

**CONSTITUTIONAL RETCONNING:
HISTORY IN JUDICIAL REASONING AND
CHANGES IN CONSTITUTIONAL MEANING**

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Retroactive continuity or “retconning” describes a situation where the established history or continuity of a narrative is adjusted or reinterpreted to align with new developments in the story. The concept was popularized in reference to comic books and television shows. This article develops and applies a novel concept, constitutional retconning, to examine how the courts have relied on retconning as an interpretive tool when redefining the meaning or scope of constitutional provisions. I explore the implications of constitutional retconning by analyzing three important instances where the courts have established a reimagining of history or new understandings of historical facts. Because retconning concerns historically established narratives about the constitution, constitutional retconning can have profound implications for changes in constitutional meaning and our understanding of the development of the constitution.

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I. INTRODUCTION

In season five of the popular television series *Buffy the Vampire Slayer*, the show’s hero, Buffy Summers, is suddenly presented as having a sister, Dawn, despite Buffy having always been an only child.¹ Viewers — and later the characters themselves — eventually learn that

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¹ Season 5, television (WB Television Network, 2000–2001).



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Dawn was the embodiment of a mystical key converted to human form by monks employing magic in order to protect it from an evil god. Dawn was inserted into Buffy's life for this purpose, and all the characters' memories were altered so that they believed Dawn had always been a part of their lives, thus reimagining the previous four seasons of the show's narrative.

This story development is one of the more famous examples of "retroactive continuity," known as "retconning" for short, which I define as a situation in which the established history or continuity of a narrative is adjusted, reinterpreted, or even transformed in the name of reconciling new developments or inconsistent, even contradictory, accounts. Retconning came to be popularized in relation to comic books. Due to their often long-running nature, some comic books feature decades of storytelling by many different authors amid criss-crossing narratives between various series of books in a shared universe. Retconning is a device used to eliminate plot holes, avoid or reconcile contradictions, or even "reset" established storylines to undo certain elements in the interest of new stories.

Constitutions share these core features of comic books. Their written features are developed, amended, added to, and reinterpreted over time by multiple authors, be it those actors or institutions designated under the prescribed amending formula or by the courts in the course of their interpretative function. The Constitution of Canada is comprised of a complex set of written acts and orders and unwritten principles that have developed over centuries, and the jurisprudence pertaining to it is similarly interwoven and intricate. It is also, inevitably, laden with inconsistencies and outright contradictions.²

When interpreting the Constitution, courts must sometimes grapple not only with its inherent tensions and complexity but also with decades — sometimes centuries — of precedent, something that generally aids in ensuring the clarity and consistency of constitutional law. Judges must coherently apply established precedent to new realities and occasionally distinguish new cases in an intelligible fashion. In rare circumstances, courts will explicitly overturn established precedent. All of this is to be expected in the realm of constitutional interpretation. Yet occasionally, judicial interpretations — or reinterpretations — amount to retconning. Constitutional retconning occurs when courts adjust, reinterpret, or transform established historical understandings of the Constitution or use history to establish new understandings or "discover" new meaning, in a way that *retroactively* alters established narratives about some aspect of the Constitution. In this way, constitutional retconning is distinct from ordinary practices of interpretation that reconcile or incorporate new information with established meaning. Indeed, as will be demonstrated in the analysis below, constitutional retconning may sometimes be employed precisely to avoid explicitly overturning or grappling with established precedent and instead to reconcile or gloss over apparent contradictions in the application of a rule or broader interpretation of the Constitution.

² Some of these apparent contradictions are settled not by interpretative measures but by constitutional practice. For example, there are glaring inconsistencies between some of the formal rules of the Constitution and how it operates in practice. A set of constitutional conventions — binding political rules of behaviour not enforced by courts — exist to enable the formal constitution to operate in a coherent fashion in the context of modern democratic expectations: Emmett Macfarlane, "The Place of Constitutional Conventions in the Constitutional Architecture, and in the Courts" (2022) 55:2 Can J Political Science 322.

Because retconning concerns historically established interpretations or narratives about the Constitution, the courts' specific treatment of historical facts and developments becomes a central component of any inquiry into whether constitutional retconning has occurred. In the legal scholarly literature, inquiries into history in constitutional law inevitably spark debates about competing approaches to interpretation, and, especially in the Canadian context, debates about originalism versus living tree constitutionalism. In this article, I will argue that constitutional retconning can occur regardless of what specific approach to constitutional interpretation appears to be employed by a court.

Finally, whether constitutional retconning is legitimate or *normatively* desirable may depend on the circumstances in which it is employed. To suggest a judicial decision employs constitutional retconning is not necessarily a criticism akin to claims about "judicial activism," which is often levelled in the context of purported judicial overreach or impropriety. It is possible there are circumstances in which constitutional retconning is necessary or justifiable precisely because it ensures the continued coherence of the Constitution or established jurisprudence. In this sense, constitutional retconning might also be distinguished from concepts like judicial amendment of the Constitution, which is often framed as reflecting the usurpation of the constitutional amending authority by courts through decisions that alter or add to the Constitution in ways that strain the proper boundaries of interpretation. Nonetheless, because constitutional retconning is fundamentally an exercise of judicial creativity and discretion, and because it can have a significant impact on our understanding of the Constitution's meaning, it is useful to identify and explain instances where this interpretative device has been used.

This article elaborates on the concept of constitutional retconning and presents case studies of three decisions where it was employed. In Part II, I present some of the contours of analysis and elaborate on the distinct nature of constitutional retconning. I begin by briefly examining the use of history in judicial decisions and some of the scholarly debates that emerge over the role of history in constitutional interpretation, primarily focusing, by way of illustration, on the famed "beer case," *R. v. Comeau*.³ Scrutiny of *Comeau* sparked renewed academic attention to debates over originalism and questions about when variants of originalist reasoning, including framer's intent and legislative drafting, but also the original meaning of the text versus progressive living tree interpretation, become apparent in judicial decisions. I conclude Part II by discussing in more detail how constitutional retconning is a distinct concept from judicial amendment of the Constitution.

In Part III, I analyze three distinct examples of constitutional retconning. The first example is the 1979 *Reference Re Authority of Parliament in Relation to the Upper House*,⁴ although the retconning at issue was reinforced, if not finalized, by the Supreme Court's 2014 opinion in *Reference re Senate Reform*.⁵ In the *Upper House Reference* the Supreme Court adopts a narrow interpretation of section 91(1) of the *Constitution Act, 1867*,⁶ the federal amending procedure enacted in 1949, based primarily on a particular assessment of established historical practice around constitutional amendment. That decision effectively

³ 2018 SCC 15 [*Comeau*].

⁴ [1980] 1 SCR 54 [*Upper House Reference*].

⁵ 2014 SCC 32 [*Senate Reform Reference*].

⁶ (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

transformed a particular assessment of historical practice into law, culminating in the Supreme Court's characterization of section 91(1) as permitting mere "housekeeping" changes.⁷ This came despite the clear text of the provision and a contemporaneous consensus among political actors and commentators that section 91(1)'s scope was much broader.

The second example emanates from the Supreme Court of Canada's opinion in *Reference re Supreme Court Act, ss. 5 and 6*.⁸ That reference concerned the eligibility requirements for the appointment of Supreme Court justices, and particularly whether judges destined for one of the "Quebec seats" could be appointed from the Federal Courts under sections 5 and 6 of the *Act*.⁹ A broader constitutional question, and the object of the present analysis, was the constitutional status of the Supreme Court itself and whether Parliament could effect unilateral changes to the *Supreme Court Act's* eligibility requirements or whether the requirements formed part of the "composition of the Supreme Court" under section 41(d) of the amending formula in the *Constitution Act, 1982*.¹⁰ The majority surprised observers by effectively suggesting that the Supreme Court's entrenchment preceded the 1982 amending formula, a claim premised on historical changes (including the 1949 abolition of appeals to the Judicial Committee of the Privy Council and changes granting the Supreme Court more discretion over its caseload).¹¹ Here, the constitutional retconning did not change the outcome of the case, reverse established precedent, or result in constitutional change. In fact, the basic historical facts surrounding the Supreme Court are uncontroversial. Yet the Supreme Court's conclusions concerning the implication of those facts and the institution's status within the architecture of the Constitution were more than merely novel, and reflect no mere statement made in passing. I examine the implications of this finding to explain why it represents a constitutional retcon.

The third example pertains to the Quebec Court of Appeal's 2019 decision that changes affecting the rules around royal succession are not part of Canadian law and thus not implicated by section 41(a) of the amending formula as a reform to the "office of the Queen."¹² The Court's reasoning downplayed key historical events relating to the separation of the Crown and the Canadianization of the Crown of Canada in order to reconcile conflicting precedents and paper over established jurisprudence. The Court's reliance on a principle of symmetry determining the identity of the monarch is also a historical innovation, and in so doing, stands as a constitutional retconning that transforms the nature of the Canadian Crown.

I conclude in Part IV with a discussion of the implications that constitutional retconning has for the Constitution's evolution and meaning, as well as for how we understand the role of constitutional interpretation.

⁷ *Upper House Reference*, *supra* note 4 at 65.

⁸ 2014 SCC 21 [*Reference re Supreme Court Act*].

⁹ *Supreme Court Act*, RSC 1985, c S-26, ss 5–6; *Upper House Reference*, *supra* note 4 at paras 1–3.

¹⁰ *Constitution Act, 1982*, s 41(d), being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11; *Reference re Supreme Court Act*, *supra* note 8 at para 5.

¹¹ *Reference re Supreme Court Act*, *ibid* at paras 82–87.

¹² *Motard v Attorney General of Canada*, 2019 QCCA 1826 at para 29 [translated by SOQUIJ] [*Motard*].

II. CONCEPTUALIZING CONSTITUTIONAL RETCONNING

The term constitutional retconning appears to be a truly novel one, as I can find no evidence of its use in the existing academic literature. In this article, I seek to demonstrate that it pertains to a specific and verifiable technique of constitutional interpretation. It is important to begin by distinguishing retconning from more general discussions of retroactivity in legal theory. As Peter Hogg and Wade Wright note, the invalidity of a law that results from judicial decisions holding that law unconstitutional is not considered the mere result of the court's holding but the operation of the supremacy clause, section 52 of the *Constitution Act, 1982*.¹³ Thus, “[i]n principle, the law is ‘invalid from the moment it is enacted.’”¹⁴ In this sense, judicial rulings are thought to have an innate retroactivity in effect, one that is in part based on “the fiction that judges do not make law, but merely discover it,”¹⁵ but also, and from a more practical perspective, “probably best based on the distinctive judicial function of resolving disputes by applying the law to facts that have occurred in the past.”¹⁶ The notion of an unjustified retroactivity in law is also a feature of criticism directed at theories of law, from H.L.A. Hart's positivism to Ronald Dworkin's theory of rights.¹⁷ These broader issues of what we might call the “retroactive effect” of the law or judicial decisions are distinct from the phenomenon of retconning that I elaborate on here, which is ultimately best conceived of as a specific interpretative technique of judicial reasoning or interpretation.

I have found only one instance of scholarship applying the concept of retconning to the law in a manner at least somewhat similar to that proposed here, although it is defined differently, and more narrowly, than the concept I seek to examine. A 2018 article by Russell Sandberg examines the evolving caselaw in the United Kingdom pertaining to whether religious ministers are considered employees under the law.¹⁸ Sandberg employs the term “judicial retcon” and defines it narrowly as capturing “a misuse of history by judges.”¹⁹ As applied to the employment status of ministers, he argues that recent judgments of the courts have mischaracterized earlier decisions, incorrectly presenting mere factual differences in subsequent cases as a “sea change” in the law itself.²⁰ Thus for Sandberg, a judicial retcon can be used to “emphasise change — by over-stating the novelty of a development and either forgetting about precedents or presenting them as being of limited value.”²¹ He adds, however, that the same technique of “historical illiteracy”²² can be used alternatively “to stress continuity — by suggesting an imagined precursor for an actual innovation.”²³

¹³ *Supra* note 10, s 52.

¹⁴ Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, 5th ed supplemented, vol 1 (Toronto: Thomson Reuters, 2022) at §58-1, citing *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 28.

¹⁵ Hogg & Wright, *ibid*, n 4.

¹⁶ *Ibid*.

¹⁷ See e.g. Kenneth J Kress, “Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions” (1984) 72:3 Cal L Rev 369.

¹⁸ Russell Sandberg, “The Employment Status of Ministers: A Judicial Retcon?” (2018) 13:1 Religion & Human Rights 27.

¹⁹ *Ibid* at 44.

²⁰ *Ibid*.

²¹ *Ibid* at 47.

²² *Ibid* at 44.

²³ *Ibid* at 47.

Because it rests on false or misrepresented historical facts by judges, Sandberg’s conception of judicial retconning is quite narrow and carries a specific normative implication that it is incorrect or even illegitimate. Yet the literary concept of retconning features multiple dimensions and varied definitions that are worth briefly exploring here. For example, Colin Clark, analyzing recent use of the term retconning in court decisions in the United States, defines it as occurring “when a later author introduces new information involving an earlier work about the same event or character in a manner that changes the meaning of the earlier work, usually without contradicting it.”²⁴ This relatively neutral definition implies that “new” facts or historical understandings might be legitimate and can be used to reconcile established jurisprudence with new cases in a normatively justifiable manner. In the literary context, retconning has also been tied to a nostalgic attempt to restore a narrative to a previous, idealized state, or to alter an overarching narrative while still preserving select elements, thus creating new audience understandings while still permitting a revisiting of previous stories.²⁵ More consistent with Sandberg’s definition, elsewhere retconning is understood as an effort “to change the past in order to fit the present.”²⁶ Retconning can involve the insertion of “‘new’ revelations in a storyline that also explain everything that occurred previously,”²⁷ thus changing interpretations of past narratives, and “applying a new logic retroactively. Since they were not part of the original narrative, these devices tend to distort the story. As ‘new’ versions of old stories, retcons tend to obscure more than they clarify.”²⁸

The broader definition of constitutional retconning that I adopt here — when courts adjust, reinterpret, or transform established historical understandings of the Constitution or a specific provision of the Constitution, or use history to establish new understandings or “discover” new meaning in a way that retroactively alters that meaning — is more appropriate because it recognizes that constitutional retconning is not limited to instances of alleged historical illiteracy. Moreover, judicial motivations may vary. There may indeed be instances where judicial decisions conceal or exaggerate changes in constitutional meaning, or clumsily reinterpret history in order to avoid having to explicitly overturn precedent. Yet as I examine below, there may also be contexts where a judicial decision does not alter historical facts but still manages to change and reinterpret how established history applies to a given structure or provision of the Constitution. One can even imagine instances where judges are unaware that retconning is what they are doing. Furthermore, not all instances of “bad judicial history” automatically amount to constitutional retconning.

Nonetheless, constitutional retconning inevitably involves some judicial alteration of the historical facts, *or* the meaning of established historical facts, surrounding a constitutional provision, structure, or rule, that retroactively alters constitutional meaning. How history is

²⁴ Colin Clark, “Retcon: How a Comic Book Word Can be Used as a Handy Rhetorical Weapon” (2021) 69:5 *Department of Justice J Federal L & Practice* 255 at 255–56. Clark notes the term “retconning” has appeared in only five cases (all emerging in the recent two-year period), although these uses by judges do not relate to matters of jurisprudential development of legal or constitutional interpretation.

²⁵ Adam Ochonicky, “Nostalgia and Retcons: The Many Returns, Homecomings, and Revisions of the *Halloween* Franchise (1978–2018)” (2020) 13:3 *Adaptation* 334.

²⁶ Casey M Ratto, “Not Superhero Accessible: The Temporal Stickiness of Disability in Superhero Comics” (2017) 37:2 *Disability Studies Q.*

²⁷ Benjamin M Jensen & Eric Y Shibuya, “The Military Rebalance as Retcon” in H Meijer, ed, *Origins and Evolution of the US Rebalance Toward Asia* (New York: Palgrave Macmillan, 2015) 81 at 81.

²⁸ *Ibid.*

understood is thus central to any inquiry of whether constitutional retconning occurs. As a result, conceptualizing constitutional retconning inevitably risks being bound up by related but fundamentally distinct debates, including longstanding disagreements over the use of originalist reasoning in Canadian constitutional interpretation.

A. CONTESTED (USE OF) HISTORY

Judicial disagreement about the history surrounding, or purposes of, a constitutional provision does not automatically constitute retconning, as an analysis of the *Comeau* case will demonstrate. In October 2012, Gérard Comeau was stopped by police and ticketed for bringing in excess of five cases of beer across the border from Quebec to his home province of New Brunswick.²⁹ Comeau contested his ticket in court and argued that the provincial law at stake was contrary to section 121 of the *Constitution Act, 1867*, which reads: “All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.”³⁰ The Crown argued that, consistent with established interpretation of section 121 and the leading precedent *Gold Seal Ltd. v. Alberta (A.G.)*,³¹ the provision was intended only to prevent provincial laws imposing cross-border tariffs or duties.³² Provincial Court Judge LeBlanc recognized the potential implications for provincial jurisdiction if section 121 were afforded a broad protective scope, going so far as to note that the “very nature of the Canadian federation is at stake.”³³ He proceeded with an in depth analysis of section 121’s specific wording and the legislative history behind the provision, noting that a broad and liberal interpretation of section 121 would suggest that “admitted free” extended beyond direct tariffs or duties.³⁴ This analysis included reliance on an expert witness who testified to the fact that the Fathers of Confederation “would have been aware of the difference between ‘admitted free’ and ‘admitted free of duty’” and that there was thus interpretative significance in the lack of any explicit qualifier in the text.³⁵ Judge LeBlanc’s analysis of the historical context surrounding Confederation similarly led to a conclusion in favour of a broader interpretation of section 121, including the desire to ensure inter-colonial free trade that included the elimination of non-tariff barriers.³⁶ The judgment also cites a series of quotations from various Fathers of Confederation, from George Brown to George-Étienne Cartier, on the importance of free trade.³⁷

Judge LeBlanc had to confront well-settled jurisprudence on section 121 endorsing the narrower interpretation that it pertains solely to the imposition of direct tariffs, or custom duties, affecting inter-provincial trade.³⁸ He agreed with the defence’s arguments that the

²⁹ *R v Comeau*, 2016 NBPC 3 at paras 1–2 [*Comeau* NBPC].

³⁰ *Supra* note 6.

³¹ (1921), 62 SCR 424 [*Gold Seal*].

³² *Comeau* NBPC, *supra* note 29 at para 18.

³³ *Ibid* at para 21.

³⁴ *Ibid* at para 69.

³⁵ *Ibid* at para 62.

³⁶ *Ibid* at paras 73–90.

³⁷ *Ibid* at paras 91–101.

³⁸ It is worth noting that *obiter* in some of the cases following *Gold Seal*, *supra* note 31 seemed to raise the prospect of a slightly wider interpretation of section 121 such that it might also be “aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist” (*Comeau* NBPC, *supra* note 29 at para 110, citing *Murphy v CPR*, [1958] SCR 626 at 642). What was clearly established by the body of jurisprudence was that section 121 does not prohibit all regulation affecting the movement of goods.

Supreme Court in *Gold Seal* engaged in no authoritative assessment of history (cited no authority) to support its interpretation, and that it failed to provide “a large, liberal or progressive interpretation” of section 121.³⁹ While this alone would not be enough to conclude *Gold Seal* was wrongly decided, Judge LeBlanc felt justified acting contrary to established precedent on the basis of “a significant change in evidence, one that [he believed had] fundamentally shifted the parameters of the debate,”⁴⁰ drawing on one of the exceptions to the stare decisis principle elaborated on by the Supreme Court in *Canada (Attorney General) v. Bedford*⁴¹ and *Carter v. Canada (Attorney General)*.⁴² Specifically, this new evidence concerned the drafting of the provision, the legislative history, and its broader context (largely relying on the testimony of a single expert witness). Judge LeBlanc thus concluded that the New Brunswick law violated section 121.⁴³

The Provincial Court decision in *Comeau* might appear to have all the hallmarks of retconning. Judge LeBlanc relies on what he indirectly calls “new”⁴⁴ evidence about the history of section 121 and the historical context surrounding it to assert a reinterpretation of its purpose and scope. Yet there are reasons to doubt whether *Comeau* falls neatly into the definition of constitutional retconning established here. Most importantly, nothing in Judge LeBlanc’s interpretation of section 121 *retroactively* alters constitutional meaning. What is at stake is an interpretative disagreement about the scope of a particular provision situated largely in debates about the historical context and legislative drafting decisions that might inform the intentions of those that enacted it. That this debate centres on judicial use of history does not automatically make the overturning of precedent in this context an example of retconning. The question is not merely whether history can be presented in a way that offers an alternative interpretation of existing constitutional provisions. Instead, to engage in constitutional retconning, a court must either apply a different historical narrative or derive new meaning from established history in a way that *retroactively* alters how we understand a constitutional provision. Judge LeBlanc’s reasoning overturned precedent based on what he believed was the better understanding of the historical context of section 121’s drafting and purpose. He was not attempting to alter a historical narrative to reconcile contradictions in earlier jurisprudence or contemporaneous understandings of the constitutional provision at stake. Indeed, much of the debate over the decision is quite literally a debate over *what the contemporaneous understandings were* and how or whether they should inform constitutional meaning. Nor was Judge LeBlanc eliding established precedent to falsely present an unchanged continuity, or pretending to make a fundamental legal change by misrepresenting precedent, as per Sandberg’s application of the judicial retcon concept noted above.⁴⁵ Instead, his reasoning was simply that established precedent was wrong and that an alternative interpretation of section 121 was more accurate. In overturning Judge LeBlanc’s decision, the Supreme Court did not so much offer an alternative history as question whether the “new” evidence presented at trial was in fact new or relevant to whether section 121 could be given a broader interpretation.⁴⁶

³⁹ *Comeau* NBPC, *ibid* at para 116.

⁴⁰ *Ibid* at para 125.

⁴¹ 2013 SCC 72 [*Bedford*].

⁴² 2015 SCC 5 at para 44 [*Carter*]; *Comeau* NBPC, *supra* note 29 at para 125.

⁴³ *Comeau* NBPC, *ibid* at para 193.

⁴⁴ *Ibid* at para 120, quoting *Bedford*, *supra* note 41 at para 41.

⁴⁵ Sandberg, *supra* note 18.

⁴⁶ *Comeau*, *supra* note 3 at para 43, quoting *Constitution Act, 1867*, *supra* note 6.

The Supreme Court ascertained that the central question in the case was fundamentally a dispute over the meaning of the phrase “admitted free” in section 121.⁴⁷ The Supreme Court unanimously rejected the idea that Judge LeBlanc was justified in overturning its judgment in *Gold Seal* on the basis of the new evidence exception articulated in *Bedford* and *Carter*:

[D]eparting from vertical *stare decisis* on the basis of new evidence is not a question of disagreement or interpretation. For a binding precedent from a higher court to be cast aside on the basis of new evidence, the new evidence must “fundamentally shift” how jurists understand the legal question at issue. It is not enough to find that an alternate perspective on existing evidence might change how jurists would answer the same legal question.⁴⁸

Rather than new evidence constituting evolving legislative and social facts, the Supreme Court noted that what Judge LeBlanc relied on was “simply a description of historical information and one expert’s assessment of that information.”⁴⁹ The Supreme Court noted that while “[h]istorical evidence can be helpful for interpreting constitutional texts ... a re-discovery or re-assessment of historical events is not evidence of social change.”⁵⁰ Moreover, “[d]iffering interpretations of history do not fundamentally shift the parameters of the legal debate in this case.”⁵¹ The Supreme Court also suggested that Judge LeBlanc relied on evidence based in part on the expert’s opinion of the correct interpretation of section 121, thereby effectively ceding the judge’s role to the expert, something that “would introduce the very instability in the law that the principle of *stare decisis* aims to avoid.”⁵²

Despite ruling that Judge LeBlanc erred in overturning *Gold Seal*, the Supreme Court nonetheless accepted the “invitation”⁵³ to offer renewed guidance on the scope of section 121, engaging in its own assessment of the text, historical context, and legislative history at stake. After briefly noting the “ambiguous”⁵⁴ nature of the phrase “admitted free,” the Supreme Court conducted its own examination of the historical context. While acknowledging the broader aims of economic integration inherent in the Confederation project, and that the “framers of the Constitution were familiar with tariffs and charges on goods crossing borders,” the Supreme Court concluded that it remained unknown why they chose the broader language of “admitted free” rather than narrower and more explicit qualifying language like “free from tariffs.”⁵⁵ In fact, the Supreme Court goes so far as to recognize that there were debates over precisely this choice and “those that wanted a more expansive term than ‘tariffs’ or ‘custom duties’ won the day.”⁵⁶

Yet because Comeau was taken to be claiming that section 121 was an absolute provision with the purpose of eradicating “*all* impediments on trade at provincial borders, direct and indirect,”⁵⁷ the Supreme Court decided the intentional drafting choice did not imply a broader

⁴⁷ *Ibid* at para 2.

⁴⁸ *Ibid* at para 34.

⁴⁹ *Ibid* at para 36.

⁵⁰ *Ibid*.

⁵¹ *Ibid* at para 37.

⁵² *Ibid* at para 41.

⁵³ *Ibid* at para 45.

⁵⁴ *Ibid* at para 54.

⁵⁵ *Ibid* at para 64.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at para 65 [emphasis in original].

scope beyond tariff and tariff-like measures. Faced with a choice between this interpretation and one that would mean section 121 effectively eviscerates provincial authority to legislate in a wide array of areas under section 92 of the *Constitution Act, 1867*,⁵⁸ the Supreme Court had an easy decision to make.⁵⁹ The underlying purpose of section 121 could not have been to severely disrupt the division of powers. The Supreme Court also elaborated on the role the principle of federalism ought to play in interpreting the scope of section 121, emphasizing the importance of balancing the interests at stake in constitutional texts.⁶⁰ Finally, the New Brunswick legislation at issue was found not to constitute a tariff-like measure because its primary purpose was not targeted at impeding trade but to regulate the sale of liquor within the province.⁶¹

Scholarly reaction to the two decisions is decidedly mixed. Writing prior to the Supreme Court's decision, Malcolm Lavoie finds Judge LeBlanc's reasoning to be "quite persuasive."⁶² Nonetheless, Lavoie was perhaps prescient in raising the issue of whether the focus on legislative history and framers' intent in "Judge LeBlanc's judgment might raise questions from those who favour a 'progressive' interpretation of the Constitution. [Judge LeBlanc's] reasons do not address the question of how changes in the values and structure of the Constitution might inform a construction of the provision based on text, original purpose and historical context alone."⁶³ A common refrain in the academic commentary⁶⁴ on *Comeau* is attention to the originalist reasoning deployed in both the trial court and Supreme Court decisions, even as both emphasized the importance of a purposive, living tree approach to interpretation.⁶⁵

Kerri Froc and Michael Marin argue the Supreme Court's decision employed "historical evidence in an arbitrary and haphazard fashion, even as it criticized the trial judge's approach."⁶⁶ Further, they state that the Supreme Court's "analysis of the historical context and original meaning of section 121 displays some of the worst qualities of 'law office history' that has been criticized, ironically, by opponents to originalism."⁶⁷ However, this does not let the trial court's reasoning off the hook for its own flaws. Froc and Marin argue Judge LeBlanc was correct to revisit *Gold Seal* "but wrong to have uncritically accepted the evidence of the expert witness for *Comeau* that 'admitted free' meant free from any and all barriers to interprovincial trade."⁶⁸

⁵⁸ *Supra* note 6.

⁵⁹ It is unclear whether the dichotomy the Supreme Court set up for itself was entirely valid. It is not difficult to imagine a less absolutist conception of section 121 but one nonetheless broader than the interpretation that the Supreme Court ultimately settled on.

⁶⁰ *Comeau*, *supra* note 3 at para 82.

⁶¹ *Ibid* at paras 117–26.

⁶² Malcolm Lavoie, "R. v. *Comeau* and Section 121 of the *Constitution Act, 1867*: Freeing the Beer and Fortifying the Economic Union" (2017) 40:1 Dal LJ 189 at 199.

⁶³ *Ibid* at 193 [footnotes omitted].

⁶⁴ *Ibid*; Kerri A Froc & Michael Marin, "The Supreme Court's Strange Brew: History, Federalism and Anti-Originalism in *Comeau*" (2019) 70 UNBLJ 297; Benjamin Oliphant, "Originalism, Beer, and Interprovincial Trade Barriers" (6 May 2016), online: *Policy Options* [perma.cc/3N5P-828J]; Hoi L Kong, "*Comeau* and Constitutional Interpretation" (2020) 94 SCLR (2d) 57.

⁶⁵ *Comeau* NBPC, *supra* note 29 at paras 42–48; *Comeau*, *supra* note 3 at para 52.

⁶⁶ Froc & Marin, *supra* note 64 at 298.

⁶⁷ *Ibid*.

⁶⁸ *Ibid* at 299.

Work by Benjamin Oliphant and Léonid Sirota has uncovered that the Supreme Court engages in historical analysis of the sort in *Comeau* quite frequently, despite its repeated warnings against originalism as incompatible with its preferred approach to constitutional interpretation.⁶⁹ They correctly note that the purposivism the Supreme Court endorses features fundamentally originalist tendencies.⁷⁰ It is a view on which Froc and Marin concur, noting that the Supreme Court sometimes “assigns very weighty significance to the ‘historical context’ or the ‘constitutional bargains’ of Confederation when its supports its preferred result. Rather than excluding historical evidence, therefore, *Comeau* represents the Court’s desire to maintain, under the auspices of ‘living tree’ doctrine, maximum discretion to use or discard such evidence as its sees fit.”⁷¹

These authors share a particular interest in providing a more nuanced and accurate portrayal of originalism than critics usually present, one they see as often caricaturing the way original meaning is ascertained or falsely equating originalism with framers’ intent. The implication is that the courts sometimes engage in originalist reasoning without admitting it, and employ it poorly. Hoi Kong suggests *Comeau* is further evidence of the Supreme Court’s “interpretative eclecticism,” noting that in practice it is unlikely, given the normative complexity and contending values at stake, that a constitutional interpreter will remain firmly rooted in a single approach.⁷² These aspects of the interpretative debates are well beyond the scope of this article. My goal here, is instead to show how these interpretative debates frequently emerge to swamp discussions of judicial use of history, while nonetheless demonstrating, as exemplified by the *Comeau* case, that originalist reasoning does not automatically constitute retconning, and that the *potential* for retconning emerges regardless of which approach to interpretation is adopted.

Given the centrality of history to the constitutional retconning concept, it is important to consider how the courts address history and how judges undertake historical analysis more broadly. *Comeau* demonstrates that we cannot equate contestation over history, or disagreement about the use of historical sources, with constitutional retconning. The disagreement centres on the different ways judges in these cases viewed the wording of section 121, its structural relationship with other provisions in Part VIII of the *Constitution Act, 1867*,⁷³ and its broader relationship with, and effect on, the division of powers. Neither the trial court’s nor the Supreme Court’s decision-making was an attempt to *retroactively* alter either the meaning of the provision or our understanding of its historical evolution. Instead, both courts simply placed differing degrees of emphasis on what are *indirect* historical supports for a broader or narrower interpretation of section 121. Constitutional retconning should not be equated with either the overturning of precedent or with these sorts of narrow interpretative disagreements. Retconning instead requires an attempt to reconcile present understandings with new information about the past, or a reinterpretation of the past, in a way that changes our past understanding about the Constitution or its evolution. Alternatively, as per Sandberg, constitutional retconning may also occur when a decision

⁶⁹ Benjamin Oliphant & Léonid Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism’?” (2016) 42:1 Queen’s LJ 107; Léonid Sirota & Benjamin Oliphant, “Originalist Reasoning in Canadian Constitutional Jurisprudence” (2017) 50:2 UBC L Rev 505.

⁷⁰ Sirota & Oliphant, *ibid* at 536.

⁷¹ Froc & Marin, *supra* note 64 at 305 [footnotes omitted].

⁷² Kong, *supra* note 64 at 81–82.

⁷³ *Comeau*, *supra* note 3 at para 46.

misrepresents or alters the status of established precedent, either to effect change in a manner that avoids explicitly overturning precedent or to frame a decision as reflecting change or innovation where none has occurred.⁷⁴

B. JUDICIAL AMENDMENT OF THE CONSTITUTION

Judicial amendment of the Constitution is a concept employed to suggest that courts sometimes make fundamental changes to constitutional meaning that strain the boundaries of ordinary constitutional interpretation. The implicit or explicit claim is that cases of judicial amendment improperly usurp the amending formula by making changes that should require recourse to it and should be left to those actors empowered by the express amending authority laid out in the constitutional text. Elsewhere, I define judicial amendment as “a judicial decision that effectively adds to, removes from, or modifies the constitution in a manner that is inconsistent with, or not plausibly contemplated by, the text in its original or modern meaning, the intent or purposes of the relevant provisions, and the expectations of the broader political community as to what the constitution contains.”⁷⁵ In the Canadian context, scholars have pointed to the Supreme Court’s creation in the *Reference Re Secession of Quebec*⁷⁶ of a duty to negotiate in the event a clear majority votes in favour of a clear question on the secession of a province as an example of judicial amendment.⁷⁷

There are two key distinctions between judicial amendment and constitutional retconning. First, constitutional retconning does not necessarily result in constitutional change akin to amendment of the Constitution. Constitutional retconning may simply reconcile contradictory elements of the Constitution by presenting a retroactive continuity in meaning based on a novel use of history. Further, sometimes constitutional retconning can result in changes to the interpretative scope of a provision, without fundamentally modifying it. Second, constitutional retconning can happen within the bounds of conventionally accepted modes of interpretation. In fact, constitutional retconning might even be understood as a distinct interpretative technique, albeit one that judges deploy without making it explicit. While judicial amendment may carry a host of distinct normative implications,⁷⁸ the empirical dimensions of constitutional retconning do not necessarily imply a radical form of interpretative innovation. While there may be cases where judicial amendment may be deemed normatively defensible or even necessary,⁷⁹ in general terms the invocation of that concept has been deployed as a criticism akin to a specific form of judicial activism.⁸⁰

As I conceptualize constitutional retconning, the claim is not that retconning is an inherently illegitimate practice or that all instances of retconning are inappropriate. Nor do

⁷⁴ Sandberg, *supra* note 18.

⁷⁵ Emmett Macfarlane, “Judicial Amendment of the Constitution” (2021) 19:5 NYU Intl J Cont L 1894 at 1896 [Macfarlane, “Judicial Amendment”].

⁷⁶ [1998] 2 SCR 217 [*Quebec Secession Reference*].

⁷⁷ Richard Albert, “Constitutional Amendment by Stealth” (2015) 60:4 McGill LJ 673 at 690; Macfarlane, “Judicial Amendment,” *supra* note 75 at 1909–15.

⁷⁸ Macfarlane, “Judicial Amendment,” *ibid* at 1924; Kate Glover Berger, “Judicial Amendment and Our Constitutional Lives: A Reply to Emmett Macfarlane” (2021) 19:5 NYU Intl J Cont L 1925 at 1932–33.

⁷⁹ Macfarlane, “Judicial Amendment,” *ibid*.

⁸⁰ See e.g. Dale Gibson, “Founding Fathers-In-Law: Judicial Amendment of the Canadian Constitution” (1992) 55:1 Law & Contemp Probs 261; Eric J Segall, “Constitutional Change and the Supreme Court: The Article V Problem” (2013) 16:2 J Constitutional L 443.

all instances of constitutional retconning stem from poor judicial history. Constitutional retconning is an effect of judicial decisions that may even be independent of the primary outcome at stake in the decision. Further, while two of the three examples of retconning I explore below include critical analysis of the way judges handle history in those cases, retconning is not necessarily the result of “bad judicial history.” The contribution I seek to make here is to identify instances of constitutional retconning and then to explore the implications this interpretative device has for the broader enterprise of judicial decision-making.

III. CONSTITUTIONAL RETCONNING IN PRACTICE

A. THE SCOPE OF FEDERAL UNILATERAL AMENDING AUTHORITY SINCE 1949

The discussion of *Comeau* demonstrates that the mere presence of disagreement over historical facts or the use of history by judges is not proof of constitutional retconning. However, retconning is implicated in contexts where the courts use history in a way to retroactively alter meaning in the face of established, contemporaneous understandings about what a constitutional provision means. In its 2014 opinion in *Reference re Senate Reform*,⁸¹ the Supreme Court determined that Parliament could not unilaterally introduce term limits for senators under section 44 of the *Constitution Act, 1982*.⁸² Section 44 states that “[s]ubject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.”⁸³ Changes to senatorial terms are nowhere listed in sections 41 or 42, so a plain reading of the text might have suggested Parliament was free to enact them.⁸⁴ However, the Supreme Court based its elaboration of the scope of section 44 on the idea that it was effectively a direct replacement of a predecessor provision, section 91(1) of the *British North America Act, 1867*,⁸⁵ which was added by way of a 1949 amendment to give the Dominion Parliament amending powers equivalent to that enjoyed by the provinces to amend their own constitutions.⁸⁶

Section 91(1) read as follows:

The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House; provided, however, that a House of Commons

⁸¹ *Senate Reform Reference*, *supra* note 5.

⁸² *Supra* note 10. The Supreme Court also made determinations about the introduction of consultative elections for senators, the abolition of the Senate, and changes to the property qualifications for senators.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, ss 41–42, 44.

⁸⁵ *Constitution Act, 1867*, *supra* note 6 as it appeared on 29 March 1867 [*British North America Act, 1867*]

⁸⁶ *British North America (No 2) Act 1949*, (UK) 13 Geo VI, c 81, s 91(1); *Senate Reform Reference*, *supra* note 5 at paras 46–48.

may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.⁸⁷

The Supreme Court elaborated on the scope of section 91(1) in the 1979 *Upper House Reference*,⁸⁸ in an opinion that reduced it to covering “housekeeping”⁸⁹ matters. That decision, and its application to section 44 decades later, was fundamentally ahistorical and flew in the face of virtually every contemporaneous account of the provision that preceded it.

I should state at the outset that it is not my assertion that the specific outcomes the Supreme Court arrived at in 1979 were incorrect. It was not unreasonable for the Supreme Court to construe limits on section 91(1) such that Parliament could not unilaterally abolish the Senate or alter the composition of the Upper House in a way that affected provincial representation. The Supreme Court noted, for example, that the text of section 91(1) implies the continued existence of the Senate by virtue of its reference to Parliament.⁹⁰ Yet the Supreme Court adopted a particular understanding of historical practice surrounding the provision that led it to reduce the ambit of section 91(1), implying a far more narrow casting of its scope than anything contemplated by existing understandings at, and in the years following, its enactment.

Contemporaneous understandings of section 91(1) viewed it as a substantial provision giving Parliament significant and broad powers of amendment, limited only by the specific textual exceptions listed. Frank R. Scott’s assessment reflects the dominant account of the historical context surrounding Canadian constitutional amendment at the time, noting that, excepting changes to provincial constitutions, amendments to the *British North America Act* had to be formally executed by the Imperial Parliament.⁹¹ In the early years of Confederation, the Imperial Parliament had a free hand to make amendments, but by 1949 a strong convention existed by which the Parliament of the United Kingdom would enact amendments only at the request of the Dominion government, following a request in the form of a joint address of the House of Commons and the Senate.⁹² Provincial legislatures had no power to make such requests and the UK Parliament did not address them if they did.⁹³ As a matter of law, Scott notes, the federal Parliament was free to request any amendment, even those directly affecting provincial powers, and only convention restrained it from doing so.⁹⁴ For this reason, Scott viewed the 1949 amendment establishing section 91(1) as federal “willingness to give a protection to provincial and minority rights which did not formerly exist”⁹⁵ and as a “voluntary” withdrawal of what was in fact an absolute power of amendment that, as a result of convention, had subjected “the legal supremacy of the Parliament of the United Kingdom to the conventional control of the Canadian Parliament,

⁸⁷ *British North America (No 2) Act 1949, ibid.*

⁸⁸ *Upper House Reference, supra* note 4.

⁸⁹ *Ibid* at 65.

⁹⁰ *Ibid* at 73–74.

⁹¹ F R Scott, “The British North America (No. 2) Act, 1949” (1950) 8:2 UTLJ 201.

⁹² *Ibid* at 203.

⁹³ *Ibid.*

⁹⁴ *Ibid.* This view was confirmed three decades later by dual majorities of the Supreme Court of Canada in *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753.

⁹⁵ Scott, *ibid.*

[and] had accidentally resulted in giving Canada a federal constitution as flexible as the English constitution itself.”⁹⁶

Scott viewed the exceptions listed in section 91(1) as relatively straightforward. Parliament could not unilaterally alter provisions relating to the use of the English or the French language (specifically section 133 of the *British North America Act, 1867* and section 23 of the *Manitoba Act*),⁹⁷ or to educational privileges under section 93 of the *1867 Act* or to those provisions relating to education in the various establishing acts of Manitoba, Saskatchewan, Alberta, and the newly-joined province of Newfoundland.⁹⁸ Nor could Parliament intrude on or alter powers assigned exclusively to the legislatures of the provinces, which Scott concluded “would seem to include all the sub-heads of section 92.”⁹⁹ Interestingly, Scott added that “it would seem to follow that Parliament could alone change the office of the lieutenant-governor since this is denied to the provinces.”¹⁰⁰ In other words, Scott’s understanding of section 91(1)’s scope was that it was limited only by its express terms, making it considerable, consistent with the view that it was an analogue to the provincial power under section 92(1) to make changes to the machinery of government.

Other commentators of the time adopted a similarly broad understanding of the scope of section 91(1). D.C. Rowat argued that the provision gave the federal Parliament “power over many other important sections of the [British North America] Act which have to do with the federal system” and that it had “for the time being assumed a power of unilateral amendment which does not accord with the principle of federalism.”¹⁰¹ Rowat thought that the law meant that if the provinces and federal government could not come to agreement on a new amending formula then “the central government will be left with the broad power of amendment that it has already unilaterally assumed.”¹⁰² William Livingston similarly described the amending powers under section 91(1) as “considerable,”¹⁰³ and Bora Laskin as “wide,”¹⁰⁴ each adopting a plain-text reading of the provision. Paul Gérin-Lajoie, author of a leading book on amendment of the Constitution, wrote the following about the newly established section 91(1):

It would no doubt be misleading, and even inaccurate, to describe this power as one to amend the federal part of the Constitution, since it does not include the power to extend the federal sphere of jurisdiction. It may be more correctly described as a power mainly to alter the structure of the central government machinery and the rules governing its functioning. For instance, the Senate could be remodelled or abolished; the basis of representation in the House of Commons could be changed; the rule providing that money bills should originate in the House of Commons could be repealed.¹⁰⁵

⁹⁶ *Ibid* at 203–204.

⁹⁷ *British North America Act, 1867*, *supra* note 85, s 133; *Manitoba Act, 1870*, RSC 1985, Appendix II, No 8, s 23.

⁹⁸ Scott, *supra* note 91 at 205.

⁹⁹ *Ibid* at 205–206.

¹⁰⁰ *Ibid* at 206.

¹⁰¹ D C Rowat, “Recent Developments in Canadian Federalism” (1952) 18:1 Can J Economic & Political Science 1 at 11.

¹⁰² *Ibid* at 11–12.

¹⁰³ William S Livingston, “The Amending Power of the Canadian Parliament” (1951) 45:2 American Political Science Rev 437 at 444.

¹⁰⁴ Bora Laskin, “Amendment of the Constitution” (1963) 15:1 UTLJ 190 at 191.

¹⁰⁵ Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950) at xxx.

Gérin-Lajoie's conception of section 91(1)'s scope is very broad indeed, albeit consistent with the established text.

Importantly, this general scholarly view of the scope of section 91(1) was shared by political leaders of the day. Indeed, the consensus view of many provincial leaders was that the clause as entrenched was too extensive, and a desire to have it amended or repealed became a key issue in the intergovernmental constitutional conferences from 1950 onward seeking to finalize a comprehensive domestic amending formula.¹⁰⁶ One can get a clear idea of the concerns of the provinces about the scope of section 91(1) by referencing the specific amendments they sought. The unanimous agreement achieved over the so-called Fulton-Favreau formula in 1964¹⁰⁷ is perhaps the best illustration of what limits the provinces wanted to ensure against unilateral federal action: the functions of the Queen and the Governor General in relation to Parliament or the Government of Canada; provincial representation in the Senate and the residence qualifications of senators; and proportionate representation of the provinces in the House of Commons.¹⁰⁸ Parliament would otherwise be left free to make amendments to various *British North America Acts* "in relation to the executive Government of Canada and the Senate and House of Commons."¹⁰⁹

Even taking into consideration provincial concerns about the wording and apparent massive scope of section 91(1), I can find no contemporaneous account that interprets it as a mere housekeeping provision. Provinces wanted to ensure that provisions and matters *directly* affecting their fundamental interests were beyond the unilateral reach of the federal level, and the debates were limited to ensuring the continuance of the Senate, its core composition, and the provinces' representation in the two houses of Parliament. The Supreme Court in 1979 would ultimately extend provincial interests into a more nebulous architectural account of what was included in the "essential features" of institutions like the Senate, later mapping this reduced scope onto section 44 and transforming it into a nearly vestigial procedure of the 1982 amending formula.¹¹⁰

The historical context surrounding, and the contemporaneous accounts concerning, section 91(1) clearly understood it as substantial and, at the very least from a purposive view, a true analogue to the provincial power under section 92(1). Yet it is not as if these contemporaneous accounts failed to recognize or acknowledge a degree of ambiguity in the wording of the limitation clauses in section 91(1). It was well known that there existed potential for federal amendments of dubious reach. There was an understanding that such disputes would ultimately be resolved by the courts (an understanding shared by Prime Minister Louis St. Laurent when defending the decision to have the provision added to the 1867 Act).¹¹¹ However, there is no record that anyone envisioned an interpretation that would

¹⁰⁶ Livingston, *supra* note 103 at 444; ER Alexander, "A Constitutional Strait Jacket for Canada" (1965) 43:2 Can Bar Rev 262; Agar Adamson, "The Fulton-Favreau Formula: A Study of its Development 1960 to 1966" (1971) 6:1 J Can Stud 45 at 51.

¹⁰⁷ Quebec would subsequently withdraw its support in 1965.

¹⁰⁸ Bora Laskin, "Amendment of the Constitution: Applying the Fulton-Favreau Formula" (1965) 11:1 McGill LJ 2 at 4.

¹⁰⁹ *Ibid.*

¹¹⁰ *Senate Reform Reference*, *supra* note 5 at para 47.

¹¹¹ Scott, *supra* note 91 at 205.

one day prevent the introduction of something like senatorial term limits. How did the Supreme Court ultimately arrive at such a proposition?

Beyond its relative inattention to the text and the clear purpose of the provision, the 1979 Supreme Court relied heavily on a single White Paper, authored by then-Minister of Justice Guy Favreau, on the history of constitutional amendment in Canada.¹¹² The Supreme Court quotes the White Paper at considerable length, listing historical amendments as well as four principles that Favreau argued had emerged from existing practice.¹¹³ The first three principles were well grounded by established practice: (1) that the Parliament of the UK only enact amendments to the Constitution at the request of Canada; (2) that the Parliament of Canada must sanction any amendment (through a joint address of the House of Commons and the Senate to the Crown); and (3) that amendments cannot be made by provincial request (all that had been attempted were refused).¹¹⁴ The fourth principle articulated by Favreau was as follows:

[T]hat the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition.¹¹⁵

Even by Favreau's own explanation, this fourth principle was not a particularly firm or clear one. In 1915, after this principle's alleged emergence and by Favreau's own account, the *British North America Act, 1915*¹¹⁶ redefined the senatorial divisions to accommodate the four western provinces, but without any consultation with the provinces. Although not a direct amendment to the *British North America Act*, Parliament was also able to unilaterally end appeals to the Judicial Committee of the Privy Council, over the objection of some provinces, in a change of significant constitutional import. Finally, the *British North America Act (No 2), 1949*,¹¹⁷ the amendment which established section 91(1), was done without provincial consultation and over the objection of some provinces. The provinces specifically asserted that they should have been consulted because the provision as written would affect their interests.¹¹⁸ This does not speak to a clearly established principle of practice, let alone a legal one.

The Supreme Court then listed five amendments that were enacted by the federal Parliament following the insertion of section 91(1), quoting the White Paper to note that they did not affect federal-provincial relationships. The Supreme Court writes that “[a]ll of these measures dealt with what might be described as federal ‘housekeeping’ matters which, according to the practice existing before 1949, would have been referred to the British Parliament by way of a joint resolution of both Houses of Parliament, and without the

¹¹² Hon Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Queen's Printer, 1965).

¹¹³ *Upper House Reference*, *supra* note 4 at 60–65.

¹¹⁴ *Ibid.* at 64.

¹¹⁵ *Ibid.*

¹¹⁶ *Constitution Act, 1915* (UK), 5 & 6 Geo V, c 45, reprinted in RSC 1985, Appendix II.

¹¹⁷ *Supra* note 86, s 91(1).

¹¹⁸ Patrick J Monahan & Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law, 2013) at 171.

consent of the provinces.”¹¹⁹ The Supreme Court then concludes that because some of those matters posed to it in the reference exceeded the bounds of these “housekeeping” matters, they must not fall under the ambit of section 91(1).¹²⁰

The Supreme Court’s reasoning drew on an (imperfect) interpretation of past practice to cement a specific interpretation of the scope of section 91(1). Had Parliament introduced senatorial term limits sometime between 1949 and 1979, would that have changed the Supreme Court’s understanding of section 91(1)’s scope? While it is not clear, the Supreme Court’s logic certainly implies it. What the Supreme Court effectively did was recognize Favreau’s fourth “principle” as a veritable constitutional convention — despite the ambiguous, if not outright contradictory practice — and then, by way of interpreting section 91(1), gave that convention legal import.¹²¹ As the principal source of historical authority the Supreme Court cites for this manoeuvre, it is important to put the White Paper into further context. At the time the White Paper was published in early 1965, Favreau, whatever his other credentials and intellectual bona fides, was the federal Minister of Justice, engaged in ongoing negotiations with the provinces over a domestic amending formula. The White Paper should be regarded not solely as a product of arms-length, objective historical analysis but as a political document with an expressly conciliatory tone designed for public and provincial consumption in the context of those negotiations.

The insertion of section 91(1) was also the first time the phrase “Constitution of Canada” appeared in the *British North America Act*.¹²² To support its narrow interpretation of the scope of section 91(1), the Supreme Court in 1979 interpreted the phrase to mean “the constitution of the federal government, as distinct from the provincial governments” rather than as a reference to the whole of the *British North America Act*.¹²³ This came despite commentators at the time of section 91(1)’s enactment envisioning the term as even broader than the *British North America Act*.¹²⁴ This is noteworthy because the meaning of the term Constitution of Canada would be (re)defined by the *Constitution Act, 1982*, and in 2014’s *Senate Reform Reference* the Supreme Court retained the narrow interpretation of the scope of section 44 despite its express reference to “Constitution of Canada,” which the 2014 Supreme Court interprets expansively, as extending beyond the various Constitution Acts and including the basic structure, or architecture, of the Constitution.¹²⁵ Remarkably, the Supreme Court directly maps on the 1979 *Upper House Reference*’s logic in limiting the scope of section 44, even referencing the “the constitution of the federal government”¹²⁶ (all while putting the term Constitution of Canada in scare quotes, but only as it related to the federal amending power), while failing to address the dramatic change in meaning brought about by

¹¹⁹ *Upper House Reference*, *supra* note 4 at 65.

¹²⁰ *Ibid* at 77–78.

¹²¹ It is noteworthy that this reliance on practice and the degree to which it informed the Supreme Court’s legal interpretation of the scope of section 91(1) has received less scholarly attention than the Supreme Court’s recognition of a convention requiring “substantive provincial consent” in the *Patriation Reference* just a couple of years later: *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753. For an example of academic commentary on this aspect of the reference, see Adam M Dodek, “Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*” (2011) 54 SCLR (2d) 117.

¹²² *British North America (No 2) Act 1949*, *supra* note 86, s 91(1).

¹²³ *Upper House Reference*, *supra* note 4 at 69–70.

¹²⁴ Livingston, *supra* note 103 at 447.

¹²⁵ *Senate Reform Reference*, *supra* note 5 at para 27.

¹²⁶ *Ibid* at para 47.

the 1982 *Constitution Act* and the definition of Constitution of Canada as expressed in section 52. Nor is there any discussion about why the plain text of section 44 and the inclusion of the phrase “Constitution of Canada” has no apparent effect on the scope of that provision. The 2014 Supreme Court effectively applies two completely incompatible understandings of the phrase “Constitution of Canada,” a broad one in its explicit discussion of the term, and a narrow one applied implicitly only to section 44.

The Supreme Court did not decide all matters asked of it in the 1979 reference, dealing only with the issues that directly impinged upon provincial interests (consistent with the concerns of provinces as reflected in constitutional conferences of the 1950s and 1960s). With respect to other matters, such as those affecting the tenure of senators, the Supreme Court stated that it did not have sufficient contextual information to provide an opinion. It was the 2014 Supreme Court that rather blindly applied the 1979 Supreme Court’s reasoning to the scope of section 44 and determined that Parliament was not free to implement term limits for senators because doing so might alter the Senate’s essential features. Although the Supreme Court in 2014 does not employ the term “housekeeping,” the adoption of the *Upper House Reference* logic was explicit. It is the extension of this logic that solidifies an exceedingly narrow understanding of section 44, premised on the dubious historical reasoning about constitutional practice undertaken by the 1979 Supreme Court.

The 2014 Supreme Court’s reasoning is also questionable in light of the explicit text of the 1982 amending formula. Section 44 is subject to sections 41 and 42, which list, as it relates to the Senate, the powers of the Senate and the method of selecting senators, the number of members by which a province is entitled to be represented in the Senate, and the residence qualifications of senators.¹²⁷ As Patrick Monahan and Byron Shaw write, the “items specified in section 42 should be regarded as an exhaustive list of matters deemed fundamental or essential, as those terms were utilized in the *Senate Reference*. To hold that the unilateral federal power in section 44 is subject to further limitation along the lines suggested would lead to needless uncertainty and ambiguity.”¹²⁸ On a related point, I have previously written that “the court explicitly refused to address the seemingly pertinent question of why a retirement age [enacted in 1965 by Parliament] might fall under the category of ‘housekeeping’ but the imposition of terms limits of *any* length or design do not.”¹²⁹ The Supreme Court refused to engage in a line-drawing exercise because identifying a fixed term “which is functionally equivalent to that provided by life tenure” was too difficult.¹³⁰ The Supreme Court had evidence before it that non-renewable terms of 8, 10, or 12 years would not affect the Senate’s functioning given the mean and median lengths of senatorial service since 1965 were 11.3 and 9.8 years, respectively.¹³¹ It made no effort to explain how non-renewable term limits impinge on provincial interests, even indirectly, let alone how the Senate’s “essential features” would be changed by such a relatively modest innovation.

¹²⁷ *Constitution Act, 1982*, *supra* note 10, ss 41–42, 44.

¹²⁸ Monahan & Shaw, *supra* note 118 at 213–14.

¹²⁹ Emmett Macfarlane, *Constitutional Pariah: Reference re Senate Reform and the Future of Parliament* (Vancouver: UBC Press, 2021) at 91 [emphasis in original] [Macfarlane, *Constitutional Pariah*].

¹³⁰ *Senate Reform Reference*, *supra* note 5 at para 81.

¹³¹ Macfarlane, *Constitutional Pariah*, *supra* note 129 at 92.

The Supreme Court's exceedingly narrow interpretation of section 44 flows directly from its application of the 1979 reference, itself the product of an approach to section 91(1) that relied on a dubious assessment of the historical context around amendment practice, and the transformation of that practice into a legally applicable principle constraining the provision's scope. These judicial decisions combine to recast history to support the erosion of one of the amending procedures in Part V of the *Constitution Act, 1982* in a way that does not reflect contemporaneous understandings of federal amending authority at the time of section 91(1)'s enactment. This recasting of the legal historical context around amendment and the way in which it was employed to alter the scope of the amending provisions is a case of constitutional retconning.

Contemporary observers may nonetheless support the Supreme Court's assessment of constitutional practice. They may argue there was a sufficiently established political rule, even convention, that Parliament not request amendments by the UK Parliament that impinge upon provincial interests and further, that the Supreme Court was correct to integrate this principle when defining the scope of section 91(1). Moreover, they might argue the Supreme Court was fundamentally guided by the principle of federalism when interpreting section 91(1).¹³² The question is not whether the Supreme Court made a normatively desirable or even a "correct" decision. The question is not even whether the Supreme Court "misused" history; indeed, reasonable observers may reasonably disagree about whether the Supreme Court's interpretation of historical practice was well founded. The question is whether the Supreme Court's decisions represent a change in the meaning of a constitutional provision that came in the form of a retroactive continuity. There was a well-established view among both political actors and constitutional commentators about the purpose and scope of section 91(1). The Supreme Court adopted a particular understanding of the historical context of Canadian constitutional amendment to adopt a narrow interpretation of a constitutional provision that changed not only the law but also the consensus view of what the law meant, all while presenting this interpretation as consistent with established practice. This establishes a retroactive continuity of historical context and practice, as well as in constitutional meaning as it relates to the amending provision.

B. THE CONSTITUTIONAL STATUS OF THE SUPREME COURT OF CANADA

In other contexts, constitutional retconning can occur absent any dispute surrounding the historical facts at stake. In *Reference re Supreme Court Act*, retconning was instead the result of the implications the majority chose to draw from certain facts surrounding the evolution of the Supreme Court. The Supreme Court was faced with the question of whether Marc Nadon, a Supreme Court appointee of the Conservative government under Prime Minister Stephen Harper, was in fact eligible for appointment.¹³³ At the time of his appointment,

¹³² Even this argument cuts both ways. There is considerable agreement that the purpose of section 91(1) was to serve as an analogue of the provincial amending power under section 92(1). An overly expansionist view of "provincial interests" for limiting the scope of section 91(1) could itself be construed as contrary to the principle of federalism because it leaves the federal level with far less unilateral amending authority than the provinces, and by carrying this interpretation to section 44, an unbalanced amending formula as a result.

¹³³ *Reference re Supreme Court Act*, *supra* note 8 at para 2.

Nadon was a supernumerary judge of the Federal Court of Appeal.¹³⁴ Nadon was appointed to one of the “Quebec seats” of the Supreme Court, and section 6 of the *Supreme Court Act* states that those shall be appointed “from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.”¹³⁵ The key issue concerning Nadon’s eligibility was thus whether the general eligibility requirement, as established by section 5 — “Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province” — should be read in tandem with section 6 such that Nadon could be considered appointed “from among the advocates of that Province.”¹³⁶

A broader constitutional question raised in the reference was whether Parliament was free to amend the eligibility requirements in the *Supreme Court Act* or whether they comprised part of the “composition of the Supreme Court of Canada” under section 41(d) of the *Constitution Act, 1982* and thus required the unanimous consent of the provinces.¹³⁷

On the statutory question, a majority of the Supreme Court ruled that Nadon was not eligible. The same majority concluded that the eligibility requirements in the *Supreme Court Act* were part of the composition of the Supreme Court for the purposes of the amending formula, and thus entrenched beyond unilateral amendment.¹³⁸ The decision was remarkable in a number of respects, including that the majority effectively entrenched at least part of the *Supreme Court Act*, which had up until that point been considered an ordinary statute rooted in Parliament’s authority to establish and maintain a general court of appeal under section 101 of the *Constitution Act, 1867*.¹³⁹ It was also possible to imagine an interpretation of the “composition of the Supreme Court”¹⁴⁰ in more narrow terms, such as reflecting its size (nine seats) and the requirement that at least three judges be appointed from Quebec. Yet rather than focusing specifically on the meaning of the precise terms of the amending formula, the majority adopted a structural reading that positioned the Supreme Court as part of the “constitutional architecture.”¹⁴¹ Carissima Mathen and Michael Plaxton describe this reasoning as “not just eyebrow-raising but downright jaw-dropping.”¹⁴²

At the time the reference was decided, it remained an open question whether the Supreme Court was in fact yet entrenched in the Constitution of Canada.¹⁴³ Because the Supreme Court itself was nowhere else mentioned in the relevant Acts comprising the Constitution, and because section 101 of the *Constitution Act, 1867* remained a viable provision, some commentators suggested that the references to the Supreme Court in the 1982 amendment formula were not yet effective law. As Peter Hogg wrote in the 2003 edition of his famed *Constitutional Law of Canada* textbook, the *Supreme Court Act* is a federal statute and thus

¹³⁴ *Ibid* at para 3.

¹³⁵ RSC 1985, c S-26, s 6.

¹³⁶ *Ibid*, ss 5–6; *Reference re Supreme Court Act*, *supra* note 8 at paras 3–4.

¹³⁷ *Reference re Supreme Court Act*, *ibid* at para 5.

¹³⁸ *Ibid* at para 107.

¹³⁹ *Supra* note 6, s 101.

¹⁴⁰ *Reference re Supreme Court Act*, *supra* note 8 at para 5.

¹⁴¹ *Ibid* at paras 82, 100.

¹⁴² Carissima Mathen & Michael Plaxton, *The Tenth Justice: Judicial Appointments, Marc Nadon, and the Supreme Court Act Reference* (Vancouver: UBC Press, 2020) at 111.

¹⁴³ For a description of some of the contours of this debate, see e.g. Erin Crandall, “DIY 101: The Constitutional Entrenchment of the Supreme Court of Canada” in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) at 211–15.

the federal Parliament, acting under section 101, retained the power to make amendments affecting the Supreme Court.¹⁴⁴ In his view, the amending provisions under sections 41(d) and 42(d) were not yet effective until further steps were taken to adopt the Supreme Court into the Constitution.¹⁴⁵ The Attorney General of Canada essentially argued Hogg's perspective before the Supreme Court, which the majority rejected. The majority noted that if this so-called "Empty Vessels Theory" applied, it would mean that the framers of 1982 had entrenched "the Court's *exclusion* from constitutional protection."¹⁴⁶ The majority noted that this interpretation "would also mean that the provinces agreed to insulate this unilateral federal power from amendment except through the exacting procedures in Part V."¹⁴⁷ These were, to the majority, dubious propositions.

Yet the majority goes much further in their reasoning, drawing on an account of the historical evolution of the Supreme Court that not only informed the Justices' opinion about the 1982 amending procedures but also about its constitutional status *prior* to 1982. Here the majority suggests the Supreme Court achieved constitutional status prior to the entrenchment of the amending formula because over time its "continued existence and functioning engaged the interests of both Parliament and the provinces."¹⁴⁸ This status was merely "confirmed" by the *Constitution Act, 1982*, which "reflected the understanding that the Court's essential features formed part of the Constitution of Canada."¹⁴⁹ Mathen and Plaxton correctly describe this conclusion as "stunning," noting that the Supreme Court "effectively inserted itself into the Constitution with nary an amendment in sight."¹⁵⁰

It is important to underline that the Supreme Court's determination about its historical constitutional status is no mere passing suggestion. The majority devotes 12 paragraphs to this history and repeats the assertion that the 1982 entrenchment of the amending formula simply "confirmed" its status as constitutionally protected no less than four times.¹⁵¹ The majority points to two primary historical developments that led to the Supreme Court's effective entrenchment in the Constitution. First, the abolition of appeals to the Judicial Committee of the Privy Council (JCPC) in 1949 "had a profound effect on the constitutional architecture of Canada. The Privy Council had exercised ultimate judicial authority over all legal disputes in Canada, including those arising from Canada's Constitution. It played a central role in this country's constitutional structure."¹⁵² The abolition of appeals to the JCPC meant that the Supreme Court inherited this role,¹⁵³ and "became the keystone to Canada's unified court system."¹⁵⁴ The majority suggests that this change meant that "the continued existence and functioning of the Supreme Court of Canada became a key matter of interest to both Parliament and the provinces."¹⁵⁵

¹⁴⁴ Peter W Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 2003) 81.

¹⁴⁵ *Ibid* at 81, 86.

¹⁴⁶ *Reference re Supreme Court Act*, *supra* note 8 at para 98 [emphasis in original], citing Stephen A Scott, "Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes" (1982) 20:2 UWO L Rev 247 at 272.

¹⁴⁷ *Reference re Supreme Court Act*, *ibid*.

¹⁴⁸ *Ibid* at para 76.

¹⁴⁹ *Ibid*.

¹⁵⁰ Mathen & Plaxton, *supra* note 142 at 156.

¹⁵¹ *Reference re Supreme Court Act*, *supra* note 8 at paras 76, 88, 90, 95.

¹⁵² *Ibid* at para 82.

¹⁵³ *Ibid* at para 83.

¹⁵⁴ *Ibid* at para 84.

¹⁵⁵ *Ibid* at para 85.

Second, important changes in 1975 to end appeals as of right to the Supreme Court in civil cases “gave the Court control over its civil docket, and allowed it to focus on questions of public legal importance.”¹⁵⁶ This meant the Supreme Court was now principally tasked with the development of the law rather than error correction.¹⁵⁷ The majority concludes that “[a]s a result of these developments, the Supreme Court emerged as a constitutionally essential institution engaging both federal and provincial interests. Increasingly, those concerned with constitutional reform accepted that future reforms would have to recognize the Supreme Court’s position within the architecture of the Constitution.”¹⁵⁸ Throughout its analysis the Supreme Court repeated that the *Constitution Act, 1982* merely “confirmed” this established status.¹⁵⁹

The implications of the Supreme Court’s architectural reasoning are enormous, standing nothing short of a retroactive transformation of how section 101 of the *Constitution Act, 1867* is understood in terms of the express authority it provided Parliament to make amendments affecting the Supreme Court.¹⁶⁰ The Supreme Court engaged in constitutional retconning, albeit not on the basis of any alteration of the historical *facts* at stake. Indeed, the sequence of events, and their particulars, as it relates to the abolition of appeals to the JCPC in 1949 and the control the Supreme Court gained over its civil docket in 1975, are uncontested. Nor did this particular rationale alter the outcome of the reference before the Justices. Whether the Supreme Court became entrenched by virtue of the 1982 amending formula or earlier had no bearing on whether Parliament could make unilateral amendments to its essential features in 2014. Nonetheless, the majority’s interpretation of how the historical events surrounding the Supreme Court’s evolution implicated its status prior to 1982 is a glaring example of retconning.

C. CHANGES TO ROYAL SUCCESSION AND THE STATUS OF THE CANADIAN CROWN

Sometimes constitutional retconning can have much larger effects on constitutional meaning, extending well beyond the mere scope of a particular provision to altering how we conceive of an entire institution at the heart of our system of government. In October 2011, 16 members of the Commonwealth agreed to amendments to the rules of royal succession, with a bill tabled in the Parliament of the United Kingdom the following year (the *Succession to the Crown Act 2013*).¹⁶¹ In Canada, Parliament passed Bill C-53, the *Succession to the Throne Act, 2013*,¹⁶² assenting to changes made by the UK Act before that Act was

¹⁵⁶ *Ibid* at para 86.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid* at para 87.

¹⁵⁹ *Ibid* at paras 76, 88, 90, 95.

¹⁶⁰ There is some irony, undiscussed by the majority, that it was the federal Parliament that unilaterally ended appeals to the JCPC in 1949 and made changes affecting the Supreme Court’s control over its docket in 1975, and yet the implication of the majority’s discussion is that it is these changes that somehow put further ones beyond the reach of the federal level’s unilateral authority.

¹⁶¹ (UK), 2013, c 20.

¹⁶² SC 2013, c 6, s 2.

enacted.¹⁶³ Two Quebec lawyers filed a constitutional challenge arguing that the *Succession to the Throne Act* was invalid because changes to the rules of royal succession constituted a change to the office of the Queen and therefore required the unanimous consent of the provinces under section 41(a) of the amending formula.¹⁶⁴ The trial court rejected the challenge¹⁶⁵ and that decision was upheld by the Quebec Court of Appeal.¹⁶⁶ The Supreme Court refused leave to appeal, and so the Quebec Court of Appeal judgment stands as the authority on the matter.¹⁶⁷

A key question at the centre of the case concerned whether the rules of succession were part of Canadian constitutional law, the answer to which is deeply rooted in the historical evolution of the Crown of Canada as a distinct, independent institution.¹⁶⁸ In making its determination, the trial court's decision, and the Quebec Court of Appeal in upholding it, sought to reconcile competing precedents and conflicting jurisprudence. The Courts' reasoning also fundamentally alters established conceptions of the Canadian Crown's independence by holding that the rules of succession to the Crown of Canada are British law, not Canadian law.¹⁶⁹ The ultimate reasoning at stake stands as a clear-cut example of constitutional retconning.

In determining that the rules to succession do not form a part of the Canadian Constitution, the Court of Appeal notes that the British rules originated in the *Bill of Rights, 1689*¹⁷⁰ and the *Act of Settlement, 1701*.¹⁷¹ In rejecting the assertion that the rules were part of Canadian law — the litigants argued that the *Bill of Rights* and *Act of Settlement* were imposed on the colonies by their own force — the Court upheld the trial court finding that, instead, a “principle of symmetry between the Queen of the United Kingdom and the Queen of Canada is firmly rooted in the Canadian Constitution” as opposed to the rules of succession themselves.¹⁷² This principle is found in both section 9 and the preamble to the *Constitution Act, 1867*. Section 9 states that “The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.”¹⁷³ The preamble states that “Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom.”¹⁷⁴ The assumption in 1867 was undoubtedly that Canada and the United

¹⁶³ The Canadian bill also secured the rarely used Crown consent mechanism, for reasons that were never explained. Crown consent is meant to ensure that legislation affecting the Crown has the consent of the Crown, yet the government argued that the law had no effect on the Crown in Canada. My thanks to Philippe Lagassé for pointing this out.

¹⁶⁴ *Motard c Canada (Procureur général)*, 2016 QCCS 588 at paras 1–4. They also challenged the law on *Charter* grounds as a violation of religious freedom and equality (in reference to the requirement that the monarch be a member of the Church of England) and under section 133 of the *Constitution Act, 1867*, which requires that laws be enacted in both official languages. Both of these challenges were dismissed, and are not important to the present analysis.

¹⁶⁵ *Ibid* at paras 151–59.

¹⁶⁶ *Motard*, *supra* note 12.

¹⁶⁷ *Ibid*, leave to appeal to SCC refused, 38986 (23 April 2020).

¹⁶⁸ *Ibid* at para 29.

¹⁶⁹ *Ibid* at paras 66, 92.

¹⁷⁰ (UK), 1 Will III & Mary II, c 2.

¹⁷¹ (UK), 12 & 13 Will III, c 2; *Motard*, *supra* note 12 at para 30.

¹⁷² *Motard*, *ibid* at para 42.

¹⁷³ *Constitution Act, 1867*, *supra* note 6, s 9.

¹⁷⁴ *Ibid*, Preamble.

Kingdom would have a shared monarch — indeed, that Canada’s Queen was the Queen “of the United Kingdom of Great Britain and Ireland.”¹⁷⁵

The Courts also had to confront the fact that the Imperial Conferences of 1926 and 1929, culminating in the *Statute of Westminster, 1931*, began the separation of the Crown into distinct institutions (or distinct corporations sole) in recognition of the legislative independence of countries like Canada.¹⁷⁶ Section 2 of the statute terminated the *Colonial Laws Validity Act, 1865*,¹⁷⁷ which invalidated Dominion laws that ran contrary to acts of the British Parliament, and section 4 ensured legislative equality between the Dominions and the British Parliament by requiring Dominion request and consent that a British act extend to its law (Canada would famously require the assistance of the UK Parliament to make major amendments to its own constitutional acts until finally entrenching a domestic amending formula in 1982).¹⁷⁸ On the rules of succession specifically, the statute provided the Dominions with a measure of control. As a compromise stemming from Canadian resistance to the idea that the Parliament at Westminster should decide matters affecting the Crown, the 1929 conference agreed on a convention, reflected in the preamble, that changes in the rules of succession would require the assent of the Parliaments of all the Dominions.¹⁷⁹

As Philippe Lagassé explains, the compromise over the rules of succession “failed to truly reconcile the British aim of a unified Crown with Canada’s push for legislative autonomy.”¹⁸⁰ The preamble and section 4 of the *Statute of Westminster* were in tension, and it was not clear whether the Dominions would need to legislate or merely assent to British changes to the law of royal succession. This ambiguity was exposed by the abdication of King Edward VIII in 1936, and the government of Canada under William Lyon Mackenzie King determined that while an assent was required, a Canadian law was also needed to reflect the change.¹⁸¹ First, “the Canadian government issued an order-in-council requesting and consenting that the British parliament extend its abdication act into Canadian law.”¹⁸² Then the Canadian Parliament passed its own legislation. Although the opposition of the day objected to this, Lagassé writes that King’s decision had an important effect:

By requesting and consenting that His Majesty’s Declaration of Abdication Act, 1936 extend to Canada, King established that the Dominion did not automatically follow the British rules of royal succession. As of December 1936, Canada could therefore claim an autonomous line and law of succession for the Crown in Canada. This Canadianisation was reinforced when parliament finally assented with the Succession to the Throne Act, 1937. The King government was careful to include His Majesty’s Declaration of Abdication Act, 1936 in the schedule to this Canadian statute, stressing that assent to the British act alone would have been insufficient.

...

¹⁷⁵ *Ibid.*

¹⁷⁶ (UK), 22 & 23 Geo V, c 4 [*Statute of Westminster*]; *Motard, supra* note 12 at para 67.

¹⁷⁷ (UK), 28 & 29 Vict, c 3.

¹⁷⁸ *Statute of Westminster, supra* note 176, ss 2, 4.

¹⁷⁹ *Ibid.*, Preamble.

¹⁸⁰ Philippe Lagassé, “Royal Succession and the Constitutional Politics of the Canadian Crown, 1936–2013” (2018) Round Table 451 at 454.

¹⁸¹ *Ibid* at 454–55.

¹⁸² *Ibid* at 455.

King used Section 4 to layer on the requirement that the changes had to be made in Canadian law. In so doing, King undermined the imperialist view that the sovereign of the United Kingdom was automatically the sovereign of Canada.¹⁸³

The *Statute of Westminster*, coupled with the precedent-setting decision by the King government during the 1936 abdication crisis, might be regarded as cementing the Canadian Crown as a distinct institution and establishing that rules governing royal succession were a part of Canada's domestic law. Indeed, this was the precise finding in 2003 by Justice Rouleau in the Ontario Superior Court judgment *O'Donohue v. Canada*.¹⁸⁴

The *Motard* Courts adopted a different perspective. The trial judge held that the "sole purpose" of the Canadian legislation was to give Canada's assent, despite its explicit reference to section 4 of the *Statute of Westminster*.¹⁸⁵ He further held that had Canada intended for its own legislation to stand as a constitutional amendment, it would have required a formal request to the UK Parliament, and that it was "not necessary" to resort to section 4.¹⁸⁶ The Court of Appeal, endorsing this reasoning, thus concluded that it "was never the intention of the Canadian Parliament on that occasion to incorporate the British rules of succession to the throne into its domestic law."¹⁸⁷ This is a stunning conclusion that completely flips a more straightforward logic on its head. The only reason to enact legislation would be to signal that the change should be reflected in Canadian law. For the Court to conclude that Canada merely "acted out of abundant caution" belies both the degree to which Canada asserted the need for independence and authority in relation to the Crown of Canada at the Imperial Conferences and the government's clear intentions during the abdication crisis.¹⁸⁸ Indeed, the very authors of the preamble to the *Statute of Westminster*, Ernest Lapoint and O.D. Skelton, and who advised the approach taken by Canada in 1936, rejected that it provided for an automatic succession and considered changes to Canadian domestic law vital.¹⁸⁹

There are also several major problems with the underlying logic of some of the other conclusions reached by the *Motard* Courts. First, although neither the *Bill of Rights* nor the *Act of Settlement* appear as part of the "Acts and orders" included in the Schedule to the *Constitution Act, 1982*, there is little question that both laws extended to the British colonies as part of their law, including Canada.¹⁹⁰ Indeed, that was the express conclusion of Justice Rouleau in the 2003 *O'Donohue* case,¹⁹¹ the very case that first "discovered" the principle of symmetry invoked by the Courts in *Motard*. The Courts in *Motard* selectively adopted the

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Ibid.

184

[2003] OJ No 2764, 109 CRR (2d) 1 (ONSC) at para 34 [*O'Donohue*]. Justice Rouleau concluded that the 1937 *Succession to the Throne Act* "effected changes to the rules of succession in Canada to assure consistency with the changes in the rules then in place in Great Britain. The changes were necessary in light of the abdication of Edward VIII in 1936. Absent this Canadian statute, the statutory change in Great Britain to account for Edward VIII's abdication would have been contrary to Great Britain's commitment in the Statute of Westminster. Arguably, without this statute, Edward VIII's abdication would not have been effective in respect of the Crown of Canada" (*O'Donohue, ibid.*).

185

Motard, supra note 12 at para 81.

186

Ibid.

187

Ibid at para 83.

188

Ibid at para 86.

189

Lagassé, *supra* note 180 at 454–55.

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Constitution Act, 1982, supra note 10, s 2(b); Anne Twomey, "Royal Succession, Abdication, and Regency in the Realms" (2017) 22:1 Rev Const Stud 33 at 36.

191

O'Donohue, supra note 184 at para 3.

principle of symmetry while dismissing the claim that the *Act of Settlement* was part of Canadian law. As Anne Twomey writes of the trial court decision, it fails to address that the laws of succession, as Imperial statutes that expressly applied to Britain's colonies, "formed part of the law of those colonies, including Canada."¹⁹² She notes that this "was acknowledged by the British Parliamentary Counsel at the time of the 1936 abdication crisis, when he advised that the *Act of Settlement* formed part of the law of all the Dominions, and that Canada's request and consent to any amendment to it would be required for such a change to have effect in Canada."¹⁹³

Twomey also exposes a fatal historical flaw of the supposed principle of symmetry invented in *O'Donohue* and adopted by the *Motard* Courts: the 1867 preamble could not possibly reflect a principle of symmetry because at the time there was only a single Crown; there was no separate Crown of Canada.¹⁹⁴ The only Queen was the Queen of Great Britain and Ireland. Twomey's critical breakdown of this part of the Courts' logic warrants quoting at length:

Finally, if one instead draws a rule of recognition from the reference to the "Crown of Great Britain and Ireland" in the preamble to the *Constitution Act, 1867* or to the reference to the Queen in section 9, then that leads to further problems. First, this Crown no longer exists and is therefore a historic statement only. Secondly, at the time of the abdication in 1936 the notion that an automatic rule of recognition might exist was expressly rejected by the Canadian Government, which insisted that to be effective in Canada, any change to the rules of succession had to extend as part of Canadian law. Thirdly, if the preamble were regarded as asserting that the Canadian provinces remained united under the Crown of the United Kingdom, then that would mean there is no separate Crown of Canada and the Queen is advised with respect to Canadian matters by her British Ministers. As this is clearly not the case, references to the "Queen" in the *Constitution Act, 1867* cannot sensibly be interpreted today as meaning the Queen of the United Kingdom, rather than the Queen of Canada, and the preamble cannot be interpreted as meaning that Canada remains federated under the Crown of the United Kingdom, rather than its own Crown. As noted above, no "rule of recognition" could have existed until such time as the Crown became divisible and a separate Canadian Crown was created. No such rule of recognition was therefore set out in the *Bill of Rights*, the *Act of Settlement* or the *Constitution Act, 1867*, as all preceded by a very long time the creation of a separate Crown of Canada.¹⁹⁵

There is an alternative understanding of the rule of recognition that is more elegant than the one articulated by the *Motard* Courts and offers a partial response to Twomey's objections. Mark D. Walters writes that what he calls the "rule of Crown identification does not imply any legal connection or unity between Crowns as offices (or 'corporations sole'). The rule of identification is just that: it identifies the person occupying the office."¹⁹⁶

¹⁹² Twomey, *supra* note 190 at 43–44 [footnotes omitted], citing a host of sources to support the claim that the common understanding of the Imperial acts apply as part of Canadian law, including a list developed by the Canadian Department of External Affairs in the 1940s, and published in Maurice Ollivier, *Problems of Canadian Sovereignty: From the British North America Act, 1867 to the Statute of Westminster, 1931* (Toronto: Canadian Law Book Company, 1945).

¹⁹³ Twomey, *ibid* [footnotes omitted].

¹⁹⁴ *Ibid* at 46.

¹⁹⁵ *Ibid* [footnotes omitted].

¹⁹⁶ Mark D Walters, "Succession to the Throne and the Architecture of the Constitution of Canada" (2015) Queen's University Research Paper No 2015-001 at 4 [footnotes omitted].

Walters' formulation may suggest that the *consequences* of this rule of recognition need not result in the erosion of independence of the Crown of Canada, but it does not respond to Twomey's more fundamental point about where and how this rule of recognition or principle of symmetry emerged. According to Walters, the *Succession to the Crown Act, 2013* "leaves in place the principal terms set by the *Act of Settlement*,"¹⁹⁷ which were established for Canada in the *Constitution Act, 1867*,¹⁹⁸ but his theory does not explain how such a rule possibly existed prior to any separation of the Crown into distinct institutions. Like the *Motard* Courts, Walters downplays the significance of Canada's assertion of independent authority over the Crown at the Imperial Conference of 1929. He writes that the "statutory 'assent' by a Dominion did not itself change any law but only served as a formal indication that changes to the law on royal succession to be made in another quarter were acceptable."¹⁹⁹ This is a cogent understanding of the *operation* of the assent rule but it elides the very *basis* of it, which was to demarcate domestic control by the Dominions over the rules of succession. In effect, Walters adopts the position held by the British in 1929 in favour of automatic Crown unity and dismisses the Canadian position, which asserted authority over its newly distinct Crown, including on matters of succession. An authority the Canadian government exercised by passing legislation rather than merely assenting in response to the 1936 abdication crisis.

Another important way to consider this issue is through the fact that the preamble provision for assent to changes to the rules of succession is not law but rather a convention. The Courts explicitly recognize this fact²⁰⁰ but fail to address its implications for their reasoning. An obvious question relevant to the assent rule's status as a convention is therefore left unaddressed by the *Motard* Courts: what would happen if Canada refused to provide assent? It was recognized by the British authorities as early as the abdication crisis that the convention found in the preamble was "of no legal force."²⁰¹ The British Parliamentary Counsel and principal drafter and architect of the *Statute of Westminster* considered that without the Dominions expressing their request and consent or legislating their own changes in domestic law, then "the changes to succession to the throne would otherwise be of no effect in the Dominion."²⁰² However, nothing in law would prevent the UK Parliament from passing legislation to change the rules. In such a scenario, under *Motard*, if the principle of symmetry is part of the Canadian Constitution but the rules themselves are nowhere found in domestic Canadian law, then the rules of succession for the Crown of Canada would be changed *even if Canada had not assented* to them. This is untenable, as it would negate entirely the *Statute of Westminster* as well as Canada's historic position vis-à-vis its authority over a separate Crown. It exposes fundamental problems with both the Courts' treatment of the convention to the extent its presence is taken as contributing to a *legal* determination that the rules of succession were not part of domestic Canadian law, and with respect to the alleged principle of symmetry. The *Motard* Courts' reasoning can only be understood as a constitutional retcon.

¹⁹⁷ *Ibid* at 3.

¹⁹⁸ *Ibid* at 5–6.

¹⁹⁹ *Ibid* at 9.

²⁰⁰ *Motard*, *supra* note 12 at para 70.

²⁰¹ Lagassé, *supra* note 180 at 454, citing Donal K Coffey, "British, Commonwealth, and Irish Responses to the Abdication of King Edward VIII" (2009) 44:1 *Ir Jur* 95 at 102–103.

²⁰² Twomey, *supra* note 190 at 47–48, citing Memorandum from Sir Maurice Gwyer to the UK Attorney-General (23 November 1936), Kew, UK, National Archives of the United Kingdom (PREM 1/449).

The determination that the rules of succession are not part of domestic law and that only a principle of symmetry exists as a part of the Constitution of Canada helps facilitate the core conclusion that the rules are not part of the “office of the Queen” under section 41(a) of the *Constitution Act, 1982*.²⁰³ On this the Courts ruled that the office of the Queen “refers to the powers, status and constitutional role of the monarch in the Canadian Constitution” and that “an amendment to the British rules of succession has no effect on these attributes.”²⁰⁴ The Court of Appeal added that “s. 41(a) of the *Constitution Act, 1982* protects the institution of the monarchy, not the procedural rules by which a person accedes to the throne.”²⁰⁵ Some scholars have criticized this conclusion as failing to comport with the conception of the Crown of Canada as a corporation sole, which holds that there is no distinction between the office-holder and the office itself, ensuring the “perpetuity of the state and governing authority” and as being “preserved as successive natural persons occupy the office of Sovereign.”²⁰⁶ This makes the rules of succession “integral to the Crown as a corporation sole because the Crown can never be vacant.... [T]he Crown depends on the line of succession. Succession is a necessary part of the office of a corporation sole.”²⁰⁷ This perspective would also be much more consistent with how the Supreme Court of Canada has approached the interpretation of other amending procedures, including those under section 41(d) relating to its own composition, and under section 42(1)(b) relating to the powers of the Senate and the method of selecting senators.²⁰⁸ As noted in the preceding sections, the Supreme Court has interpreted those procedures broadly, incorporating the eligibility requirements for the justices and reading “powers of the Senate” so widely as to apply to the inclusion of senatorial term limits.

The narrow interpretation of section 41(a) pertains to the present analysis only insofar as that conclusion helps to explain the constitutional retconning. The *Motard* Courts’ retconning helped to reconcile several aspects of its reasons with historical and precedential incongruities or outright contradictions, including: the historical evolution of the Crown as reflected in the Imperial Conferences of 1926 and 1929 and the *Statute of Westminster*; the strong position taken by the Canadian government regarding the independence of the Crown and the rules of succession specifically; the events surrounding the 1936 abdication crisis and the Canadian government’s assertion of authority over the Crown by way of legislation; and the established jurisprudence, including *O’Donohue*, from which the *Motard* Courts adopted the principle of symmetry but rejected the holding that the rules of succession were part of the Canadian Constitution and subject to section 41(a). The *Motard* Courts’ approach can best be explained as a pragmatic solution to the risks posed by the historically appropriate and principle-based understanding of the Crown as a truly independent Canadian institution. Requiring a formal constitutional amendment under section 41(a) with unanimous provincial agreement raises existential stakes in Canada given past failures of post-1982 constitutional

²⁰³ *Supra* note 10, s 41(a).

²⁰⁴ *Motard*, *supra* note 12 at para 91.

²⁰⁵ *Ibid* at para 92.

²⁰⁶ Philippe Lagassé & James WJ Bowden, “Royal Succession and the Canadian Crown as a Corporation Sole: A Critique of Canada’s *Succession to the Throne Act, 2013*” (2014) 23:1 *Const Forum Const* 17 at 18.

²⁰⁷ *Ibid* at 19. For a critique of this perspective and an elaboration of the King’s “two bodies” doctrine that buttresses the conclusion in *Motard*, see Marie-France Fortin, “The King’s Two Bodies and the Canadian Office of the Queen” (2020–21) 25:2 *Rev Const Stud* 117.

²⁰⁸ *Reference re Supreme Court Act*, *supra* note 8; *Senate Reform Reference*, *supra* note 5.

amendment and the national unity strife that followed.²⁰⁹ As Twomey puts it, the decision “defies history and precedent” and “looks like a stark case of short-term political pragmatism taking priority over fundamental constitutional principle.”²¹⁰ As Lagassé notes, the Conservative government of 2011 wanted to avoid a constitutional debate that “threatened to spark separatist sentiments. Accordingly, the prudent path was to deny that the rules of succession were part of Canadian law or the constitution altogether.”²¹¹ The courts agreed. The effect, according to Lagassé, was the de-Canadianization of the Crown, leaving “the monarchy to drift as a vestigial British entity, the only part of the constitution that had not been fully patriated in 1982.”²¹² This was constitutional retconning.

IV. IMPLICATIONS

It is perhaps no mistake that the three cases analyzed here involve questions of constitutional change surrounding core institutions like the Senate, the Supreme Court, and the Crown. Identifying which features of these institutions enjoy constitutional status raises obvious questions concerning their historical origins and evolution. Yet constitutional retconning might appear in any major area of constitutional interpretation. History plays a pivotal role in division of powers disputes and the Supreme Court frequently appeals to precedent dating back to the nineteenth century to resolve contemporary issues, ranging from environmental policy in the *References re Greenhouse Gas Pollution Pricing Act*²¹³ to the regulation of securities.²¹⁴ It is not difficult to imagine federalism cases requiring the reconciling of complex precedential issues in a way that involves retcon-style historical analysis.

Historical inquiry is also central to the courts’ jurisprudence on Indigenous rights under section 35 of the *Constitution Act, 1982*,²¹⁵ as well as that concerning Aboriginal title claims, so much so that a major critique has been that the Supreme Court has adopted an essentially originalist perspective to Aboriginal and treaty rights in sharp contrast to the living tree approach it advances in relation to rights under the *Charter of Rights and Freedoms*.²¹⁶ Scholarly inquiry into this body of caselaw might reveal instances of constitutional retconning. Further, one of the most pressing challenges confronting courts in relation to Indigenous rights is reconciling the assertion of Crown sovereignty with the existing sovereignties of Indigenous nations, both in the context of established treaty relationships

²⁰⁹ Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3rd ed (Toronto: University of Toronto Press, 2004).

²¹⁰ Twomey, *supra* note 190 at 40–41.

²¹¹ Lagassé, *supra* note 180 at 458 [footnotes omitted].

²¹² *Ibid* at 459. Even monarchists were willing to abandon principle for pragmatism. Lagassé, *ibid* writes that “[t]he Monarchist League of Canada, which had previously argued that alterations to the line of succession require a unanimous constitutional amendment, adopted the opposite view when the amending formula presented a possible problem to the Crown” [footnotes omitted].

²¹³ 2021 SCC 11.

²¹⁴ *Reference re Securities Act*, 2011 SCC 66.

²¹⁵ *Supra* note 10, s 35.

²¹⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]; John Borrows, “Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism” (2017) 98:1 *Can Historical Rev* 114.

and in relation to unceded territory.²¹⁷ The historically contingent nature of how courts conceive of Crown sovereignty is increasingly in tension with contemporary understandings in a new era of reconciliation, a tension that courts may feel pressure to address without dramatically undercutting the legitimacy of key aspects of the Canadian Constitution. Some form of retconning may be the only answer to addressing some of these interpretative challenges.

One can also imagine the prospects of identifying instances of retconning in relation to decisions concerning the *Charter*. The potential for retconning might arise in a number of ways. First, judicial decisions that initially elaborated on the scope of particular *Charter* provisions often engaged in analysis of the historical context around the rights in question, as well as the intention of the framers and drafting history at stake.²¹⁸ As noted in relation to the discussion of *Comeau* above, this historically-driven analysis does not automatically equate to retconning, but departures from contemporaneous understandings might, as examined in relation to the Supreme Court's approach to federal amending authority in the *Upper House Reference*.²¹⁹ Second, although I have also emphasized that overturning precedent is not the same thing as retconning, it is worthwhile to investigate how the courts treat precedent when establishing important changes in constitutional meaning to see if retconning ever plays a role.²²⁰ Third, retconning might also explain *inattention* to particular constitutional provisions or the diminution of their substantive purpose. Historical analyses of provisions like section 28 of the *Charter*, which states that “[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons,” suggest that it is no mere interpretative clause as it has sometimes been treated, and thus marginalized, by courts.²²¹

I do not mean to suggest that each of these examples are indeed constitutional retconning, or that these areas of jurisprudence are rife with it. This article is merely a starting point of analysis for what it asserts is a distinctive interpretative technique. I have defined constitutional retconning in such a way that hopefully makes clear that it should not be equated with every contested use of history by courts. Nonetheless, even if genuine examples of constitutional retconning prove quite rare, it is important to acknowledge the considerable implications retconning can have for constitutional meaning.

²¹⁷ Kiera Ladner, “Beyond Crown Sovereignty: Good Governance and Treaty Constitutionalism” in Elizabeth Goodyear-Grant & Kyle Hanniman, eds, *Canada: The State of the Federation 2017: Canada at 150: Federalism and Democratic Renewal* (Kingston: Institute of Intergovernmental Relations, 2019) at 227.

²¹⁸ See e.g. *Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

²¹⁹ *Comeau*, *supra* note 3; *Upper House Reference*, *supra* note 4.

²²⁰ Judicial discussions of the history of labour law in relation to the right to strike may or may not involve retconning. See e.g. *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4. When commentary, even approving commentary, concludes that “everything we thought we knew about labour law in Canada and s. 2(d) changed” it is worth inquiring whether retconning has occurred (Omar Ha-Redeye, “Everything You Thought You Knew About Labour Law,” *Slaw* (2015), online: [perma.ca/UN7J-SE64].

²²¹ *Charter*, *supra* note 216, s 28; Kerri Anne Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms* (PhD Thesis, Queen's University, 2015) [unpublished]; Kerri A Froc, “Shouting into the Constitutional Void: Section 28 and Bill 21” (2019) 28:4 Const Forum Const 19.

A. FORMS OF RETCONNING

Sometimes the results of retconning are as straightforward as shaping the scope of particular provisions, as occurred with respect to the *Upper House Reference* and its subsequent application to section 44 of the *Constitution Act, 1982* in *Reference re Senate Reform*.²²² Constitutional provisions are often broadly phrased and so courts enjoy considerable discretion in assessing their scope. There are rarely definitively “correct” answers about how widely they might apply. This was the case with respect to section 121 of the *Constitution Act, 1867* in *Comeau*.²²³ What marked the *Upper House Reference* and *Senate Reform Reference* sequence as an example of constitutional retconning where *Comeau* was not is the retroactive nature of the changes to historical meaning vis-à-vis the contemporaneous views of the relevant actors and commentators. The contested history at stake in *Comeau* involved largely indirect evidence about the intent of the framers, based on their broader understandings of free trade issues, and drafting choices (such as the use of “admitted free” instead of “admitted free of duty”).²²⁴ The Courts were faced with valid competing interpretations of history in *Comeau* and did not retroactively alter meaning or new or alternative historical facts. In contrast to *Comeau*, which involved disagreement over what the contemporaneous understandings of section 121 were, the Supreme Court in the *Upper House Reference* adopted an understanding of the scope of section 91(1) of the *British North America Act, 1867* rooted in an analysis of historical practice that fundamentally differed from established contemporaneous understandings, as well as from the plain text of the provision.²²⁵ The application of this narrow view of federal amending authority to section 44 of the *Constitution Act, 1982* in the *Senate Reform Reference* cemented this constitutional retconning.²²⁶ The claim is not necessarily that this interpretation was “incorrect” — although the analysis above treats it critically — only that retconning as defined here occurred and altered constitutional meaning.

In other contexts, constitutional retconning may have more fundamental implications, even where the retconning does not alter the outcome of a particular case. The Supreme Court’s treatment of history in the *Supreme Court Act Reference* might have surprising implications for how we understand potential limits on constitutional amendment prior to 1982.²²⁷ The historical narrative itself is uncontested. Kate Glover Berger notes that the story the Supreme Court tells is “well-established in Canadian legal culture ... a retrospective in which the Court sheds its reputation as a ‘quiet court’ and rises to prominence as an institution of national importance.”²²⁸ The retconning instead flows from the Supreme Court’s conclusions about the implications of this evolution, “in effect, an exercise of self-entrenchment.”²²⁹ If we take the Supreme Court’s reasoning seriously, it would mean that Parliament could not have abolished or fundamentally transformed the Supreme Court

²²² *Upper House Reference*, *supra* note 4; *Senate Reform Reference*, *supra* note 5.

²²³ *Comeau*, *supra* note 3; *Comeau NBPC*, *supra* note 29 at para 62.

²²⁴ *Comeau*, *ibid* at paras 64–67.

²²⁵ *Upper House Reference*, *supra* note 4 at 69–70; Livingston, *supra* note 103 at 447.

²²⁶ *Senate Reform Reference*, *supra* note 5 at para 47.

²²⁷ *Reference re Supreme Court Act*, *supra* note 8.

²²⁸ Kate Glover, “The Supreme Court in Canada’s Constitutional Order” (2016) 21:1 *Rev Const Stud* 143 at 150 [footnotes omitted]. See also James G Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985); Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013).

²²⁹ Glover, *ibid* at 161.

between 1949 and 1982 without provincial consent, despite the express power to do so under section 101.²³⁰ Does the majority's contemporary understanding of history mean that, prior to 1982, there was in effect a "basic structure doctrine"²³¹ making certain features of the Constitution effectively unamendable? The Supreme Court of the 1960s or 1970s may have been unlikely to draw the same conclusions as the Supreme Court in 2014. Yet that does not matter. In fact, that the Supreme Court of decades past would not have reached the same conclusion as the 2014 Supreme Court quite naturally follows from constitutional retconning! Rather than approaching the Supreme Court's 2014 reasoning as inviting speculation about how its understanding would apply prior to 1982, we should recognize it as a retroactive continuity: a statement about past constitutional meaning that had not, in fact, been in effect or realized. Retconning reframes and changes historical understandings *for contemporary purposes*. The majority used its assessment of history in an effort to buttress its conclusions about the status of the Supreme Court in relation to the 1982 amending procedures.

While the specific constitutional retconning deployed in the *Supreme Court Act Reference* did not effect the outcome, the finding that the Supreme Court was effectively entrenched prior to 1982 does carry potentially significant implications for the future. The architectural logic the Supreme Court uses maximizes judicial discretion not only to ascertain constitutional meaning but also to decide what is and is not included in the Constitution of Canada. As Mathen and Plaxton argue, among the reasons to be "skeptical of the majority's reliance on structural principles" is the expansionist approach it takes to identifying the "essential features" of the institution.²³² They write that "[o]ne may agree that the Constitution forbids the prime minister from engaging in court stacking but hesitate to agree that it bars Parliament from changing any aspects of its composition — including all eligibility criteria whatsoever."²³³ The architecture concept has been criticized for the discretion it confers judges to determine the contours of specific constitutional provisions depending on the broader structure, "placing a great degree of dependence on the justices' ability to accurately describe the various institutions, conventions, and processes that animate the Constitution."²³⁴ Architectural reasoning that broadens the scope of certain procedures in the amending formula, and especially the unanimity procedure under section 41, means exacerbating the degree to which Canada suffers from a formal constitutional stasis,²³⁵ a result that ironically will mean increased reliance on the courts to effect future constitutional change through interpretation.²³⁶

²³⁰ *Constitution Act, 1867*, *supra* note 6, s 101.

²³¹ Basic structure doctrine, adopted in India and elsewhere, is a judicial doctrine of implied unamendability suggesting that certain essential features of a constitution are beyond the established amending authority and effectively immutable. Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017). For a discussion on the applicability of basic structure doctrine in Canada post-1982, see Emmett Macfarlane, "The Unconstitutionality of Unconstitutional Constitutional Amendments" (2022) 45:1 *Man LJ* 198.

²³² Mathen & Plaxton, *supra* note 142 at 161–62. It is worth noting the Supreme Court's self-interest in shielding as many aspects of itself as possible from unilateral amendment.

²³³ *Ibid.*

²³⁴ Macfarlane, *Constitutional Pariah*, *supra* note 129 at 80.

²³⁵ Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 *Alta L Rev* 85 at 86.

²³⁶ Macfarlane, "Judicial Amendment," *supra* note 75 at 1894.

The judicial reasoning on the rules of royal succession in *Motard* is perhaps an exemplar of retconning for pragmatic purposes to reconcile ambiguous or conflicting precedents.²³⁷ Yet it demonstrates that such retconning can create its own issues for consistency and coherence. As already noted, the effect of the decision is to narrow the scope of section 41(a) as it pertains to the “office of the Queen” in a manner that does not seem to accord with the broad and liberal interpretation applied to other matters listed in sections 41 and 42.²³⁸ The implications of *Motard* for our understanding of the Crown of Canada are potentially enormous, at the very least for the suggestion that the Constitution of Canada was not, in fact, fully patriated in 1982. The “principle of symmetry” relied on by the *Motard* Courts, albeit drawn from an earlier case, is the closest constitutional analogue to the creation of Dawn in *Buffy the Vampire Slayer*: the judges of the *Motard* Courts played the role of mystical monks, protecting the Constitution and perhaps the Crown itself from the threat of a formal amendment requirement all while changing our historical understandings of the Crown’s evolution into a fully independent and Canadian institution.

Motard also raises questions about other changes that might be effected unilaterally on Crown institutions, such as the office of the governor general or lieutenant governors. For example, in legal challenges to early election calls under fixed-term election date laws, complainants have asserted that requests for early dissolution should be refused, despite such laws explicitly preserving the vice-regal authority to grant them.²³⁹ The reason fixed-term election date laws preserve vice-regal authority is because altering the power of the governor general or lieutenant governors would require recourse to section 41(a) of the *Constitution Act, 1982*.²⁴⁰ In rejecting these claims, the courts have generally recognized the purpose for tailoring the laws this way. In effect, Canadian fixed-date election laws only ensure the maximum life of a legislature. Yet a recent challenge in British Columbia raised the question of what limits might be placed on the prerogative powers of a lieutenant governor in relation to dissolving the legislature.²⁴¹ Justice Gomery held that section 41(a) “is only engaged by transformative institutional changes.”²⁴² Justice Gomery cites the Quebec Court of Appeal’s decision in *Motard*, stating that it is “ambiguous” and therefore unhelpful, but nonetheless noting that it supports a conclusion that “institutions may experience significant changes in their powers or status without a change in their essential character.”²⁴³ Following a brief analysis of the text of section 41(a),²⁴⁴ a similarly brief claim that “the scheme of the *Constitution Act, 1867* is one that contemplates a significant degree of local constitutional tinkering,”²⁴⁵ and noting that the “exercise of prerogative powers in British Columbia does not seem to be a matter in which other provinces and the federal Parliament should necessarily be interested,”²⁴⁶ Justice Gomery concludes that “the Lieutenant Governor’s power of dissolution is not so fundamental to the vice-regal role that the constraint or

²³⁷ *Motard*, *supra* note 12.

²³⁸ *Ibid* at para 92; *Constitution Act, 1982*, *supra* note 10, ss 41–42.

²³⁹ See e.g. *Duff Conacher and Democracy Watch v the Prime Minister of Canada, the Governor in Council of Canada, the Governor General of Canada and the Attorney General of Canada*, 2009 FC 920; *Conacher v Canada (Prime Minister)*, 2010 FCA 131.

²⁴⁰ *Supra* note 10, s 41(a).

²⁴¹ *Democracy Watch v British Columbia (Lieutenant Governor)*, 2022 BCSC 1037.

²⁴² *Ibid* at para 26.

²⁴³ *Ibid* at para 28.

²⁴⁴ *Ibid* at paras 31–32.

²⁴⁵ *Ibid* at para 35.

²⁴⁶ *Ibid* at para 36.

curtailment hypothesized by the petitioners will undermine the legal theory underlying the office.”²⁴⁷ This logic is questionable given historic protections afforded to the office of lieutenant governor against unilateral provincial change. Moreover, while *Motard* did not play a determinative role in shaping this logic, the restrictive approach it adopted to the scope of section 41(a) lends it more credence. Such retconning can thus have important implications for future controversies.

B. OBJECTIONS TO RETCONNING

While constitutional retconning may in some contexts be normatively defensible, it sometimes involves a distortion of history, either in terms of historical facts or the implications drawn from those facts. Moreover, in the examples analyzed here, courts employing retconning do so in a way that effectively masks or hides the fact that they are changing constitutional meaning. Indeed, the concealed nature of change is inherent to the very concept of retroactive continuity.

The preceding analysis argues that retconning is not the provenance of any particular approach to interpretation. It is important to note that retconning might also be *criticized* from any perspective. Originalist or textualist critiques of retconning might be obvious. The Supreme Court’s retconning of federal unilateral amending authority in the *Upper House Reference*, for example, might be viewed as contrary to the original purpose and plain textual meaning of section 91(1), which was to provide the federal level with amending authority equivalent to that provided to the provinces to amend their own constitutions and a plain reading of which established a relatively broad power.²⁴⁸

Yet retconning might also be criticized from a living tree perspective. The retconning apparent in *Motard* is arguably a direct rebuke on the evolution of the Canadian Crown as an independent institution. The Courts’ dependence on the preamble to reconceptualize the principle of symmetry in order to read the rules of succession out of Canadian law stands as an affront to living tree constitutionalism: it rolls back developments in the growth and advancement of the Crown, freezing this central institution and tying it to the laws of another country in a manner contrary to the idea of a modern, fully patriated constitution. These potential criticisms reinforce the extent to which retconning, as a discrete technique of interpretation, is effectively agnostic with respect to broader debates over constitutional interpretation in legal theory.

Although criticism of retconning might in some contexts imply a form of judicial impropriety, it should not be equated, necessarily, with judicial activism.²⁴⁹ There is some evidence in the preceding analysis that retconning can be used in a deferential matter. The *Motard* reasoning, for example, serves to quiet the threat of recourse to formal amendment

²⁴⁷ *Ibid* at para 41. Justice Gomery nonetheless found that the legislation at issue made no such change to the lieutenant governor’s powers.

²⁴⁸ *Upper House Reference*, *supra* note 4.

²⁴⁹ Judicial activism is itself a notoriously slippery concept, but usually denotes a willingness of courts to exercise power in the face of government action: Emmett Macfarlane, “Revisiting Judicial Activism,” in Kate Puddister & Emmett Macfarlane, eds, *Constitutional Crossroads: Reflections on Charter Rights, Reconciliation, and Change* (Vancouver: UBC Press, 2022) 41.

for changes to the rules of succession.²⁵⁰ In this light, retconning is a practical exercise of *deference* to governments' preference to avoid the oft-existential stakes of formal amendment. While reconning is undoubtedly an act of judicial creativity and an exercise of judicial power, it is not necessarily an exercise of constitutional change that seeks the approval of political actors so much as one that caters to their needs in light of limitations or problems surrounding the politics of the formal Constitution.

V. CONCLUSION

This article contributes to our understanding of judicial use of history and constitutional interpretation. It analyses specific examples in which courts have recast historical events or narratives to establish retroactive changes to constitutional meaning. The effect is an alteration, reinterpretation, or transformation of established historical understandings of the constitution or its history wherein the court seeks to reconcile a new reading with existing precedent and established narratives. Retconning is not the product or byproduct of particular approaches to constitutional interpretation, like originalism, textualism, or living tree constitutionalism. Constitutional retconning is thus best viewed as a specific interpretative technique that can be used to recast historical facts and narratives in order to effect fundamental changes in constitutional meaning, altering the way we understand specific provisions, institutions, and constitutional structures. As a distinctive mode of reasoning, and one that can have profound implications for how we understand the constitution, it is a concept that warrants further scrutiny.

²⁵⁰ *Motard*, *supra* note 12.