

# Placing Future Senate Reform in Context

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## Introduction

As the opening speaker at the Centre for Constitutional Studies' March 2015 conference entitled "Time for Boldness on Senate Reform," I took it as my mission not to advance any bold ideas of my own (though some found my comments on Senate numbers particularly bold).<sup>1</sup> Rather, I tried to set the context for **other** participants' bold ideas.

This paper follows a format similar to my talk. In the first part, I explain the current state of scholarly knowledge of second chambers and bicameralism. In the second part, I discuss the accepted orthodoxy that exists in Canada concerning Senate reform, namely that it must simultaneously address the method of selection, the numbers of seats each province gets, and the powers of the Senate. In the third part, I discuss the real constraint on Senate reform which is sociological and not constitutional. I left it to my fellow panelists to explore the Supreme Court ruling in the reference on Senate reform.<sup>2</sup>

## I. Our understanding of second chambers

As John Uhr notes, "bicameralism is surprisingly under-researched and is quite under-theorized."<sup>3</sup> Currently "two-thirds of democratic national legislatures are bicameral"<sup>4</sup> and while federal countries only account for one-third of bicameral systems in the world,<sup>5</sup> the "model of bicameral federalism spread so widely that today all

federal countries have bicameral legislatures."<sup>6</sup> The link between federalism and bicameralism would suggest, though not require, the need for a second chamber in federal countries.<sup>7</sup>

There have been a few attempts to come up with a theory for bicameralism. This was attempted by largely Anglo scholars. In spite of these attempts, the consensus is that bicameralism is nothing more than a concept in search of a theory.<sup>8</sup> Part of the reason for the failure to divine a solid theory is because bicameralism emerged first in ancient Greece and Rome in the seminal works by theorists like Aristotle who argued for "mixed government" as a restraint on both despots and on mob rule. These ideas are seen as having less relevance in the modern era, though similar arguments about needing to restrain the intemperate mood swings of popular will can be found as recently as the 18<sup>th</sup> century at the birth of the largest federal democracy, the United States of America.<sup>9</sup>

In the 20<sup>th</sup> century, the early comparative works on bicameralism attempted to derive a theory by combining the historical record with the then-contemporary comparative experience.<sup>10</sup> The more modern approach combines deductive analysis, beginning with an examination of the writings of early Greek political philosophers and the 17<sup>th</sup> and 18<sup>th</sup> century theorists who gave the world the theory of federalism, with inductive analysis, by examining the bicameral legislatures that operate in both federal and unitary states.<sup>11</sup>

In each of these attempts, the result has been a theory which is surprisingly similar across periods of scholarship, yet is still little more than a recognition that a second chamber provides both a **review** and **representation** function which is **distinct from the Lower House**;<sup>12</sup> and even here there is dispute as to which is the more significant role, since the comparative evidence is that regional and administrative unit representation is not always provided by second chambers, meaning that review might be its primary, if not singular, function, which the Canadian Senate provides and most advocates of Senate reform want to preserve.<sup>13</sup>

## II. Accepted orthodoxy in Canada

While there is no compelling bicameral theory that can inform upper chamber design in Canada, there are a number of factors that impede reform. The first impediment, though modest, is an accepted orthodoxy when it comes to what must be in a reform package. There is a common belief now in Canada that, when it comes to Senate reform, there are three dimensions that must be dealt with simultaneously in any Senate reform package, specifically:

1. Powers
2. Method of selection
3. Number of seats

The reason for this belief can be laid at the feet of the late constitutional scholar, Senator Eugene Forsey. He was a fan of the British system of government and bridled at the idea of introducing republican elements from the United States. Being a member of the CCF and later of the NDP, he originally supported his party's position that the chamber should be abolished. He next came to support the institution, agreeing to serve in the body at Pierre Trudeau's insistence. Towards the latter part of his Senate career, he came to support the idea of reform, but the only way he could see to reconcile an elected upper chamber with the Westminster model of responsible parliamentary government, where the chamber of confidence was the lower chamber, would be to alter the upper chamber's powers.

The belief of responsible parliamentary government scholars had always been that an **appointed** senate is compatible with the Westminster model because appointed senators would, as they have in Canada and do in other countries, defer to the elected members of the lower chamber. The fear is that an elected chamber would, as it does in other countries, try to exercise the full range of its powers. Limiting the powers of the Canadian Senate was seen as the only solution so as to preserve the Westminster model.

While many others have endorsed and echoed this belief, it was Forsey — whose prolific publishing and relationship with Trudeau made him a trusted constitutional advisor — who made this not just the accepted orthodoxy with respect to Senate reform, but part of the constitutional amending formula:

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):
  - (b) the powers of the Senate and the method of selecting senators;
  - (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of senators;<sup>14</sup>

That this configuration reflects the belief of Forsey (and others) that method of selection and the powers of the Senate were intertwined is evident in the fact we see (a) the three dimensions included specifically in the examples of subjects to be covered by the “general amending formula” and (b) why powers of the Senate and method of selecting senators is listed as a single, not two separate, dimension on which a Senate amendment is to be considered pursuant to clause 42(1) (b). All three of these items are, pursuant to the *Constitution Act, 1982*, things to be done by the House of Commons with the agreement of seven provinces representing 50% of the population of Canada (with the Senate only having a suspensive 180-days veto, at which point the Commons can override it).<sup>15</sup>

Because of the preoccupation with the need for supremacy of the lower chamber by scholars

of responsible government, we start our discussion of this trifecta of Senate reform prerequisites with a discussion of the Senate's powers.

## 1. Powers

Most second chambers in the world have commensurate powers to the lower chamber irrespective of method of selection. The suspensive veto adopted for the UK House of Lords is somewhat unique. So there is no comparative evidence that would point to an inherent necessity to hobble the Senate.

The Fathers of Confederation never considered limiting the powers of the Senate, or even having a dispute resolution mechanism (the British government convinced them to insert a clause allowing for the summoning of additional senators should the two bodies become locked in permanent discord).<sup>16</sup> They did consider continuing the experiment of an elected upper chamber from the united province of Canada and quickly dismissed the idea. It was their experience that the caliber of people who were running for that body were found wanting; opportunities for advancement by appointment to cabinet were much less and the expenses of election were so much greater as the ridings were 10 times the size of those in the lower chamber. These two points would still be true for an elected Canadian Senate in the 21<sup>st</sup> century, and limiting its powers to a suspensive veto like the Lords would be yet a third factor dissuading some people from pursuing public service by running for a Senate seat.

It is also worth noting that the reason people, organizations, and provinces have been advocating for Senate reform in Canada is due to dissatisfaction with the way the Westminster model had been operating and with the unrestrained power of the government, increasingly the prime minister, within the House of Commons.

Having said that, there is, of course, no right or wrong answer when it comes to second chamber powers, and there are many valid arguments to be made on both sides. What it comes down to is where a person stands on the following issues:

- The fear of gridlock

- The need for greater checks on the executive branch
- The relative importance placed on representation by population vs. regional, provincial, and minority representation

If a person is afraid of gridlock, as can be seen occasionally in the United States where a lack of agreement between the two chambers or between the executive and legislative branches causes legislation to die and even the government to shut down, then that person is likely to advocate for something as severe as a suspensive veto. However, if a person is concerned by the power of the executive branch, and by the prime minister within the executive branch, then parliamentary reform, including a powerful Senate made legitimate through election, is likely on his or her wish list.

Different principles of representation for the two chambers was the compromise of Confederation. The lower chamber would be based on representation by population, as Canada West (soon to be Ontario) had been demanding. The regions would be equally represented in the upper chamber. John A. Macdonald spoke in the Confederation debates about sectional differences, noting that Maritimers, Lower Canadians, loyalists, and Anglophones in Canada West were distinct, and that the Anglophones in Quebec were assured of representation through the retention of the electoral boundaries of Canada East for the appointed upper chamber. Macdonald thought that Newfoundlanders were a distinct people as well, and fully expected that those who settled the west would be equally of different stock and thus would create their own distinct region with time. Harold Innis would later develop this idea of cultural differences in each region of Canada through his staples theory.<sup>17</sup>

While provincial and regional representation has not been a priority for senators, over time, the Canadian Senate has been used to add Aboriginals, Acadians, Jewish Quebecois, Métis, people of colour, and other under-represented constituencies to parliament; some now have representation by convention and some have it on an *ad hoc* basis. The Senate has also been used

to compensate for the under-representation of women in the House of Commons.

So, if one believes in a model alternative to representation by population to rebalance the federation, then an effective second chamber is essential. The alternative is, after all, the *sine qua non* of bicameralism.

It is worth pointing out again that the suspensive veto imposed on the British House of Lords is a rarity. However, virtually every bicameral country has built into their constitution or legislative rules a dispute settlement mechanism. There is a wide variety to choose from. For example, in Australia the governor general can order a “double dissolution” whereupon both chambers will need to seek re-election, letting the people settle the dispute. In the United States, where Canadians have come to think of gridlock, they actually resolve matters more frequently than they reach an impasse (though this varies based on which party is in control of either or both chambers), and they do this through a “conference committee.” The conference committee that settles disagreements over specific legislation is made up of the senior members of the committees which dealt with the bill in each house. The report, which recommends amendments jointly to both chambers, is often so detailed and comprehensive that it has been used by the Supreme Court of the United States to interpret Congress’ intent with respect to legislation.<sup>18</sup> These amendments are then put immediately to a vote in each chamber and may not be amended.

Yet another dispute settlement mechanism is for the two chambers to meet together. This means that the lower chamber, being always more populous, will have the advantage if there is a dispute between the two chambers. More often, it will be a dispute between political parties and, unless one party is dominant in both chambers, then negotiation and compromise will be necessary.

The point here is that there are many ways of ensuring that gridlock does not cripple the Canadian Parliament short of limiting the Senate’s powers.

## 2. Method of selection

Because of the Fathers’ of Confederation experience with an elected upper chamber, at Confederation appointment to this body by the Governor General (on the advice of the Prime Minister) was the choice. The arguments for this model went beyond the failure of their experiment with an elected upper chamber. The Fathers of Confederation argued that this would allow for the summoning of great men who could help the government and the legislature due to their unique experience. This was an era when it was widely believed that property ownership made for a better citizen since by owning property one had a vested interest in defending the land and advancing the success of the country, province, or town.<sup>19</sup> Whatever the theoretical arguments for the design of the Canadian Senate, the practical benefit was that it allowed John A. Macdonald to offer Senate seats to most of the members of the upper chambers of the provinces that formed Canada, making passage of the enabling legislation in their personal interest — especially since, in most cases, they could continue serving in their provincial legislative council while reaping the rewards of a new Senate position.

One of the promises Macdonald made to the other Fathers of Confederation was that he would appoint senators along the party divisions in the provincial legislatures. This he did with the first Parliament if for no other reason than to get their support in agreeing to Confederation. Although Macdonald made his career claiming to be part of and leading a perennial coalition government (even calling his party the Liberal-Conservatives), the chamber was quickly dominated by a single party; it has continued to exist in this form ever since. Its independence, to varying degrees, comes from appointments being until age 75 (for life up until 1965).

When Pierre Trudeau burst onto the constitutional scene as a young justice minister, he outlined in his first federal-provincial conference (where he achieved notoriety for sparring with his Quebec counterpart) his plan for the constitution. First, there would be patriation of the constitution (i.e. ending British control) with an amending formula and an entrenched

bill of rights. Second, there would be institutional change, which for him at the time meant the method of selection for the Senate and the Supreme Court.<sup>20</sup> The third issue in Trudeau's plan, the issue of the division of powers between the two levels of government, would be put on the table by the federal government. This was the first formal federal-provincial meeting on the Constitution, held on the 5<sup>th</sup> to 7<sup>th</sup> of February, 1968.<sup>21</sup> The conference was specifically subtitled the "First meeting. Proposed Charter of Human Rights and constitutional review."

A surprising number of scholars continue to argue that Trudeau was only interested, when it came to a Charter, in bilingualism and yet his plan was laid out in his first speech and in the title of the very first conference on the Constitution.<sup>22</sup> While his stated plan was to hold off on institutional reform, the reality of federalism is that the federal government is not the only institution that sets the agenda; other powers quickly entered the fray, spurred on not just by the provinces, but by a number of NGOs and other organizations interested in the Constitution.

From Trudeau's speech until he left office, the Bundesrat model was popular in Canada. The Bundesrat is the German legislature's second chamber and is made up of representatives from the 16 provinces (called *Länder*). Each provincial delegation represents the *Länder* government and, in the case of coalition governments, reflects the distribution of cabinet seats between the parties in the coalition. It is obvious why the provinces would like the Canadian Senate to be made up of provincially-appointed delegates, if not officials serving in the provincial cabinet like in Germany. So, this became the most studied and advocated model in the 1970s.<sup>23</sup>

For his part, Prime Minister Trudeau, frustrated with the inability to find an acceptable amending formula, departed from his aforementioned plan and introduced legislation to change the Canadian Senate. His proposed "House of the Federation" would have had half the members named by the House of Commons and the other half named by the legislature of the respective provinces.<sup>24</sup> The seat distribution by party would reflect the vote share received in the previ-

ous election (a concept similar to that promised by Macdonald before he breached it).

The Supreme Court, in its first Senate reference, told the government that, even prior to an amending formula when the British Parliament had legal right to alter its own statute and set the institutional rules for Canada, there was a convention that required significant provincial consent (more than the two he had obtained and less than unanimity).<sup>25</sup>

While still an undergraduate, I believed at the time that Quebec could have used this case to argue that it had a veto only over the Senate. At the time of Confederation, the only reason Quebec agreed, in the face of Ontario's demands for representation by population, was because of bicameralism (and federalism). According to Ontario's George Brown, whose speech was cited in part in the SCC Senate reference:

Our Lower Canadian friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step; and, for my part, I am quite willing they should have it.<sup>26</sup>

So, it is possible that pre-1982 Quebec could have established its limited right of veto. Unfortunately for them, they tried for a broader argument in 1982 that was shot down<sup>27</sup> and they got stuck with an amending formula Quebec never wanted though René Lévesque agreed to (thinking it would never be adopted).<sup>28</sup>

By the mid-1980s, the idea of an elected Senate had become the mantra of reformists.<sup>29</sup> The proposal that got the most resonance was Triple-E, which tried to conform to the Canadian orthodoxy. It argued for less (though "Effective") powers, Equal representation by province (like in the US for states) and Elected (it proposed the electoral system used in Australia lessens the hold of mainstream political parties over senators).<sup>30</sup> This idea of an elected Senate became the dominant idea during the 1980s, though none of the provinces could agree on how to redistribute seats.<sup>31</sup>

As for electoral systems, each proposal had its own favourite. A point we made in our paper on the federal government's Senate proposal (and we make in all discussion of electoral systems) is that there is no "better" or "best" electoral system.<sup>32</sup> A society's choice is often, sadly, based on the politics of the time so as to advantage the party in power. But, it should be based on the social contract that the people made and should thus reflect public priorities. The system chosen will favour different dimensions such as:

- accountability
- party system stability
- political equality
- representation of diverse viewpoints
- governability
- clear choices in terms of policy
- the ability for the system to handle social conflict.

And, as you can see from Table 1, every electoral system can be, and is being used for, upper chamber election.

There are a number of other variables that must be considered with respect to electoral design when it comes to second chambers:

- Ballot structure (how voters are enabled or constrained in voter choice)
- District magnitude and number of seats in each district
- Electoral formula (how constituents' votes translate into allocated seats)
- Timing of elections
- Role of Parties
- Terms (years)

Each will have an impact on the sort of person elected and the political parties or individuals that will be advantaged. Discussion of how those variables interact is beyond the scope of this paper.<sup>33</sup> But, they are referenced here to make the point that a society needs to make choices and, again, there is no right or wrong answer.

That doesn't mean the choice should be ill-conceived. As I pointed out at the conference, in a criticism of the Harper Government's attempt to alter the Senate by stealth, when we have tried to make much more modest alterations in electoral systems at the provincial-level (which would only add a few seats to the chamber so that the electoral results better reflect vote percentages), the provinces have held hearings, convened royal commissions, ordered committees of the legislature to travel the province and canvass the people, hired consultants, interviewed leading experts from academe, and even held province-wide referenda. Altering one of the two chambers of the federal Parliament should not be done in the manner of the Harper government, by hurriedly ushering in a bill through Parliament with little or no study. Even if the Supreme Court had not ruled as I expected, and even if I secretly liked the government's goal, the government's approach lacked moral legitimacy and it needed to be stopped.<sup>34</sup> Our Constitution is the contract we have as citizens and it should not be altered without popular consultation.

Having said that, I also stated at the conference that if election was, in fact, the federal government's goal, it could be done quickly with one single amendment. Section 24 of the *Constitution Act, 1867*, could be amended to provide for the election of senators and any one of over 1,000 members of a provincial legislative assembly, the House of Commons, or the Senate has the constitutional authority to move a\*\* resolution to that effect.<sup>35</sup> The Alberta legislature could have adopted such a constitutional amendment by now and it could already be working its way through the other legislatures with the goal of meeting the 7/50 general amending formula goal within three years.

### 3. Number of seats

While it was not my intention to offer bold ideas of my own, I here reiterate a proposal I had first made back in 1991. My purpose was to find a compromise over Senate seats between Ontario and Quebec, which would not accept a dramatic reduction in seats, and those other provinces that wanted equal provincial representation. My

**Table 1**  
**Electoral systems used for Senate elections where the upper chamber is directly elected**

<b>Country</b>	<b>District magnitude</b>	<b>Timing of elections</b>	<b>Parties</b>	<b>Terms (years)</b>
<b>Single-member plurality</b>				
Dominican Republic	30 separate constituencies (29 provinces, 1 federal district)	Same time as lower-chamber elections	Same parties	4 years
<b>Multi-member plurality</b>				
Bolivia	3 seats per department (2 seats to majority party, 1 seat to next party)	Same time as lower-chamber elections	Same parties	5 years
Brazil	3 seats per state and federal district	Same time as lower-chamber elections	Same parties	8 (33% and 66% alternating every 4 years)
Palau	Based on population (multi- member and single districts)	Same time as lower-chamber elections	No parties	4 years
Philippines	Nationwide constituency	Same time as lower-chamber elections	Same parties	6 (50% every 3 years)
Poland	2-4 seats per constituency	Same time as lower-chamber elections	Same parties	4 years
US	2 seats per state (majority needed in Georgia and Louisiana)	Same time as lower-chamber elections	Same parties	6 (33% every 3 years)
<b>Single-member majority</b>				
Czech Republic	81 separate constituencies (with two-round voting)	Separate from lower-chamber elections	Same parties	6 (33% every 2 years)
<b>Multi-member majority</b>				
Haiti	3 seats per department (with two-round voting)	Same time as lower-chamber elections	Same parties	6 (33% every 2 years)
Switzerland	2 seats per canton (with two-round voting)	Same time as lower-chamber elections	Same parties	4 years
<b>Single transferable voting</b>				
Australia	12 senators per state and 2 per territory	Same time as lower-chamber elections	Same parties	6 (50% every 3 years)
<b>Proportional representation</b>				
Colombia	100 seats nationwide (2 seat for Aboriginal people)	Same time as lower-chamber elections	Same parties	4 years
Paraguay	45 nationwide seats	Same time as lower-chamber elections	Same parties	5 years
Romania	42 constituencies with 2-12 seats each (1 senator per 160,000 people)	Same time as lower-chamber elections	Same parties	4 years
<b>Mixed-member proportionality</b>				
Mexico	3 seats per state plus federal district (2 go to majority party and 1 to next party, and 32 additional seats are used for list PR)	Same time as lower-chamber elections	Same parties	6 (50% every 3 years)
Japan	73 from multi-member and single-member constituencies; and 48 seats allocated using PR	Separate from lower-chamber elections	Same parties	6 (50% every 3 years)

Sources: Based on Inter-parliamentary Union (n.d.); Central Intelligence Agency (2008).  
Note: There are additional country variations not reflected in the classification.

idea garnered positive responses both at the conference and in reviews.<sup>36</sup>

I have written about this proposal, which came to be dubbed *The Hicks Amendment*, in this journal before.<sup>37</sup> Simply put, the idea is to give every province six senators, as had been proposed by Alberta and Newfoundland at the time in response to the *Meech Lake Constitutional Accord*. But, in the case of Ontario and Quebec, these provinces should be divided into three or four districts. Figure 1 shows just such a division, with Ontario being split into Northern Ontario, Southwestern Ontario, and Eastern Ontario for the purposes of the Senate. Quebec has been similarly divided.

Other provinces are concerned by the influence of the Montreal-Toronto-Southwestern Ontario corridor, which David Kilgour has dubbed “inner Canada.”<sup>38</sup> In a Senate thus divided, one could imagine a senator from Northern Ontario voting with a senator from Newfoundland, Alberta, and Saskatchewan on issues of natural resources and against the senators from Montreal and Toronto. Additionally,

**Figure 1**  
**Districts for Senate elections**



where most provinces are adequately represented by provincial governments, areas like Northern Ontario and Northern Quebec, given the sheer size of these provinces and their scarce northern populations compared to their urban centres, have little clout within their own province let alone at the federal table.

The other bold idea I floated in 1990-1991 was the idea of taking all reserve territory and making a single province. Virtually all of the powers identified by the Royal Commission on Aboriginal Peoples as necessary for indigenous people’s culture and identity to survive and thrive are provincial powers.<sup>39</sup> This restructuring would enable aboriginal people to have the financial and economic clout of a province, empower them to negotiate province-to-province when arranging infrastructure on- and off-reserve, to sit at federal-provincial meetings, and to have control over the resources beneath their territorial ground.

Finally, the three territories in the North would be given two seats each instead of a single seat, and when granted provincehood, each new province would get six senators regardless of population.

I noted other ideas for Senate seat configuration. For example, my colleague at Glendon, the former senator and York University president, Lorna Marsden, had suggested drawing Senate districts so they crossed provincial boundaries specifically to counterbalance the power of provincial governments in Canada. Power, she observes, is augmented by provincial caucusing in both chambers.

My point here is two-fold. First, the numbers problem has long been thought to be the biggest impediment to Senate reform as it was assumed the provinces who favoured Triple-E, in opposition to the two biggest provinces which are currently considered an entire region each in the Senate, could never find common ground. The Hicks Amendment was proposed as a way to get Quebec and Newfoundland to begin talks during the Meech Lake Accord ratification process, and they did — even if those negotiations



ended in bitterness and failure when the federal government took them over. Second, as noted at the outset, representation is one of the two dimensions our limited theory of bicameralism points to as central to second chamber design. The second chamber **must have a different representational purpose**: having Francophones, Aboriginal People, people from smaller provinces, and people from the north (the territories as well as Northern Quebec and Ontario) over-represented in this chamber is a legitimate goal given the lower chamber's intended goal which is representation by population. It ensures balance in the federation — and there is a reason why Canada is a federation.

### III. Sociological Restraint on Change

There is a belief in Canada that the Constitution is the barrier to Senate reform.<sup>40</sup> Constitutional rules for changing institutions of governance do generally require higher levels of concurrence than what is required for ordinary pieces of legislation, but this is not unique to Canada and they are rarely prohibitive. Ergo: ALL CONSTITUTIONS CAN BE CHANGED!

For example, in the United States, their constitution has been changed numerous times with a greater number of states (all but one with a bicameral legislature) needed to concur than in Canada. These US constitutional changes include the 17th amendment which made the US Senate elected.<sup>41</sup> And, at the state level, referendums are now almost routinely used to change state constitutions. So the question is: if the Constitution is not inherently a deterrent, then what is? This was the focus of my doctoral dissertation.<sup>42</sup>

Seymour Lipset and Stein Rokkan, in their seminal book on how political parties emerged in Europe, showed how in each country there was an identifiable social cleavage.<sup>43</sup> The word “cleavage” comes from geology and describes a major break in a rock or in the earth's surface. As sociologists, they were looking for one big fissure that divided a population. They identified these cleavages for each country and showed how, in every case, a political party emerged out of the

minority group to contest political power and this forced institutional and societal change.

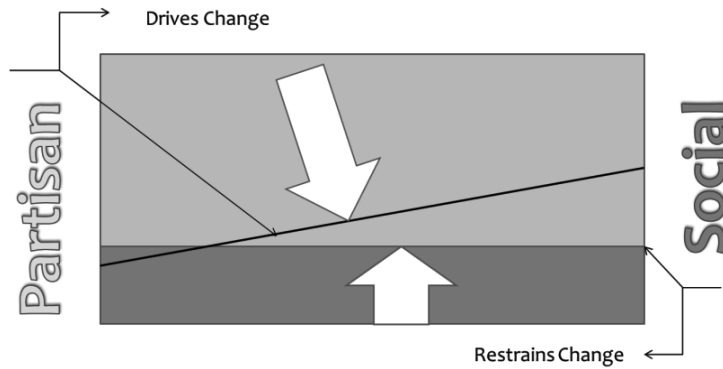
In one chapter, Rokkan broke with his colleague and argued that perhaps there could be cross-cutting cleavages (i.e. more than one cleavage that might be working at cross purposes) and he found evidence of this.<sup>44</sup> Rokkan is not alone in his belief that there might be competing cleavages. Karl Marx was terrified of how the cleavage of religion might compete with the cleavage of class and thus prevent the socialist revolution that he hoped would save the exploited workers.<sup>45</sup>

While Lipset and Rokkan's findings on cleavages have dominated understandings of how sociological divisions influence politics, my findings were a marked departure. It was always believed that a social cleavage lead to change, because the minority cleavage eventually agitated for political power by demanding participation and then forming a vehicle to contest elections. However, it turns out that when it comes to institutional reform, the minority group in a social cleavage will always demand the status quo.

I examined 400 years of successful and failed attempts at institutional change in Canada. In each case, and at each time, the cleavages were different. For example: in Manitoba, there was a Metis/English-Protestant cleavage that fought change; in NB, it has always been an Acadian/English divide; NS went from Acadian minority to a Scottish Catholic minority to a class-based cleavage; PEI went in the other direction with its cleavage originally class-based and then becoming Catholic/Protestant and Quebec's Catholic/Protestant divide became English/French. Quebec was officially the last to formally dissolve its upper chamber though PEI was arguably the last to abolish its upper chamber.<sup>46</sup>

Figure 2 illustrates how these cleavages compete. The political group — which in the last century has been a political party, but in the colonial period, and even in the early days of Confederation, was a loose grouping of elites who held power — would often try to agitate for change. When it comes to second chambers this was often, in more recent times, when the elites

**Figure 2**  
**Competing cleavages**



who held power were not the same as those who controlled the first chamber (in the early colonial days, the power relationship was inverse and lower chamber alteration was the goal).

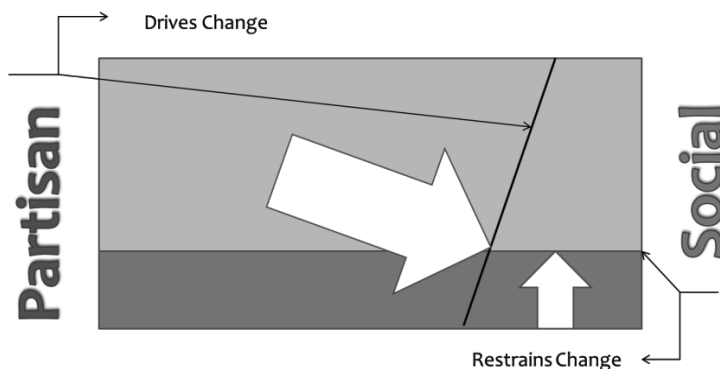
It is only when a partisan group that can bridge the social cleavage emerges that the minority group is divided and institutional change is possible. Institutional change in Canada during these 400 years includes representational government, responsible government, an elected upper chamber and second chamber abolition. All of these changes were achieved by a group that could breach the social cleavage as modeled in Figure 3.

The simplest example is Confederation. Both Upper and Lower Canada had elements which had advocated change. The partisan

groups were divided along religious lines (more so than language lines, though today we would say “cultural lines” to encompass these and other identity markers). It was only when a political party emerged that crossed this divide — led by Macdonald and Cartier, leaders of both sides of the cleavage and they, in turn, teamed up with George Brown who led a growing progressive English faction from Ontario — that change was possible. They intuitively knew the necessity of bridging the partisan and social cleavages as they dubbed themselves the “Grand Coalition.”

Confederation is a dramatic example of cross-cleavage coalitions being able to bring about change, but this is also true for upper chamber abolition; the more socially divided a society is, the longer it takes for it to eliminate its second chamber. A provincial second chamber may not

**Figure 3**  
**Bridging the social cleavage**



be necessary for **review**, but it is necessary for **representation** if there is a social cleavage in that province that requires more representation than its numbers warrant in a unicameral legislature where representation is based on population.<sup>47</sup>

So, it should be no surprise that Quebec, which had an insecure English minority, was the last to officially abolish its second chamber, as shown in Table 2.

**Table 2**  
**Dates of upper chamber abolition**

<b>Province</b>	<b>Date joined Confederation</b>	<b>Date of Abolition</b>	<b>Mechanism</b>	<b>Notes</b>
Alberta	Sept. 1, 1905	Never had an upper chamber*	N/A	Province created out of territorial land.
British Columbia	July 20, 1871	Never had an upper chamber*	N/A	Joined Canada without a legislative council.
Manitoba	July 15, 1870	1876	<i>An Act to diminish the spending power of the Legislature of Manitoba</i>	
New Brunswick	July 1, 1867	1892	<i>An Act respecting the Legislative Council</i>	
Newfoundland	March 31, 1939	1934*	<i>Newfoundland Act, 1949</i>	Joined Confederation without a legislative council as the legislature was dissolved in 1934.
Nova Scotia	July 1, 1867	1928	<i>An Act abolishing the Legislative Council and amending the Constitution of the Province</i>	
Ontario	July 1, 1867	1866*	N/A	Province created at Confederation without a legislative council. Elections to the legislative council in the province of Canada were suspended a year earlier.
Prince Edward Island	July 1, 1873	1963	<i>Elections Act, 1963</i>	Joined Confederation with an upper chamber elected by property owners. <i>An Act respecting the Legislature</i> merged the two chambers in 1893.
Quebec	July 1, 1867	1968	<i>An Act respecting the Legislative Council of Quebec</i>	
Saskatchewan	Sept. 1, 1905	Never had an upper chamber*	N/A	Province created by Parliament out of territorial land.

\* These provinces effectively entered Confederation without upper chambers. This table is from my dissertation.

## Conclusion

My mission as the first conference speaker of the day was to frame the subsequent discussion of Senate reform. From my perspective, the Supreme Court reference decision didn't shed any new light on the issues surrounding Senate reform. I had told the federal Minister of Democratic Reform directly that his plans were unconstitutional and, drawing on my research when it came to social cleavages, suggested that the only way to avoid a constitutional challenge would be to allow for Quebec exceptionalism.<sup>48</sup> Let the Quebec National Assembly choose its own senators and perhaps the Quebec government would let other provinces elect theirs without going to court.<sup>49</sup> At the time, I did not know Quebec would refer the matter to the Quebec Court of Appeal or that I would be asked to write an expert opinion in support of their constitutional challenge. I was, however, confident from my research that Quebec would be the first to object, given Canada's dominant cleavage. I was also confident that the Supreme Court would agree with me on legal grounds, which it did.

The lessons that I tried to instill in my talk and in this paper are straightforward. First, the upper chamber needs to have a coherent purpose when it comes to review (and this means a careful consideration of how to limit its powers if at all, with a dispute settlement mechanism being preferable to limits on its powers). Second, it must, especially in a federation (but arguably in all cases) have a representational role that is distinct from the lower chamber. In a federation, it is arguably needed to rebalance power so that minority groups have a larger say in the second chamber given the lower chamber's focus on majoritarian rule which is amplified in a parliamentary system since the government is chosen by the lower chamber. The reason a country chooses federalism is the same as why it chooses bicameralism: to reassure the minority group(s) created by its social cleavage.

Senate reform does not need to be done according to the accepted orthodoxy. There is no reason why any reform concerning powers, numbers of seats, and methods of selection need to be done simultaneously.

As my doctoral research has shown, minority groups will resist change out of mistrust of the motives of the majority. And, we know from examining electoral reform that parties in power will try to change the rules to their own advantage.<sup>50</sup> Quebec will need to be part of any reform of the Senate even though the 7/50 general formula does not require its consent. The Hicks Amendment may be a way to get them to agree on numbers, and numbers will be central to getting Quebec to agree to Senate reform.

As I have argued, altering one of the chambers of the federal parliament (the one theoretically focused on minority representation), should never be done without widespread consultation. It is ironic that such consultation has been done extensively at the provincial level for changes that pale in comparison. Senate reform, and all constitutional change, is possible. There is no "better" or "best" design; Canadians just need to have a dialogue and decide what they want.

## Notes

- \* Dr. Hicks is the BMO Visiting Fellow and an Adjunct Professor at the Glendon School of Public and International Affairs at York University.
- 1 Art Grant, "Senate Reform in Canada: Going Boldly Where No Senate Has Gone Before?" (16 March 2015), *Constitutionally Canadian* (blog), online: <<http://constitutionallycanadian.com/2015/03/16/senate-reform-in-canada-going-boldly-where-no-senate-has-gone-before/>>.
- 2 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.
- 3 John Uhr, "Bicameralism" in R.A.W. Rhodes, S.A. Binder & B. A. Rockman, eds, *The Oxford Handbook of Political Institutions* (Oxford: Oxford University Press, 2006) at 474.
- 4 *Ibid* at 477.
- 5 Samuel C Patterson & Anthony Mughan, *Senates: Bicameralism in the Contemporary World* (Columbus: Ohio State University Press, 1999) at 10.
- 6 George Tsebeli & Jeannette Money, *Bicameralism* (Cambridge: Cambridge University Press, 1997) at 6.
- 7 In fact, four countries don't have bicameralism, but these are small countries and they have incorporated some representation for the regions,

- distinct from representation by population, into their unicameral legislature, see Bruce M Hicks & André Blais, "Restructuring the Canadian Senate through Electoral Rules" (2008) 14:15 IRPP's Policy Choices.
- 8 Donald Shell, "The History of Bicameralism" (2001) 7:1 J Legislative Studies at 5-18; and David E Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003).
  - 9 See e.g., Alexander Hamilton, James Madison & John Jay, in Dans C Rossiter, ed, *The Federalist Papers* (New York: Penguin Books, 1999).
  - 10 Alvin W Johnson, *The Unicameral Legislature* (Minneapolis: University of Minnesota, 1938); HB Lees-Smith, *Second Chambers in Theory and Practice* (London: George Allen and Unwin Ltd, 1923); John Arthur Ransome Marriott, *Second Chambers: An Inductive Study in Political Science* (Oxford: Clarendon Press, 1910); and HVW Temperley, *Senates and Upper Chambers* (London: Chapman and Hall Ltd, 1910).
  - 11 Patterson & Mughan, *supra* note 5 at 10; Shell, *supra* note 8 at 5-18; and Tsebelis & Money, *supra* note 6 at 6.
  - 12 Bruce M Hicks, "Can a middle ground be Found on Senate Numbers?" (2007) 16:1 Const Forum Const at 22 [Hicks, "Middle Ground"].
  - 13 Geoffrey Brennan & Loren Lomasky, *Democracy and Decision* (Cambridge: Cambridge University Press, 1993) at 214. Patterson and Mughan, *supra* note 5 at 240-242, argue that this is particularly true in parliamentary systems, where the representational role is largely displaced by the review function.
  - 14 *Constitution Act, 1982*, s 42, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
  - 15 *Ibid*, s 48.
  - 16 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. Section 26 allows for the summoning of an additional four or eight senators from each of the four regions of the Senate: Maritimes, Quebec, Ontario and the West. While this was suggested by the British it was the Fathers of Confederation who insisted that additions be equal by region; and the Quebec delegation insisted, over the objection of the British law officers, that the Queen herself must agree so this clause could not be used easily. When Alexander Mackenzie asked for permission to appoint additional senators as the chamber was entirely conservative (or 'liberal-conservative') the law officers in Britain refused, noting there was not a protracted impasse. When Brian Mulroney asked for these additional senators to pass a single bill, creating the Goods and Services Tax, Queen Elizabeth agreed without hesitation. This change in the role of the monarchy I have discussed in a number of papers, including in this journal, but this specific example I reference in Bruce M Hicks, "The Crown's 'Democratic' Reserve Powers" (2010) 44:2 J Can Studies at 5-31.
  - 17 Harold Innis, *A History of the Canadian Pacific Railway* (Toronto: McClelland & Stewart, 1923), *The Fur Trade in Canada: An Introduction to Canadian Economic History* (New Haven: Yale University Press, 1930) and *The Cod Fisheries: The History of an International Economy* (New Haven: Yale University Press, 1940).
  - 18 *Simpson v United States*, (1978) 435 U.S. 6 at paras 17-18.
  - 19 Property ownership (later, a significant rental cost in lieu of ownership was deemed sufficient) was even required for voting for the lower chambers both federal and provincial [see Louis Massicotte et al, *A History of the Vote in Canada* (Ottawa: Office of the Chief Electoral Officer, 2007)]. The argument that property ownership was a prerequisite for loyalty prevented Aboriginal People from obtaining the vote for decades. And to this day, owning land in a city, even if it is not your place of residence, entitles you to vote in many municipalities. As an aside, John Stuart Mill broke with his contemporary philosophers and the British (and by extension the Canadian) government and argued that education was what made someone a good citizen and thus advocated for women getting the vote if educated. He even argued in one pamphlet that the higher the education one has achieved, the more votes one should get.
  - 20 Because Trudeau was such a fighter by nature, and prime minister of Canada by position, the assumption was he favoured the federal government and maybe wanted a unitary state in the way John A Macdonald did (though Macdonald reluctantly accepted federalism to get Confederation). Trudeau believed in federalism. He often noted that absent federalism Canada would never have survived, and he thought that it was wrong for the federal government to be appointing senators who are to represent regional interests or Supreme Court justices who adjudicate disputes between the two levels of government, on its own.
  - 21 The holding of this meeting was, in part, because Pierre Trudeau had a love of constitutional law. He and his friend and fellow scholar, McGill

- law professor Frank Scott, had long bemoaned that human rights in Canada was a battle over federal and provincial jurisdiction and not about fundamental justice. But it was also in response to the premier of Ontario, John Robarts, convening a “Confederation of Tomorrow Conference” during Canada’s centennial, between November 27<sup>th</sup> and 30<sup>th</sup>, 1967 and the increasing nationalism in Quebec. Prior to this point, only Quebec had objected to increasing federal intrusion into provincial jurisdiction; with the Quiet Revolution, it had only gotten stronger. When Canada’s largest (and most pro-federal) province entered the fray, a federal response was required.
- 22 For those who still believe Trudeau’s interest in the Canadian *Constitution* was all about enshrining bilingualism and stopping separatists (admittedly worthwhile goals), re-read section 15 on equality rights of the *Canadian Charter of Rights and Freedoms* in the *Constitution Act, 1982*. This is arguably the most important clause, given its timing and the subsequent changes it brought about through jurisprudence as opposed to legalisation, and compare it to similar clauses internationally. This clause in subsections 1 and 2 is conceptually the codification of John Rawls’ arguments about “distributive justice,” which Trudeau, as a constitutional scholar and a fan of social contract theory, must have been drawn to (irrespective of the federal-provincial negotiations and the advice he was getting from the cautious Department of Justice passed on by a disinterested law-minister, though effective constitutional salesperson, Jean Chrétien) [see John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971)].
- 23 I try not to take positions on such issues as a scholar; rather, I try to understand why and how things are gaining popularity or how they are being proposed and opposed. I must admit that, as an undergraduate, I mocked this model in a debate by saying the Bundesrat-model put “a rat in the Canadian Parliament” (which I still think is a clever line, though I recently proposed to the Minister of Democratic Reform that Quebec be permitted to do just that). See Bruce M Hicks, “Advice to the Minister of Democratic Renewal: Senate Reform, Constitutional Amendments, Fixed Election Dates and a Cabinet Manual,” (2013) 21:2 Const Forum Const at 23-37 [Hicks, “Advice”].
- 24 Bill C-60, *An Act to Amend the Constitution of Canada*, 4th Sess, 30th Parl, 1978.
- 25 *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54. Until the day he died, Trudeau took issue with this ruling, his most convincing point being that if there was a convention, then the high court should be able to say specifically what it was based on the Jennings test and saying that it was more than two, but less than unanimity and not a specific number, was proof that a convention could not have existed.
- 26 *Debates*, Legislative Assembly of the Province of Canada, February 8, 1865.
- 27 *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793.
- 28 In Quebec, the circumstances that led to the 1982 constitution agreement are known as the “night of the long knives,” an analogy to when the SS consolidated control over the Nazi party through the midnight murder of the SA storm trooper leadership. But Quebec’s isolation was due to a quirk of location that saw the Quebec delegation housed in Hull (now called Gatineau) while every other delegation was across the river in Ottawa. It was further isolated due to self-inflicted wounds on the province inflicted by Lévesque, who was obsessed with stopping his nemesis (so forgoing Quebec’s traditional demand for a veto).
- 29 Trudeau had considered holding a referendum on the 1982 *Constitution* in this era of evolving views of citizen participation (he was actually inspired by Lévesque’s ideas about democracy and wanted to put referenda as an option in the amending formula) but was talked out of it by Jean Chrétien who argued he didn’t know how divisive a referendum could be as it was he who had to fight it in the trenches.
- 30 Peter McCormick, Ernest C Manning & Gordon Gibson, *Regional Representation: The Canadian Partnership — A Task Force Report* (Calgary: Canada West Foundation, 1981).
- 31 For a review of the various Senate reform proposals, in both the Bundesrat- and elected-Senate periods, see Jack Stilborn, “Forty Years of Not Reforming the Senate” in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate you Never Knew* (Ottawa, Canadian Centre for Management Development, 2003).
- 32 Hicks & Blais, *supra* note 7.
- 33 For a discussion of these variables, see *ibid*.
- 34 Thus, I had no hesitancy when the Quebec Ministry of Intergovernmental Affairs approached me, on behalf of the Department of Justice, to write an expert opinion in support of its reference to the Quebec Court of Appeal challenging the constitutionality of the federal government’s plan to hold a Senate “consultative” election. *Reference*

- re *BILL C-7 concerning the reform of the Senate*, [2013] QCCA 1807.
- 35 While section 24 is all that would be needed to be changed to make the Senate elected, section 26, and by extension s.27, should probably also be changed to allow for a proper dispute settlement mechanism. Given the new chamber would be elected appointing additional senators to break an impasse is probably not workable. If it was me drafting the resolution, I would simply have the two chambers meet as a single body in the event of an impasse over a bill that lasts more than one session. The less complicated, the better.
- 36 Grant, *supra* note 1.
- 37 Hicks, “Middle Ground”, *supra* note 12 at 22.
- 38 David Kilgour, *Inside Outer Canada* (Edmonton: Lone Pine Publishing, 1990). The economic and political influence of “inner Canada” is undisputed, though it has lessened since 1991 when I made this proposal and, irrespective of population growth, will fluctuate depending on international factors such as the price of oil and the value of the Canadian dollar.
- 39 Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the report of the Royal Commission on Aboriginal Peoples* (Ottawa: Royal Commission on Aboriginal Peoples, 1996).
- 40 For example, David E Smith, “The Improvement of the Senate by Nonconstitutional Means” in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate You Never Knew* (Ottawa: Canadian Centre for Management Development, 2003); and see Smith, *supra* note 8 at 5-18; JR Mallory, *The Structure of the Canadian Government* (Toronto: Gage Publishing Limited, 1984); CES (Ned) Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987); and Eugene Forsey, “Reform of the Canadian Senate” (1984) 65:1 *The Parliamentarian* at 47-51.
- 41 How this came to pass is not entirely understood in Canada, which explains in part the Harper Government’s (and the Canada West Foundation and Alberta Governments before that) naïve belief that one or a handful of provinces simply holding “consultative elections” would result in a domino effect, thus making the Senate an elected body.
- 42 Bruce M Hicks, *Societal Cleavages and Institutional Change in Canada: Retention, Reform and Removal of Nominee Councils* (Montreal: Université de Montréal, 2011), online: <<http://hdl.handle.net/1866/6258>>.
- 43 Seymour M Lipset and Stein Rokkan, eds, *Party Systems and Voter Alignment: Cross-national Perspectives* (New York: Free Press, 1967).
- 44 *Ibid* at 367-444.
- 45 Karl Marx, *Critique of Hegel’s Philosophy of Right* (Cambridge: Cambridge University Press, 1970).
- 46 In PEI, its inability to abolish the second chamber in the face of rising debt caused it to merge the two chambers so that there was a legislative councillor and an assemblyman from each riding, which in a time of religious cleavage, meant Catholics would contest one seat and Protestants the other. It was only when religion ceased being the dominant cleavage that they eliminated the dual member ridings.
- 47 The argument that the second chamber was not needed for review was made with respect to Ontario at Confederation and in the context of abolition in other provinces following Confederation on the grounds that provincial matters were few, being more municipal in nature, and that the federal government’s power to reserve and disallow legislation adequately fulfilled the review function.
- 48 Hicks, “Advice”, *supra* note 23 at 23-37.
- 49 Perhaps, as I told the Minister, if election is such a compelling method of selection, Quebec would join the other provinces under pressure from the people. Even if they didn’t, the chamber would have legitimacy as the Bundesrat is undeniably credible.
- 50 There are other reasons countries will adopt electoral reform. They will (perhaps surprisingly) do it because a normative idea, like the merits of multiparty representation in a legislature will create cross-border momentum (see André Blais, Agneiszka Dobrzynska & Indridi H Indridason, “To Adopt or Not to Adopt Proportional Representation: The Politics of Institutional Choice” (2004) 35:1 *British J Political Science* at 182-190.

