives a new trial, whether Aboriginal title attaches to a tract of land, whether certain rights warrant official sanction. But the Court cannot initiate its cases or execute and enforce its judgments. These require external human action. Accordingly, the meaning and normative impact of each of the Court's judgments is ultimately decided on the ground, as procedures change (or do not), as title is respected (or is not), and as rights are exercised (or are not). The most important questions

---

171 *Ibid* at 180–81.

172 On courts' "multidimensional" relationship to disputes, see Galanter, *supra* note 72 at 10.

173 For discussions of these issues generally, outside the context of the Court, see Roderick A Macdonald, "Legal Bilingualism" (1997) 42:1 McGill LJ 119; Webber, "Human Agency", *supra* note 110.

174 See e.g. Kislowicz, *supra* note 111; Belley, *supra* note 132.

about the legal significance of the Court will always be asked from the perspective of the people who are subject to and live law, people who are necessarily complex and living in a complex world.

The questions contemplated in this research agenda aim to go beyond assessments of the cases that the Court decides and focus on the Court as an institution. They are questions about the health of a prominent public institution and about the ways that we try to access and pursue justice. The institutions of law matter because they provide ways for "those affected by law to identify and clarify the ends they seek and to communicate to others the reasons for valuing and pursuing those ends."[175] Ultimately, by proposing that we continue to ask whether we should care about the Supreme Court and in what ways, I am asking, in the paraphrased words of Lon Fuller: Does this institution, in the context of other institutions and the conditions in which we live, contribute to a way of life and of living that is worthy of our human capacities and experiences?[176]

Conclusion

This paper is a microcosm of a special issue on the *Reference Re Senate Reform* because it serves as a reminder that one case can be simultaneously understood in multiple, equally legitimate ways. Further, it is a reminder that what we learn from a judgment of the Supreme Court depends on what lenses we wear when we read.[177] In this contribution, the aim was to determine what reading and rereading the *Reference* could offer us as we try to understand the Supreme Court of Canada.

I have argued in favour of pursuing pluralist understandings of the Supreme Court of Canada in order to draw attention to questions about the Court in the complex legal and social terrain on which—and in which—the Court operates. To argue in favour of a pluralist lens is not to deny the explanatory virtues of the dominant narrative. Nor is it an attempt to diminish the significance of the Court or undermine the Court's adjudicative capacity. Nor is it to ignore the important role of the Court in Canada's federal and democratic constitutional order. Rather, the opposite is true. Proposing that we consider pluralist narratives is to suggest that thinking about law in a pluralist way encourages us to assess the Court's significance in a way that does justice to the diverse society in

---

[175] Kong, *supra* note 156.

[176] See Lon L Fuller, "Means and Ends" in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Oxford: Hart, 2001) 61 at 69.

[177] The use of a metaphor related to sight throughout this paper has its limits. Our understanding of the world is informed by all of our sensorial experiences and the filters through which we perceive those experiences.

which we live, the contextual, contingent nature of law, and the capacity of individuals in law-making and constitution-changing.

When we read the *Reference* through a lens of pluralism, our attention is drawn away from an exclusive focus on the prescriptions found in Part V and toward the practice, process, and principles of constitutional amendment. It is a reminder that the successes and failures of formal constitutional reform do not turn on the Court's interpretation of "method of selecting senators" or text of the 7/50 formula. Rather the future of reform lives in the actors who negotiate amendment and the citizens who live the constitution. Indeed, the *Reference* is as much a statement of official law as a reminder that the law of constitutional amendment is also made and remade outside of the courts. Further, reading the *Reference* through a pluralist lens encourages reflection on the traditions, cultures, and contexts that weighed on the parties' submissions and the judges' decision making and on the traditions, cultures, and contexts that were not represented or normatively significant.

When we study the Court through the lens of legal pluralism, instead of asking ourselves only what the Court tells us to do, we could be asking how and why the "Court's law" is meaningful in our diverse and multicultural world and in the local occurrences of our everyday lives. Instead of framing assessments of the Court in terms of formal state law alone, we could be asking what can be said about the way in which the Court and its work interact with the complete framework of rules, processes, and institutions that bear on our conduct. Rather than accepting that the Court is an "essential constitutional institution" because the Court says it is, we would consider how the meaning of "essential" changes according to our understanding of pluralism within the Canadian constitutional order. Rather than assuming that the Court's role is only to make other normative orders submit to the demands of state law, we could consider how the these orders interact in and with legal claims, judicial and everyday decision making, institutional forms and processes, and community and individual action, and the relevance of this interaction for the Court. Instead of assuming that the Court is a legal institution only because of its official adjudicative mandate, we could also ask about the normative implications of the Court's internal ordering and the impact of that ordering on the Court's mandate in Canada's constitutional democracy.

The operating premise of this paper is that the goals of legal theory are not limited to exploring the nature (or natures) of law. Rather, the goal of doing 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 the relationship between law and life. A re-

reading of the *Reference* and a reimagination of the story of the Supreme Court through the lens of legal pluralism is intended to provoke this reflection.