

CONSTITUTIONAL PARIAH

Reference re Senate Reform
and the Future of Parliament

Emmett Macfarlane



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INTRODUCTION

The Making of a Landmark Case

IN *REFERENCE RE SENATE REFORM*, the Supreme Court of Canada ruled out major unilateral reform of the Senate of Canada by Parliament. The federal government, headed by Prime Minister Stephen Harper's Conservative Party of Canada, had sought to enact consultative elections and senatorial term limits for the upper house. The Senate was enmeshed in a scandal over expenses, and the public overwhelmingly favoured reform or abolition of the deeply unpopular institution. The court's 2014 decision might have stood as a simple story of the country's apex court acting, as it occasionally does, as a veto player via constitutional interpretation. If left at that, the reference could be regarded as just one of a string of constitutional defeats for the government of the day,¹ or analogized to the many times the court has adjudicated disputes between the two orders of government throughout the country's history.² Yet two factors make the decision stand out: first, within a very short period of time, the decision contributed to the most significant reform of the Senate – arguably even Parliament – in Canadian history; second, it marked the Supreme Court's first comprehensive foray into articulating the boundaries between key procedures in the constitutional amending formula since its entrenchment in 1982.

This book examines *Reference re Senate Reform* as a landmark case in Canadian constitutional law. With an analysis of the decision at its centre, the book undertakes a study of the Senate in light of the changes

implemented after 2014. It also assesses the decision's implications for the future prospects of constitutional change in Canada more broadly.

As a study of the Senate, the book first sets the context by exploring the various roles of Parliament's upper house, how its performance in fulfilling them has evolved, and historical efforts at reform. The Senate's critics view the institution as an anachronism in a modern democracy, with some advocating reform to make it an elected body and others wishing it were abolished altogether. These are far from new ideas as they relate to the upper house – it has long been the pariah of Canada's governing institutions. Such displeasure with the Senate, however, runs headlong into a constitutional framework and intergovernmental political context that makes reform notoriously difficult to achieve. The Harper government thought it had found a way to effect reform of the Senate without recourse to formal constitutional amendment. *Reference re Senate Reform* is, in part, the story of how the Supreme Court put an end to that aspiration but – perhaps ironically – paved the way for informal change to the Senate appointments process that may have lasting effects on Parliament and the legislative process for decades to come.

As a study of constitutional reform, this book explores the potentially far-reaching effects *Reference re Senate Reform* has for the future of constitutional change in Canada. Despite the changes to the Senate appointments process, the Supreme Court's arguably nebulous approach to assessing the requirements of the amending formula may ultimately hinder future constitutional change in other contexts. This is significant because the Canadian Constitution is already one of the most difficult to amend in the world.³ This book will specifically examine the implications of the decision for future attempts at reform, not just with respect to formal amendment but also in relation to informal constitutional change.

The Senate's status as the black sheep of Canada's governing institutions plays a pivotal role in the narrative presented in these pages. Historically, when the Senate of Canada has not been generally ignored, it has been an object of derision or controversy. This was no less true in the lead-up to the 2014 reference, as the Senate found itself mired

in an ongoing scandal over improper expenses. The scandal only exacerbated the general public's long-standing dissatisfaction with an unelected and arguably ineffective upper chamber. The political stakes should then be quite apparent: How does a governing party deal with the constitutional pariah that is the Senate without becoming tainted by mere association? In the lead-up to the reference, the Harper government itself became implicated by the expenses scandal, not only by having appointed a number of the senators most directly associated with dubious expenses but also in dealing with the fallout when it was revealed that the prime minister's chief of staff personally cut a cheque to assist one of those senators in reimbursing his expenses. By the time the Supreme Court ruled on the Conservatives' long-delayed reform proposals, the government had little appetite for dealing with the Senate at all – to the point of announcing a constitutionally dubious policy of non-appointment to the upper chamber.

When the Liberals took power under Prime Minister Justin Trudeau in 2015, they were seemingly left with a single option: If major reform or abolition was off the table, would it be possible to repair the institution's reputation by improving its performance? The proposal, a new “merit-based, non-partisan” appointments process, had the twin virtues of good policy and good politics. The Liberals sought to eliminate patronage and partisanship as the main criteria for appointment, installing an independent advisory body to nominate lists of candidates for consideration on the basis of merit, including criteria such as an exemplary record of public service. As a matter of policy, the proposal had the appeal of addressing what might be the most cynical view of the Senate: that it was little more than a halfway house for party hacks. As a matter of politics, the Liberals could insulate themselves from the Senate by emphasizing its renewed independence from the government of the day, thereby making it less likely they could become associated with future senatorial scandal.

The Senate itself has been the object of increasing academic scrutiny in the twenty-first century. From 1867 through 2000, only four book-length studies focusing on the upper house were published.⁴ In the last twenty years, this number has more than doubled, in addition to edited

collections and myriad articles focusing especially on the topic of Senate reform.⁵ The most important modern academic contribution in this vein is David E. Smith's *The Canadian Senate in Bicameral Perspective*, and the present study stands directly on the shoulders of Smith's and other previous works. Like many (though certainly not all) of these works, this book is written from the perspective of someone who believes an appointed Senate can serve a useful, if modest, function in the context of the broader democratic parliamentary system. This is especially true in light of the reforms that followed *Reference re Senate Reform*.

One of the unique aspects of the court's decision as a landmark case in Canadian law is its status as a reference. References, or "advisory opinions," are notable in the Canadian context in part because countries with similar systems of government (such as Australia) or courts comparably empowered with judicial review (such as the United States) do not permit the use of the reference procedure. Indeed, in the US context, advisory opinions are not permitted because the constitution limits federal courts to resolving cases and controversies (advisory opinions are technically not considered cases, although for reasons described in the next paragraph I do not consider "landmark case" a misnomer in this context). In Canada, references typically pertain to constitutional matters, but they can involve any area of law. Until recently, the legacy of the reference power was relatively understudied in Canada, but two books, one by legal scholar Carissima Mathen and another by political scientist Kate Puddister, shed important light on the dynamics around references and their general impact on doctrine and government decision making.⁶

One of the most notable features of references in the Canadian experience is that, as Mathen emphasizes, they contain all the trappings of regular cases. Technically nonbinding, they are treated as every bit as authoritative as any judicial decision, not only by governments that consistently adhere to the decisions but also by the courts themselves (Mathen notes, for example, the tendency of judges to apply them via *stare decisis* as they would normal cases, or even apply remedies).⁷ This is backed up by interview-based research where Supreme Court justices view references as a serious component of their work and an opportunity

to provide clarity to other branches of government on issues of importance.⁸ And it is clear that references are among some of the most notable judicial decisions in Canadian legal history, ranging from landmarks like the *Patriation Reference*⁹ or the constitutionality of Quebec secession¹⁰ to some of the leading federalism and Charter cases.¹¹ As Puddister notes, references also routinely result in the invalidation or rejection of legislation and policy (in more than a third of all such cases). They also feature a high third-party intervener participation rate – indeed, *Reference re Senate Reform* is among the highest of such cases, with seventeen interveners (twelve of them governments).¹²

Yet what distinguishes references is the ability of governments to choose to defer a degree of authority over policy-making to courts, and to frame the questions about legal (and often fundamentally political) issues in often broad and calculated ways. As Puddister writes, there is considerable evidence of a strategic dimension to the decision to initiate references, including using them as a method for dealing with hot-potato political issues, freezing the politics around an issue for a time, or even forcing negotiations between governments. Governments might be seeking assurance, not only about the constitutionality of their position or policy proposals but also to get courts to effect the political legitimization of those policies.¹³

The fact that many references take place in the context of abstract review (rather than dealing with a concrete case involving litigants directly affected by a law or policy) also structures how the Supreme Court deals with the issues before it, especially as it relates to highly salient constitutional references like the Quebec secession decision or *Reference re Senate Reform*. Mathen points out that institutional references like these involve “highly contested disputes that were inescapably political.”¹⁴ This is a feature of many constitutional cases, but the abstract nature of certain references effectively invites creativity on the part of the court. In the secession reference, the court famously articulated a novel duty to negotiate but then disavowed any direct oversight of a process that might result in negotiations over secession, something Mathen points out perhaps “signaled the Court’s awareness that it was on less-than-solid constitutional ground.”¹⁵

Reference re Senate Reform similarly has the Supreme Court drawing principles from the abstract. The court explicitly bases its decision on an approach that requires recourse to the nebulous concept of the constitutional “architecture.” Changes to the basic structure of the Constitution, the court argues, require provincial consent. This approach obliges the court itself to correctly identify and describe the animating core features of the institutions, processes, and values comprising the Constitution and then determine whether they are essential or not. It is a recipe for uncertainty, unintended consequences, and the creation of virtually unlimited judicial discretion over the acceptability of future constitutional reform proposals. In this respect, the analysis of this landmark case extends well beyond its immediate impact on the Senate.

This book consists of six chapters. In [Chapter 1](#), I examine the various roles of the Senate, including its roles as an independent chamber of sober second thought, as a defender of regional interests, as a protector of property rights, and as a defender of minority rights. These roles emanate from the Confederation debates and the essential purposes of the upper house, but they have evolved over time. The Senate’s record in fulfilling any one of these roles is mixed at best, and that mediocre-to-poor performance has contributed to the various reform proposals that have emerged, particularly over the last half-century. Yet it is also worth noting the ways in which these roles can sometimes come into tension, if not outright contradiction. An understanding of the Senate’s disparate roles is important because changes to them that are viewed by the court as essential – even ones that seem relatively minor on their face – now trigger a requirement for provincial consent under the constitutional amending formula.

[Chapter 2](#) explores historical reform proposals with an analysis of why these efforts have continuously failed. Critics of the Senate have generally been divided between those supporting various efforts to improve the institution along different dimensions and those in favour of abolishing the upper house altogether. Should provinces have a say in appointments, such that the Senate’s role as a defender of regional interests can be strengthened? Should the Senate be elected, to satisfy

those who view it as a vestige of an undemocratic tradition? Any of these changes would likely have profound implications for other aspects of the Senate's functioning, including its independence or its role as a complementary chamber of sober second thought. The perennial failure of these reform efforts in part reflects the fact that certain reforms were at cross-purposes with what other Senate critics disliked about the institution and wanted to see changed. This lack of consensus among the Senate's fiercest critics persists to this day. The chapter concludes with a brief examination of more modest or informal proposals for reform.

The events leading up to *Reference re Senate Reform* are presented in [Chapter 3](#). The chapter examines the Conservative government's legislative initiatives to introduce term limits for senators and consultative elections for senatorial selection. A series of difficulties, ranging from the government's minority status from 2006 to 2011, followed shortly by the explosive scandal over Senate expenses, contributed to delays in getting various bills to third reading in the House of Commons. The chapter then explores the lead-up to the reference itself, including an analysis of the reference first posed by the Quebec government to its own court of appeal. The combined effects of the scandal over expenses and Quebec's legal maneuvering compelled the federal government to initiate its own reference, setting the stage for the Supreme Court's landmark decision.

The Supreme Court's decision in *Reference re Senate Reform* is analyzed in [Chapter 4](#). In finding that the Harper government's proposed reforms required provincial consent under the general procedure of the constitutional amending formula, the court articulated its own view of the Senate's role, one that is arguably simplistic and incomplete. Moreover, although the court likely came to the correct conclusion regarding the introduction of consultative elections, the analysis in [Chapter 4](#) reveals that its logic as it relates to the issue of term limits suffers from serious inconsistencies. Most importantly, the court's approach to assessing the requirements for the amending formula – premised in part on the idea that changes to the “constitutional architecture” require provincial consent – introduces considerable uncertainty for future constitutional change.

Chapter 5 undertakes a study of the reform to the Senate appointments process in 2016, and the operation of the renewed Senate in its aftermath. The chapter provides a bit of an insider's perspective on the reform, as I provided non-partisan, unpaid advice to the government in crafting the new advisory process for appointments. The chapter then turns to appraising the major effects of the turn towards a merit-based, non-partisan appointments process. The rise of independent senators created organizational difficulties and added considerably to the complexity of the legislative process, particularly from the government's perspective. Parliament also witnessed a spike in amendment activity from the upper house, as both the independent senators and the Conservative opposition demonstrated a growing willingness to propose changes to government bills. Yet the Senate avoided obstructionism. It neither blocked government legislation nor played ping-pong with the House of Commons over bills. Thus, the renewed Senate has so far served the role largely envisioned for it: active engagement to improve or safeguard legislation while avoiding conflict or competition with the elected chamber. Much remains to be seen, particularly with regard to how a non-partisan upper house will come to organize itself. Further, the analysis is limited to the duration of a single Parliament. It remains unclear how senators appointed under the new process will conduct themselves in the context of a government of a different stripe.

Chapter 6 begins with an explanation of why the 2016 reform to the appointments process was constitutional, with reference to the court's logic in *Reference re Senate Reform*. Yet the success of the 2016 reform may constitute an outlier. The chapter examines why the court's approach clouds what future reforms to the Senate might be possible under the amending formula. It then turns to broader constitutional change, noting that the reference threatens to exacerbate Canada's constitutional stasis. Even informal changes, or attempts to alter constitutional conventions, may be heavily implicated by the court's structural approach, to the detriment of the flexibility and appropriate evolution of the Constitution and the various institutions, processes, and values that comprise it.

The conclusion examines the two major legacies of *Reference re Senate Reform* – its impact on reform of the Senate itself and its implications for future constitutional change. First, many of the criticisms of the renewed Senate focus on the impact the changes have for senatorial independence and for the functioning of Parliament. From the perspective of some critics, the enhanced legitimacy conferred upon the Senate by the elimination of patronage and partisanship threatens to turn the Senate into an activist or obstructionist chamber. Other critics fear unintended and negative consequences stemming from the elimination of partisanship in the Senate. My analysis suggests that these criticisms suffer from a misguided or distorted conception of independence, which includes both the independence of the Senate at the institutional level and the independence of individual senators. Second, the conclusion briefly dissects the prospects for creative constitutional change in light of *Reference re Senate Reform*. Although there may be possibilities to replicate the sort of informal reform brought about for the Senate appointments process, I argue that such reforms are akin to walking on a tightrope. To one side lies constitutional stasis, to the other the danger of inventive but ultimately illegitimate attempts at constitutional change. Whatever transpires, the legacy of *Reference re Senate Reform* for both Parliament itself and the future of Canada's constitutional evolution will continue to play out for years to come.

The Senate's (Unfulfilled) Roles

AT THE TIME OF Confederation, the inclusion of an upper house in the new Parliament was inevitable. As David E. Smith notes, “it would have been inconceivable not to have followed the model” of bicameralism,¹ both for the obvious favouritism shared by most of Canada’s constitutional framers towards the British exemplar and for the basic fact of federalism. The key debates over the Senate, which absorbed much of the 1864 Quebec Conference in the lead-up to Confederation, concerned the extent of representation allotted to the smaller provinces to compensate for the intention of a representation-by-population basis for apportioning seats in the lower house. Yet while the question of regional representation tends to dominate discussions of the Senate’s origins, the constitutional framers had a number of roles in mind for the upper house. This includes the much-vaunted role of the Senate as a chamber of “sober second thought,” with the upper house intended to act as an independent check on the worst impulses of the popularly elected lower house, and especially the Cabinet. The Senate is also regarded as a defender of minority rights and a protector of private property.

This chapter examines the Senate’s evolving history through its disparate roles and its execution of them. It finds that the Senate’s performance on any of these fronts is subject to much debate and disagreement. If the Senate acts with too much verve as an independent

check on the Commons or the executive, it is attacked as illegitimate. If it evinces too much deference, it is a useless rubber stamp. Whether viewed as an undemocratic thorn or a waste of resources, Canada's constitutional pariah can never seem to win. Its defenders, meanwhile, will consistently remind us that its valued sober second thought capacity extends beyond the brute force of its legislative powers. These disagreements are at the heart of the reform debates examined in [Chapter 2](#). In relation to the Senate's roles, it may surprise some to learn of the sizable chasms between how we talk about the Senate's purpose and how it has evolved in practice. The Senate has never been a particularly strong defender of regional interests, a function of the relatively weak exercise of its powers coupled with the fact that it is appointed, and has historically organized itself, on a partisan basis. Its role as a defender of minority rights emerges infrequently and pales in comparison with the role of the courts in the period since the *Canadian Charter of Rights and Freedoms*. And its role as a protector of property has all but vanished from contemporary discourse.

This chapter thus serves as the broad historical and institutional foundation to a primary background question faced by the Supreme Court of Canada in the 2014 *Reference re Senate Reform*: What is the Senate for? The questions of what the constitutional framers intended, how the Senate operates in practice, and how it has evolved with respect to its various roles all seem relevant to identifying the institution's role. Given that the court's landmark reference opinion centred on whether that role would be altered by certain reform proposals, and whether the provinces have an interest in those changes, the analysis in this chapter provides a basis for understanding and critically examining the court's reasoning.

THE SENATE AS AN INDEPENDENT CHAMBER

Janet Ajzenstat writes that the theory of checks and balances as it relates to a parliamentary system “regards Cabinet ministers as potential tyrants, the ambitious leaders in the lower house as potential demagogues, and senators as potential oligarchs. When all is working as it should, when

the branches are free to check each other, the system forestalls the three classic forms of despotism.”² The expectation among framers was thus that the Senate would act as a fully independent body within Parliament. Most frequently quoted on this point among the framers is John A. Macdonald, in debate in the legislative assembly:

[The Senate] would be of no value whatever if it were a mere Chamber for registering the decrees of the Lower House. It must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation which may have come from that body, but which will never set itself in opposition to the deliberate and understood wishes of the people.³

Similarly, George Brown noted that the desire among framers “was to render the Upper House a thoroughly independent body, one that would be in the best position to canvass dispassionately the measures of this House, and stand up for the public interest in opposition to hasty or partisan legislation.”⁴

The composition of the Senate differs from the British House of Lords in important respects, and the most immediately obvious one to the framers was the fact that the colonies lacked an aristocratic class. The Canadian Senate, therefore, would not come to represent the upper class (at least in a narrow sense) or protect it from unruly democratic decisions of those who represent the masses, but it would nonetheless embody a “deeply rooted conservatism” as the basis for the functioning of upper houses in modern times.⁵ Thus in terms of its role, “the absence of feudal-aristocratic elements from the social environment made no difference in the expectations as to the substantive function of a second chamber.”⁶

How could the Senate exercise this desired independence as an appointed body? Whatever influence the House of Lords may have had on the framers’ intentions surrounding the Senate, the framers were not ignorant of the electoral option. The upper house of the Province of Canada, the Legislative Council, underwent reform to hold

elections for new seats in 1856. This reform was in part due to complaints about obstructionism.⁷ Yet the result was a Legislative Council emboldened by its elected status and that directly opposed legislation passed by the lower chamber (including a supply bill in 1859), raising the spectre of long-term deadlock.⁸ This experience led representatives from Canada to favour an appointed upper chamber for the Senate, including Macdonald, who had been a supporter of elective reform in 1856.⁹ In the Confederation debates, only Prince Edward Island advocated strongly for an elected Senate, while most founders opposed the proposition for fear of conflict between the two houses (although the Opposition in the Canadian legislative assembly argued that an appointive chamber was a retrograde step).¹⁰ Brown argued that a system of appointments would ensure the independence of the upper house, as with the House of Lords, and that it should be “responsible to no one” and “thus no threat to the operation of responsible government.”¹¹ The impact of an elected upper house on responsible government remains relevant to the ongoing reform debate, and is discussed in more depth below.

Any assessment of whether the Senate has fulfilled its role as a truly independent body is complicated, for several reasons. First, although the framers clearly desired an upper house with the capacity to stifle imprudent or hasty legislation emanating from the popularly elected house – short of introducing money bills, the Senate’s formal powers are effectively equal to those of the House of Commons – they also anticipated that the Senate would never act as a legislative roadblock or in a way that would create deadlock between the two houses. This is reflected by Macdonald’s statement that the Senate will “never set itself in opposition to the deliberate and understood wishes of the people.”¹² This “democratic character” of the Senate was not sufficient to assuage the concern of the British secretary of state for the colonies, Henry Herbert, the Earl of Carnarvon, over the risk of collision between the two houses. Lord Carnarvon “insisted that some provision should be made in the *British North America Act* to overcome such a contingency, should it arise.”¹³ The result was section 26 of the act, a safety valve provision permitting the addition of four or eight senators

(representing equally the various regions) to overcome deadlock. Section 26 would not be used for over century, and, as discussed below, has been used only once in Canadian history.

Second, the Senate's role in this regard, at least as represented by the degree of activity it has generated in proposed amendments to legislation, has evolved considerably over time. For example, in the period from 1867 to 1960, the Senate amended 20.4 percent of all bills coming from the House of Commons.¹⁴ The Senate began to demonstrate considerable deference to the lower house in the modern era. For example, from 1963 to 1974, the percentage of bills amended by the Senate fell to only 3.5.¹⁵ The outright veto rate of bills during these two periods also fell, from 2.4 percent from 1867 to 1960¹⁶ to 1.2 percent from 1963 to 1974.¹⁷ During a more recent period, the Senate's amendment rate settled a bit higher, at 8.3 percent from 1994 to 2011.¹⁸ This evolution in the extent of the Senate's role and activity is reflected in existing scholarship, but it is somewhat remarkable that early studies of the Senate were every bit as interested in how often the *House* amended and rejected Senate bills as vice versa. The idea that the House "has been more drastic" in amending Senate legislation would likely be viewed as irrelevant to observers today.¹⁹ Such is the modern view of the Senate as a vestigial organ rather than an independent, active body of Parliament.

Finally, identifying whether the Senate has generally hit the sweet spot between being a vigilant, independent house exercising its powers to prevent or correct undue legislative initiatives and one that is obstructing the will of the people is hardly a science. Simple descriptive statistics about amendment rates or the exercise of the legislative veto tell only a part of the story. For one thing, many of the Senate's amendments to bills are "technical" rather than substantive. They involve drafting corrections, changes at the request of government, or administrative improvements consistent with the purpose or objectives of the bill. One study analyzing the period from 1925 to 1963 found that 70 percent of the Senate's amendments to legislation were technical in nature, rather than fundamental changes to bills or their purpose.²⁰ This may go some way to explaining why a strong majority of Senate

amendments are normally accepted by the House of Commons.²¹ The Senate can also employ an “indirect veto” by delaying legislation or returning it with amendments shortly before an expected dissolution, as it did with a 1996 bill regulating negative option billing by cable companies.²² Finally, an on-again, off-again exercise of “pre-study” of bills before they arrive from the House has sometimes seen the Senate propose amendments before the bills have received a final vote in the House, and the proposed Senate changes are incorporated into the Commons’ version of the legislation.

As for the rarely used veto power, a general consensus has emerged that this should be reserved for particularly egregious legislative initiatives and with a high level of justification, limited to only a few situations. One possible list of contexts under which the Senate might defeat a bill outright includes: when it is of grave detriment to one or more regions; when it violates constitutional rights; when it is of grave detriment to linguistic or other minorities; when it is of such importance that the government should seek a new mandate; or when it is so repugnant that it represents a quasi-abuse of the legislative power of Parliament.²³

Given evolving democratic norms, even this list might be overly liberal. For example, the idea that the Senate should ever determine when a sitting government should seek a new mandate is arguably an affront to the principle of responsible government, wherein the government must maintain the confidence of a majority of members of the elected House of Commons. The Senate is not the confidence chamber in Parliament, and arguably oversteps its proper role when it attempts to assert the power to do so (as it did during the 1980s, discussed below). In a broader sense, those who question the Senate’s democratic legitimacy on the basis of its unelected nature might consider *any* use of the veto normatively unacceptable.

The upper house’s exercise of amendment or veto powers is only part of the story. The Senate’s sober second thought role has been important in another respect, specifically its committee investigations and special studies. C.E.S. (Ned) Franks, for example, points to influential committee investigations on land use in 1957 that had an important impact

on agricultural legislation, and on science policy in 1967. He contends that the Senate's investigations are generally at a higher standard than similar work in the House of Commons:

Reasons for the differences included: first, many extremely able and experienced Canadians sit in the Senate and contribute to this investigative work; second, investigations by the Senate are usually non-partisan; third, Senate investigations do not suffer from excessive exposure in the media; fourth, senators have the time and leisure to conduct diligent research and exhaustive analysis; and fifth, investigators can work on for many years, immune from the vagaries and demands of the electoral process.²⁴

The long-term perspective of the Senate is an important element of its unique contribution and sober second thought role. The work of the Standing Committee on Social Affairs, Science and Technology to conduct a two-year study of health care in 2000–02 is an important example: if “undertaken by the House of Commons, it would take up nearly half of the members’ entire term and, in this particular case, would have risked being disrupted by the fall 2000 election. Moreover, there would be considerable pressure to generate short-term results that would bolster the members’ immediate electoral chances.”²⁵

Many of the Senate’s defenders point to its committee work as the prime example of the institution’s effectiveness. Even here, however, there is evidence that this may be overstated. Andrea Lawlor and Erin Crandall report that while a committee like the Legal and Constitutional Affairs Committee acts as “a workhorse for legislative review,” even it only occasionally produces legislative change.²⁶ In their study of the work of Senate committees, Lawlor and Crandall thus report that “the Senate may not be as systematic a check on the power of the House of Commons as sometimes thought.”²⁷

Partisanship and Independence

There is a lack of clarity on the extent to which partisanship negatively affects the Senate’s capacity to act with independence or as a vigilant

check on executive power or poorly conceived legislation. Writing in 1926, Robert Mackay notes that the “most serious objection to the system of appointments is that it has failed to give to the members of the Senate the character of independence of party ties.”²⁸ In the revised edition of his study nearly four decades later, Mackay still agrees with this sentiment but notes that a broader tradition of non-partisanship “seems to be more firmly established,” basing this on a period from 1940 to 1960 when the Senate majority was held by a different party than the government and it not once rejected a government bill.²⁹ A more recent study by Jean-François Godbout presents the most comprehensive account of partisanship in the upper house. Godbout’s analysis confirms a decline in party unity, at least among Liberals, in the 1940s. However, partisan voting in the Senate has generally increased in a linear fashion over time, to the point where since the 1980s voting unity levels for the two main parties exceeded 90 percent.³⁰

Beyond voting patterns, there is qualitative evidence that the intensity of partisan behaviour in the upper chamber has ebbed and flowed over time. Indeed, Godbout notes that the Senate’s activism usually increases in periods of divided government.³¹ Personalities and leadership within the Senate are sometimes considered causal factors in these shifting tendencies. Raoul Dandurand was a long-time organizer for the Liberal Party in Quebec and a high-level adviser to Prime Ministers Wilfrid Laurier and Mackenzie King. He was appointed to the Senate in 1898, serving as Speaker of the Senate from 1905 to 1909 and as either Government Leader or Opposition Leader in the Senate from 1921 until his death in 1949. Dandurand adopted a fiercely non-partisan attitude towards the work of the Senate, something perhaps informed by the fact that he “had never been a member of the House of Commons, and, therefore, he was not imbued with the mentality of an almost mechanical self-subordination to a parliamentary party machine.”³² It is perhaps no coincidence that his death correlates somewhat with the end of less partisan voting behaviour by Liberal senators at the time. According to F.A. Kunz, in Dandurand’s “image of the Upper house as a body of independent-minded elder statesmen coolly exercising judicial impartiality there was no room for a formal party

machinery, which would only accentuate a spirit that ought to be extirpated by all means.”³³

In fact, in Dandurand’s view an ideal Senate would not even have a Government Leader, and each minister would select individual senators to pilot legislation independently through the upper chamber. Further, he believed the Senate should not sit along party lines, nor should senators attend party caucus meetings (which he personally avoided) so as to “remain away from the political atmosphere of the Commons.”³⁴ These ideas presage events following *Reference re Senate Reform*, which saw the elimination of the government caucus in the upper chamber. Dandurand’s virtually *anti*-partisan view did not take complete hold in the Senate but was clearly influential during his leadership role there, as Mackay’s and Godbout’s analyses suggest. Even former prime minister Arthur Meighen, upon his own appointment to the Senate, became a convert to Dandurand’s perspective, and subsequently argued that the “Senate is worthless if it becomes merely another Commons divided upon party lines and indulging in party debates.”³⁵

Dandurand’s position on partisanship in the Senate is noteworthy as an indicator that the nature and extent of partisanship in the Senate is not a fixed or entrenched variable. In the broad context of Canadian history, his attitude is no doubt in the minority, but critics of the 2016 reform who decry the non-partisan appointments process as a departure from the Senate’s proper design overstate their case. Undoubtedly most of the framers would have assumed patronage and partisanship as a feature of appointments, but the degree of partisanship, and the lack of balance prime ministers generally exhibited in making almost all of their appointments from individuals of their own party are not part of some ordained design. As Smith writes, “the long periods of one-party rule that followed Confederation and the expansion of the national party system into the provinces of Canada” were unforeseen events that may help explain why the Senate has not performed as the framers expected.³⁶ Without those intervening events, appointments to the upper house may have been more balanced and less afflicted with patronage. Regardless, there is no good reason that the appointing

culture has clung to partisanship – let alone patronage – for as long as it has.

To the extent that the core role of the Senate was as an independent body capable of sober second thought, the evolution of partisan control is something that has worked against the institution's performance on this score. This is examined further in [Chapter 5](#). Yet it is also worth noting in the present analysis that rule changes and procedural innovations within the upper house have, according to Godbout, been “introduced with the explicit goal of transforming the Senate into a more partisan chamber.”³⁷ For example, the Liberals in 1984 abandoned the use of pre-study, and in 1991 changes by the Conservative majority increased the government's control of the legislative agenda. In Godbout's view, “these changes contributed to altering the dynamic of debates in the upper chamber by promoting divisions between Conservative and Liberal senators.”³⁸

Even when the Senate has evinced independence from the lower house, partisanship has arguably encouraged it to cross a line into pure obstructionism rather than sober second thought. The most prominent contemporary example of this is the Liberal-dominated Senate that greeted Prime Minister Brian Mulroney's government in 1984. Senate Opposition Leader Allan MacEachen's “ardent partisanship”³⁹ was at least partly responsible for a level of Senate obstructionism unprecedented in the modern era. That period saw the Senate refusing to approve a borrowing bill in 1985, playing “ping-pong” with the House over amendments to the *Drug Patent Act* for a full year from 1986 to 1987, and forcing an election after refusing to pass legislation for the free trade agreement with the United States in 1988.⁴⁰ The Senate's activism during Mulroney's second Parliament was no less obstructionist, as it defeated a compromise bill on abortion in a tie vote, delayed an unemployment insurance bill, and attempted to block the Goods and Services Tax (GST). Only after Mulroney took the unprecedented action of employing section 26 of the *Constitution Act, 1867*, enlarging the Senate by eight members, was the deadlock broken and the GST bill passed.⁴¹

The Mulroney period and a similar (although more mild) period of tension between a Liberal-dominated Senate and John Diefenbaker's

Progressive Conservative government⁴² imply that the problem of partisanship can create unwanted deadlock between the two houses when the government does not control the upper house.⁴³ With the benefit of hindsight, some argue that “[c]lashes between the two houses were so inevitable from the start that it is difficult to believe that a politician as astute as Macdonald did not anticipate them.”⁴⁴ The problem of appointments as an exercise of partisan patronage is one of the major sources of condemnation the institution faces, particularly when flare-ups between the two houses occur (or whenever a scandal involving the Senate surfaces).

To what extent might partisanship explain a generally deferential, less-than-fully-independent Senate? As it pertains specifically to amendments, Andrew Heard’s statistical analysis suggests that the size of the government majority in the Commons has “a far greater correlation to Senate amending activity” than the partisan mix.⁴⁵ Some important qualifiers should be placed on this analysis, however. First, the statistical data are limited to the period from 1957 to 1988. Second, Heard’s analysis does not appear to account for the difference noted above between technical amendments and substantive amendments to legislation. Nor does it attempt to assess the relative salience of the bills at stake under different configurations – if Senate activity during the Mulroney period was not quantitatively distinct, it was surely qualitatively so. Finally, the introduction of the non-partisan appointments process by Prime Minister Justin Trudeau in 2016 appears to have led directly to a considerable spike in amendment activity. By the end of the 42nd Parliament in 2019, 33 percent of the eighty-eight government bills that received royal assent were subject to amendments by the upper house. The non-partisan nature of the appointments seems to be a prime reason for this. This is one of the primary issues discussed in more detail in [Chapter 5](#).

THE SENATE AS REPRESENTING REGIONAL INTERESTS

The Senate is composed of 105 senators, 24 for each of the regions (Ontario, Quebec, the Maritime provinces, and the four western

provinces), 6 for Newfoundland and Labrador, and 1 for each territory. From the perspective of Canada's modern population distribution, this regional breakdown may seem archaic or esoteric, but like many aspects of Canadian constitutional development, much of it is simply derived from historical contingency, messy compromise, and path dependency. The upper house was initially established following a compact featuring the Province of Canada (Ontario and Quebec), Nova Scotia, and New Brunswick (Prince Edward Island declining to enter Confederation until 1873). In 1867, the seventy-two-seat chamber thus saw Ontario and Quebec each with twenty-four seats, with twelve each for Nova Scotia and New Brunswick, over some objections from the smaller Maritime colonies.⁴⁶ As relayed in *Dawson's The Government of Canada* text:

Representation in the Senate was not seen in the 1860s as one of the democratic elements in the constitution. One indication of this was shown in 1873 when Prince Edward Island entered Confederation: the complement of senators was not enlarged to accommodate the new province, but four senators were taken away from the other two maritime provinces to keep the regional total at twenty-four.⁴⁷

As western provinces joined or were created, they were “somewhat arbitrarily”⁴⁸ assigned two, three, or four seats until a 1915 constitutional amendment created a new region of twenty-four seats, six for each province. As a result, Peter Russell argues that the “need for Senate reform was built into the very foundations of Confederation.”⁴⁹ In the modern period, the West in particular has a legitimate claim about its relative underrepresentation in the upper house.

From early on, the Senate's regional composition led observers to declare that the upper house was “the guardian of Provincial rights.”⁵⁰ While the Senate's regional composition was, in terms of the compact arrived at by the framers in the Confederation debates, in part intended to defend the interests of the smaller provinces against domination by the larger ones (representation by population was the inevitable design intended for the House), the Senate's role in protecting regional interests is often incorrectly conflated with the notion that it is a voice for the

provinces. As several scholars point out, the Fathers of Confederation expected senators to be independent of provincial governments. The intention was that the Senate would represent regional interests at the national level, not that it would act as a “house of the provinces.”⁵¹

Prince Edward Island demanded equal representation of the provinces, but its Maritime counterparts did not push as hard.⁵² The argument for equality of representation across the provinces (as in the US model) faced an uphill battle in the Canadian context, especially given the unique concerns of francophone Quebec, which was concerned about its numerical position in Parliament overall (this remains relevant to modern attempts at reform, as discussed below).

The federal appointing power was also an issue for some of the participants in the Confederation debates. As Mackay notes, “sectional representation and nomination by the central government seem irreconcilable in principle. It is probable that Macdonald and other leaders who favoured a strong union were convinced of this also, and saw in appointment by the federal government the means of weaning the sections from their particularism.”⁵³ The agreement on regional representation has been described as “the key to federation, ‘the very essence of the compact,’ said George Brown. ‘Our Lower Canadian friends have agreed to give us representation by population in the Lower House, on the express condition that they could have equality in the Upper House. *On no other condition could we have advanced a step.*”⁵⁴

If regional representation was obviously fundamental for the provinces, does that mean that the Senate’s role as protector of regional interests is paramount? This question is fundamental to the Supreme Court’s determination in *Reference re Senate Reform* that changes to the Senate’s essential features require provincial consent. Some interpretations of what the framers intended suggest that their expectations of the Senate’s role were not as lofty as Brown’s rhetoric might imply. In defending against criticism of the federal role in appointments, George-Étienne Cartier pointed to Cabinet and even the lower house as providing for additional protections. This leads Mackay to conclude that “it is clear that the Fathers of the federation did not expect that the Senate would be the chief line of defence for the protection of

provincial or sectional rights. The first great check on the central government would be in the federal nature of Cabinet; the upper house would be only a last means of defence.”⁵⁵

Kunz is even more cynical about what some of the framers intended, arguing that the agreement on regional representation was “a well-calculated political device used as a constitutional tranquilizer to palliate the sectional fears of the weaker partners to federalism from the numerical majorities of the House of Commons. In order that such fears might not endanger the ultimate outcome of the bargain, the value of the Senate as a reliable safeguard of provincial rights had to be stressed.”⁵⁶ Kunz points out that even with the regional composition, the smaller provinces remain numerically weak in the Senate, and thus “the Senate as a bulwark of provincial rights was essentially a rhetorical device, a psychological rather than a political remedy ... an opiate of the provinces.”⁵⁷ Other commentators argue that, rather than “a ploy to lure other partners to Confederation,” the agreement on the upper house’s composition more likely reflected “the Fathers’ ambivalence about the machinery required for effective regional representation,” something that in turn helps to “explain the tenuity of the Senate’s ultimate institutional position.”⁵⁸

Many observers view the Senate’s performance in fulfilling its role as a voice for regional concerns as ultimately weak.⁵⁹ It was not long before the Senate’s role in protecting the interests of regions was overshadowed. The provincial rights movement, the first Interprovincial Conference in 1887, regional representation in Cabinet quickly becoming a powerful convention, and the role of the courts – particularly the Judicial Committee of the Privy Council – as arbiters of federalism all became much more influential in protecting provincial powers.⁶⁰ In practice, early commentators note that the upper house “has rarely been appealed to as the champion of provincial or section rights and, even when appealed to, it has not consistently supported claims to such rights.”⁶¹ One key example is the 1949 constitutional amendment granting Parliament authority over future amendments except in relation to a subset of matters, without provincial consent. Mackay notes that opposition to the amendment was far more vocal in the House than

the Senate.⁶² Nor were the provinces consulted regarding the 1915 constitutional amendment redefining regional divisions in the Senate and creating one region for the four western provinces.⁶³

Moreover, modern executive federalism and the substantial growth in the importance of the provincial governments generally were simply not envisioned by the framers. In that sense, as Ron Watts argues, we risk assessing a representational role for the Senate that it was simply not originally designed to fulfill.⁶⁴

Another account attributes the long-term challenge the Senate has faced in protecting regional interests to other changes in the political system, including the centralization of power in the hands of the government within a system of responsible government, and the increasingly democratic nature of Canadian society. Anti-Confederates in the Maritimes were deeply concerned that the number of seats granted to the region would not be sufficient to prevent their smaller provinces from being overwhelmed by those from Ontario and Quebec, but in Phillip Buckner's view, the seat count would become irrelevant once those other factors took hold.⁶⁵ The Senate would end up with insufficient power or legitimacy to act as a meaningful voice for the Maritimes. Similarly, Donald Savoie argues that the extent to which Macdonald's sober second thought role for the Senate has dominated the collective imagination of what the institution's primary role should be "has taken away from the Senate's most crucial role according to the constitution" – its role as regional voice.⁶⁶

Other scholars argue that the Senate has occasionally served a useful function in looking out for regional interests. Despite his harsh rhetoric about the emptiness of the framers' promises regarding the upper house's regional role, Kunz argues the Senate from 1925 to 1963 was a "distinguished spokesman of the component parts of Canadian federalism" through its "revisory" and committee work.⁶⁷ He acknowledges that this was an auxiliary rather than leading role, however.⁶⁸

Writing in a more contemporary context, Paul G. Thomas readily identifies a number of important instances when the Senate did act on behalf of regional concerns, including initiating amendments to a 1977

maritime bill that threatened to abolish all ports of registry and replace them with the single port of Ottawa; attempting amendments to the *Unemployment Insurance Act* under the Mulroney government that reduced benefits to seasonal workers (particularly affecting the Atlantic provinces); introducing tax credits for low-income individuals to a 1997 bill to harmonize the GST with provincial sales taxes in three Atlantic provinces; and introducing amendments based on Senate testimony of nearly two hundred individuals and organizations from the Prairies to a bill on the *Wheat Board Act* in 1998.⁶⁹

The contemporary Senate offers its own examples. In 2019, a majority of senators on the Standing Committee on Transport and Communications voted to recommend against Bill C-48, the *Oil Tanker Moratorium Act*, and did so on the justification of regional concerns.⁷⁰ (The bill would ultimately pass.) This is a particularly interesting case because within a nominally “regional” context it offers competing provincial perspectives. On the one hand, the Government of Alberta vociferously opposed the legislation, with Premier Jason Kenney calling the law “a prejudicial attack on Alberta, banning from Canada’s northwest coast only one product – bitumen – produced in only one province, Alberta.”⁷¹ On the other hand, British Columbia also had a direct interest in the legislation as providing environmental protection for its northern coast, on which basis that government articulated its support for the law.⁷²

As this most recent example makes clear, the interests of the provinces should not be conflated with the representation of regions within a national Parliament. As noted above, the regional composition of the upper house is embedded in historical contingency and the relevance of several intersecting factors, including the presence of Quebec and Canada’s linguistic and cultural duality (setting aside for the moment the presence of Indigenous peoples and the colonizers’ complete antipathy towards any involvement in Confederation for them), the federal reality of the Constitution, and regionalism in a large and diverse new country. The regional basis for the Senate’s composition begins to look less esoteric when the relevance of regionalism is taken into consideration,

as it has been in other institutional contexts, including appointments to the Supreme Court and to the federal Cabinet, and, as Smith notes, even the federal regional veto act of 1996, legislation that further complicates Parliament's role and approach to the constitutional amending formula.⁷³ This reality further complicates Senate reform proposals and their consequences, as discussed in the next chapter.

THE SENATE AS DEFENDER OF PROPERTY

Another key role of the Senate as envisioned by the framers was the protection of property. This should be distinguished from a particular interest in defending the interests of the upper crust; indeed, the framers felt that the Senate would avoid one of the defects of the House of Lords by not containing a hereditary class, and that “the property qualifications would not be so high as to distinguish [senators] sharply from their fellow citizens.”⁷⁴ The constitutional eligibility requirement of at least \$4,000 in personal property (a sizable sum in 1867, but not as high a cut-off as some wanted) was as much designed to ensure the individual independence of senators as it was a reflection of the importance of class itself. It was important for Macdonald, for example, that senators would be “of the people.”⁷⁵ The intention of the framers was thus that senators “do not sit for class, estate, or corporate interests that leaves them free to speak on all the issues that come before Parliament, and enables them to support or check Cabinet and Commons.”⁷⁶

While some critics argue that the Senate operates “on behalf of Canada's business community” and that its composition “gives an undemocratic advantage to business interests in their efforts to compete with other groups for influence in the policy arena,”⁷⁷ most systematic accounts of the Senate's performance over the years suggest otherwise. Kunz's 1965 analysis suggests that the Senate did not play much of a role in constraining the growth of the welfare state, although prior to the Great Depression there was some pushback in a few areas.⁷⁸ In his view, “the policy of the Senate during this period [1925–63] has been to check the political extremism of the ‘positive state,’ without

obstructing its economic/social implications.”⁷⁹ Franks’s analysis of Parliament similarly pushes back against the idea of the Senate as a lobby for business interests, noting that “it would be more accurate to describe it as a defender of the rights of property, a function which it was intended to perform by the fathers of confederation.”⁸⁰ And former senator and constitutional scholar Eugene Forsey writes that there was a lot of evidence that the Senate often acted *against* corporate interests, citing amendments to the drug patent bill in 1987, the refugee bills in 1988, and unemployment insurance legislation in 1989–90.⁸¹

As for the Senate’s success as a defender of property, history – or, at least, historical analysis – has not been kind. As put bluntly by one observer:

[T]he status of property as the basis of Canada’s institutions quickly eroded. Institutional protections of property against federal encroachment withered, and universal enfranchisement ensued. The phenomenon of party dominance discouraged divergences by the Senate from the House of Commons. Time rendered the property requirements for appointment virtually meaningless. The Senate never fulfilled the functions meant for it, becoming instead a rubber stamp for Commons legislation and a burial ground for political patrons.⁸²

The Senate’s lack of interest in protecting, or its ability to protect, property rights has been so minimal that the institution’s role in this regard has been all but ignored by the Supreme Court. In the 1979 *Upper House Reference*, the court declined to answer a question on the authority of Parliament to make changes to the qualifications of senators due to lack of specificity, noting only that the property qualifications entrenched in the *Constitution Act, 1867* “may not today have the importance which they did when the Act was enacted.”⁸³ The 2014 *Reference re Senate Reform* does not even mention this aspect of the Senate’s role, despite the fact that one of the reference questions explicitly pertained to the removal of property qualifications for senators. This is discussed in more detail in [Chapter 4](#).

THE SENATE AS PROTECTOR OF MINORITY RIGHTS

The Senate is also cited as a protector of minority rights. Beyond its regional composition, prime ministerial appointments to the Senate have been preoccupied by representational concerns. Historically, prime ministers have been attentive to the need to ensure representation among Acadians in the Maritime provinces, francophones in Ontario and the West, English-speaking Catholics in anglophone provinces, and English-speaking Protestants in Quebec.⁸⁴ In the contemporary period, a more pluralistic set of diversity concerns have emerged, extending considerations beyond the historical linguistic and (narrowly) religious cleavages. The representation of women, people of different ethnic and racialized backgrounds, and Indigenous peoples has taken on a pronounced importance in Senate appointments, particularly as the House of Commons remains a relative laggard on several of these aspects of representation.⁸⁵

The Senate has historically fulfilled its role of protecting minority rights “infrequently”⁸⁶ and “its record has not been impressive.”⁸⁷ Writing somewhat weakly in the upper house’s defence on this score, Kunz notes in 1965 that “it should be stressed, however, that there has been nothing dramatic about its role as a moderating influence on the executive, for the simple reason that there has been nothing dramatic about the attempts of the Executive to tread upon Parliament or the individual.”⁸⁸ Notably, this analysis came before the *Charter of Rights and Freedoms* was established, with the courts, not Parliament, now widely regarded as the primary institution for the protection of minority rights. Smith states, however, that the framers “looked to Parliament’s upper chamber as a shield. As sensitivity in the area of rights grows, so the Senate’s role in the scrutiny of legislation in advance of judicial review may be expected to grow too.”⁸⁹

Contemporary accounts of the Senate’s role in protecting minority rights are somewhat more positive.⁹⁰ Smith cites the prolonged Senate debate over the ending of denominational schools in Newfoundland in the 1990s as an example of the vigilance the Senate occasionally displays with regard to such rights issues.⁹¹ And it is no doubt true that

the Senate's committee work, particularly that of the Legal and Constitutional Affairs Committee, has provided some important oversight on rights issues in the modern era and tends to be more comprehensive than any parallel work in the Commons. Examples of this in relation to the renewed Senate are explored in [Chapter 5](#).

Still, it is uncontroversial to say that the Senate's role in protecting minority interests remains largely overshadowed by other institutions in the Charter period. An example of the lack of attention to this particular role of the Senate is the fact that the upper chamber was not included as an authority to review a referendum question on the question of secession (for purposes of clarity) under the *Clarity Act*. The determination of whether a referendum question on secession was sufficiently clear, and whether there is a clear will to secede following the referendum vote, is left solely to the House of Commons. Smith argues that the *Clarity Act* removes "from the upper chamber one of its historic functions – to protect minorities – of whom among the most historic and central to the preservation of national unity are residents of Quebec."⁹²

CONCLUSION:

IN SEARCH OF A MODERN ROLE FOR THE SENATE

Dawson's classic text on the Government of Canada concludes about Parliament's upper chamber that "[i]t would be idle to deny that the Senate has not fulfilled the hopes of its founders; and it is well also to remember that the hopes of its founders were not excessively high."⁹³ It is, of course, open to debate whether the original roles *as envisioned* by the framers remain relevant today. Yet a number of things bear on that discussion. First, the lack of formal constitutional change relating to the Senate – explored in the next chapter – means that both a plain reading of the Constitution and a consideration of the Senate's place within Parliament and the broader system of government cannot ignore the foundational reasons the upper house exists. Second, as considered in [Chapter 4](#), the Supreme Court places significant weight in *Reference re Senate Reform* on the views of the framers in its own articulation of

the Senate's role.⁹⁴ Third, as the preceding analysis suggests, these various roles may have evolved in different ways (for example, the disparate categories of people whose rights as minorities are legitimated are considerably more varied and numerous now than they were in 1867), but their core normative purposes have not changed.

Thus, while the modern Senate has a spotty record at best in fulfilling some of its roles, the normative justification for seeking to maintain them has not evaporated along with the Senate's general reputation. A primary question seems to be whether the Senate is best suited to fulfilling those roles, and whether it can do so with its current composition, powers, organization, and norms of behaviour. As the analysis in [Chapter 4](#) will show, the Supreme Court emphasizes certain roles and not others, and engages in scant analysis of how these have evolved over time or even the degree to which the Senate has fulfilled them.

The discussion cannot end there, however. Each of the various roles of the Senate remains balanced against other interests, or even against each other. The Senate's independence and its role as a chamber of sober second thought is explicitly balanced against the democratic legitimacy of the House of Commons and the government of the day. The Senate's role as a defender of property might in some contexts come into conflict with its role as a protector of minority rights. And it is clear that the Senate's place as a national institution in a federal Parliament – particularly one dominated by the executive in the context of highly partisan organization – has, in the aggregate, diminished its potential role as a forum for regional representation.

The next chapter explores historical and modern reform efforts that seek to change the very nature of the Senate. Many reform proposals do not explicitly consider the Senate's role, or if they do, they appear to desire a strengthening of one role over, or even to the exclusion of, the others. This is a problem that will continue to plague Senate modernization efforts, and it is why this book begins with a focus on the Senate's myriad roles. Coherent and meaningful reform can begin only with explicit attention to what the reforms are desired to achieve. The next chapter concludes with a brief examination of more modest proposals for informal reform that would enhance the Senate's existing

roles or simply improve the institution's performance in fulfilling them. The combined purpose of this chapter and the next is to provide context for the events leading up to and following the 2014 *Reference re Senate Reform*. The constraints imposed by the court in its reasoning, and arguably the inspiration for the 2016 reform to the Senate appointments process, are ultimately based on a particular conception of the Senate's roles. To what extent that conception meshes with the historical ones examined in the preceding analysis is the subject of [Chapters 4](#) and [5](#).

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