

*Partisan self-dealing in the design of election laws is a central challenge for democratic governance. This article develops a new conceptual framework, which I call a structural rights approach, that would enable the Supreme Court of Canada to respond effectively to this problem. A structural rights approach uses the language and logic of individual rights to regulate the structure of democratic institutions. In particular, I argue that courts should design democratic rights to remedy the structural deficiencies of the political system. To this end, I claim that the Supreme Court should interpret the right to vote as encompassing a new democratic right – the right to a fair and legitimate democratic process. In addition, I argue that the right to a fair and legitimate democratic process is best understood as a ‘structural right.’ I define ‘structural rights’ as individual rights that take into account the broader institutional framework within which rights are defined, held, and exercised. This article focuses on two cases studies – electoral redistricting and campaign finance – to show how the Court could use the right to a fair and legitimate democratic process to remedy the problem of partisan self-dealing. In addition, this article canvasses a wide array of structural approaches in the Canadian and American law of democracy literatures, and it locates the structural rights approach within this body of scholarship. The article also considers the structural rights approach with reference to theories of dialogue and deference. The structural rights approach not only provides a new paradigm for the Supreme Court’s oversight of the democratic process; it also offers an alternative way to conceptualize democratic rights.*

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Partisan self-dealing in the design of election laws is a central challenge for democratic governance.<sup>1</sup> It occurs when political actors craft election laws in order to entrench themselves in power. Electoral rules that govern voting, political parties, electoral boundaries, apportionment, the administration of elections, and campaign finance are often designed to achieve partisan objectives. By manipulating these rules, elected representatives stifle political competition, thereby reducing democratic accountability. In addition to undermining the fairness of elections, partisan self-dealing impairs the legitimacy of the democratic process as a whole.

This article considers how the Supreme Court of Canada should respond to the problem of partisan self-dealing in the rules that govern the democratic process. As a start, it is worth emphasizing that the partisan manipulation of electoral rules is a significant issue in Canadian politics despite the existence of such safeguards as independent boundary commissions.<sup>2</sup> The Supreme Court has addressed a number of topics in its election law cases, such as electoral redistricting, campaign finance, the regulation of political parties, and prisoner disenfranchisement.<sup>3</sup> Although the Court has established several principles for resolving these disputes,<sup>4</sup> it has not squarely confronted the problem of partisanship;

1 The election law field is also referred to as the ‘law of democracy’; see Samuel Issacharoff, Pamela S Karlan, & Richard H Pildes, *The Law of Democracy: Legal Structure of the Political Process*, 3d ed (New York: Foundation Press, 2007) at 1–3 [Issacharoff, Karlan, & Pildes]. The Supreme Court of Canada’s law of democracy cases have arisen under *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, s 3 (the right to vote), s 2(b) and 2(d) (freedoms of expression and association), and s 15 (equality guarantee) [Charter]. See Colin Feasby, ‘Constitutional Questions about Canada’s New Political Finance Regime’ (2007) 45 *Osgoode Hall LJ* 514 at 539 [Feasby, ‘Constitutional Questions’], defining the law of the political process as encompassing decisions that fall under sections 3, 2, and 15 of the Charter.

2 See Part IV, below.

3 *Reference Re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158 (electoral boundary drawing) [*Saskatchewan Reference*]; *Sauvé v Canada (AG)*, [1993] 2 SCR 438 (inmate voting rights); *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 (residency requirements during referenda) [*Haig*]; *Harvey v New Brunswick (AG)*, [1996] 2 SCR 876 (membership in provincial legislatures) [*Harvey*]; *Libman v Quebec (AG)*, [1997] 3 SCR 569 (referendum spending limits) [*Libman*]; *Thomson Newspapers Co. v Canada (AG)*, [1998] 1 SCR 877 (public opinion polls); *Sauvé v Canada (AG)*, 2002 SCC 68, [2002] 3 SCR 519 (inmate voting rights) [*Sauvé II*];  *Figueroa v Canada (AG)*, 2003 SCC 37, [2003] 1 SCR 912 (benefits for political parties) [*Figueroa*]; *Harper v Canada (AG)*, 2004 SCC 33, [2004] 1 SCR 827 (third party election spending) [*Harper*]; *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527 (distribution of election results) [*Bryan*].

4 The most prominent principle is a commitment to an egalitarian model of elections. The egalitarian model is premised on the notion that ‘individuals should have an

indeed, its election law decisions demonstrate a notable reluctance to acknowledge the possibility that self-interested political actors are manipulating the rules of the democratic game.

The conventional response to the problem of partisan self-dealing in the American and Canadian election law scholarly literature is the ‘political markets’ approach, which I will refer to as the ‘structural approach.’<sup>5</sup> According to political markets theorists Samuel Issacharoff and Richard Pildes, the major political parties use legal rules to ‘lockup’ political institutions, thereby giving permanent political advantage to one political party.<sup>6</sup> Issacharoff and Pildes argue that the role of the courts is to prevent political actors from deploying lockups such as partisan gerrymandering to insulate themselves from electoral competition.<sup>7</sup> In particular, political markets theorists contend that courts should adopt a ‘structural’ approach to the judicial supervision of democracy. A structural approach is focused on the system-wide consequences that legal rules generate for democratic politics.<sup>8</sup> The structural approach is usually contrasted with the traditional individual rights approach, under which US courts employ a balancing test in which an individual’s right to equal protection under the law is weighed against the interests of the state.<sup>9</sup> Structural theorists argue that the individual rights approach is ill-equipped to respond to partisan self-entrenchment; indeed, the individual rights approach can damage and distort the democratic process because

equal opportunity to participate in the electoral process’; *Harper*, *ibid* at para 62. Under this model, spending limits are required to prevent the most affluent citizens from monopolizing electoral discourse; *ibid* at para 63. See Colin Feasby, ‘*Libman v Quebec (AG)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model’ (1999) 44 McGill LJ 5 [Feasby, ‘Egalitarian Model’].

<sup>5</sup> The political markets/structural scholarship in the American law of democracy literature is extensive. The central articles are Samuel Issacharoff & Richard H Pildes, ‘Politics as Markets: Partisan Lockups of the Democratic Process’ (1998) 50 *Stan L Rev* 643 [Issacharoff & Pildes]; Richard H Pildes, ‘The Theory of Political Competition’ (1999) 85:8 *Va L Rev* 1605 [Pildes, ‘Political Competition’]; Richard H Pildes, ‘Foreword: The Constitutionalization of Democratic Politics’ (2004) 118 *Harv L Rev* 29 [Pildes, ‘Foreword’]; Samuel Issacharoff, ‘Gerrymandering and Political Cartels’ (2002) 116 *Harv L Rev* 593 [Issacharoff, ‘Political Cartels’]. See also Issacharoff, Karlan, & Pildes, *supra* note 1.

<sup>6</sup> Issacharoff & Pildes, *ibid* at 646.

<sup>7</sup> *Ibid*; Pildes, ‘Foreword,’ *supra* note 5 at 46; Issacharoff, ‘Political Cartels,’ *supra* note 5 at 645.

<sup>8</sup> Pildes, ‘Foreword,’ *ibid* at 41.

<sup>9</sup> The individual rights approach is the traditional approach used by US courts in election law cases. The leading proponent of the individual rights approach in the American election law literature is Richard Hasen. See Richard L Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v Carr to Bush v Gore* (New York: New York University Press, 2003) at 4–46 [Hasen, *Supreme Court*].

individual rights doctrines cannot remedy threats to the competitive legitimacy of the system.<sup>10</sup>

Many scholars in the Canadian election law literature have applied the structural approach to the Supreme Court of Canada's law of democracy jurisprudence.<sup>11</sup> Although these proposals differ in some of their details,

10 Issacharoff, 'Political Cartels,' supra note 5 at 645; Pildes, 'Foreword,' supra note 5 at 40.

11 See Feasby, 'Constitutional Questions,' supra note 1; Colin Feasby, 'The Supreme Court of Canada's Political Theory and the Constitutionality of the Political Finance Regime' in Keith Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Oxford: Hart, 2006) 243 [Feasby, 'Political Finance']; Colin Feasby, 'Freedom of Expression and the Law of the Democratic Process' (2005) 29 Sup Ct L Rev (2d) 237 [Feasby, 'Democratic Process']; Colin Feasby, 'Continuing Questions in Canadian Political Finance Law: Third Parties and Small Political Parties' (2010) 47 Alta L Rev 993 [Feasby, 'Small Parties']; Heather MacIvor, 'Do Canadian Political Parties Form a Cartel?' (1996) 29 Canadian Journal of Political Science 317 [MacIvor, 'Cartel']; Heather MacIvor, 'Judicial Review and Electoral Democracy: The Contested Status of Political Parties under the Charter' (2002) 21 Windsor YB Access Just 479 [MacIvor, 'Contested Status']; Heather MacIvor, 'The Charter of Rights and Party Politics: The Impact of the Supreme Court Ruling in *Figuroa v Canada (AG)*' (2004) 10:4 Choices 1 [MacIvor, 'Party Politics']; Christopher Manfredi & Mark Rush, 'Electoral Jurisprudence in the Canadian and US Supreme Courts: Evolution and Convergence' (2007) 52 McGill LJ 465 [Manfredi & Rush, 'Evolution and Convergence']; Christopher Manfredi & Mark Rush, *Judging Democracy* (Peterborough, ON: Broadview Press, 2008) [Manfredi & Rush, *Judging Democracy*]; Mark Rush & Christopher Manfredi, 'From Deference and Democracy to Dialogue and Distrust: The Evolution of the Court's View of the Franchise and Its Impact on the Judicial Activism Debate' (2009) 45 Sup Ct L Rev (2d) 19 [Rush & Manfredi, 'Deference and Democracy']; Christopher D Brecht & Laura Pottie, 'A Comment on Colin Feasby's "Freedom of Expression and the Law of the Democratic Process"' (2005) 29 Sup Ct L Rev (2d) 2910 [Brecht & Pottie]; Michael Pal, 'Breakdowns in the Democratic Process and the Law of Canadian Democracy' (2011) 57:2 McGill LJ 299 [Pal]; Robert E Charney & Bruce Ellis, 'The Constitutional Validity and Practical Impact of Candidate Deposits in Canadian Elections' (2009) 3 Journal of Parliamentary and Political Law 227 [Charney & Ellis]; Howard Epstein, 'Electoral Boundaries and the Problem of Vote Dilution in Municipal Elections' (2004) 48 Municipal and Planning Law Reports (3d) 259 [Epstein]; Karen Eltis, 'Proportionally Reconciling Floor-Crossing with Conflicting Charter Rights: A Proposal for Regulating the Practice' (2008) 22 NJCL 215 [Eltis]; Lisa Young, 'Party, State and Political Competition in Canada: The Cartel Model Reconsidered' (1998) 31 Canadian Journal of Political Science 339 [Young, 'Political Competition']; Lisa Young, 'Regulating Campaign Finance in Canada: Strengths and Weaknesses' (2004) 3 Election LJ 444 at 488 [Young, 'Campaign Finance']; Harold J Jansen & Lisa Young, 'Cartels, Syndicates, and Coalitions: Canada's Political Parties after the 2004 Reforms' in Harold J Jansen & Lisa Young, eds, *Money, Politics, and Democracy: Canada's Party Finance Reforms* (Vancouver, BC: University of British Columbia Press, 2011) 82 [Jansen & Young]; Yasmin Dawood, 'Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Perspective' (2006) 4 International Journal of Constitutional Law 269 (2006) [Dawood, 'Campaign Finance Reform'].

they are united by a concern that political insiders are manipulating the rules of the electoral game in order to secure a partisan advantage. These commentators argue that the Court's decisions should be informed by the structural insight that political actors are often self-serving when they design election laws. The Canadian law of democracy field has explored the theoretical and practical implications of the structural approach for a range of election law topics, including electoral redistricting, campaign finance, the regulation of political parties, the administration of elections, and political-party funding.<sup>12</sup> I refer to this development in the field as the 'structural turn.'<sup>13</sup>

This article contributes to the structural turn by developing an alternative conceptual framework that would enable the Supreme Court to respond effectively to the problem of partisan self-dealing in election laws. At the heart of this alternative structural approach lies a new conceptualization of democratic rights, which I refer to as 'structural rights.' I define structural rights as individual rights that take into account the broader institutional framework within which rights are defined, held, and exercised. The 'broader institutional framework,' refers not only to governmental institutions and processes but also to the actions of other individuals who are exercising their rights. Rights do not exist in a vacuum but are instead exercised within a particular political, institutional, and societal context. For example, the right to vote, while held by individuals, is meaningless in the absence of a set of democratic processes and institutions such as elections, political parties, constituencies, candidates, governing bodies, and the like. Structural rights theory thus offers a new way to account for the individual and institutional nature of democratic participation. The participation of individuals is the key focus (hence the emphasis on rights), but individuals participate within an institutional framework that is constituted by relations of power (hence the emphasis on structure). Democratic rights inevitably have a structural dimension because an individual's exercise of his or her rights takes place within an existing organization of social and political power.

This new conception of democratic rights has implications for the judicial oversight of the democratic process. The structural rights approach suggests that it is possible for courts to regulate the structure of institutions by using an individual rights regime.<sup>14</sup> In particular, I

<sup>12</sup> Part II.B, below, provides a detailed discussion of the structural approaches in the Canadian law of democracy literature.

<sup>13</sup> But see Pal, *supra* note 11 at 303, 315 (describing the structural approach as relatively underdeveloped in the Canadian law of democracy literature).

<sup>14</sup> Scholars in the US law of democracy context have argued that the US Supreme Court has used individual rights doctrines to regulate the democratic process; see Heather K

argue that the Supreme Court should interpret the right to vote as encompassing a new democratic right – the right to a fair and legitimate democratic process. The Court has already identified a number of democratic rights that fall within the ambit of the right to vote as protected by section 3 of the Charter.<sup>15</sup> For example, the Court has recognized ‘the right to effective representation’ as the purpose of section 3.<sup>16</sup> In addition, the Court has observed that ‘s. 3 imposes on Parliament an obligation not to interfere with the right of each citizen to participate in a fair election.’<sup>17</sup> Although the Court mentioned the right to ‘participate in a fair election’ only in passing, I suggest that this right, once theorized and expanded, can be used by the Court to remedy the problem of partisan self-dealing in electoral laws. For this reason, I argue that the Court should explicitly recognize the right to a fair and legitimate democratic process as a purpose of the section 3 right to vote. In addition, I claim that the right to a fair and legitimate democratic process is best understood as a structural right. While this right is held by individuals, it is premised on a system-wide account of the integrity of the political process as a whole.<sup>18</sup>

In general, I argue that the role of the Supreme Court is to ensure the fairness of the democratic process. By recognizing the right to a fair and legitimate democratic process, the Court would send a signal to Parliament that partisan rule-making is constitutionally intolerable in terms of both the process by which the legislation was created and the substance of the legislation. The broad and general language of a ‘fair and legitimate’ process is useful precisely because it allows the Court to set a

Gerken, ‘Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum’ (2004) 153 U Pa L Rev 503 at 512 [Gerken, ‘Doctrinal Interregnum’]; Guy-Uriel E Charles, ‘Democracy and Distortion’ (2007) 92 Cornell L Rev 601 at 657 [Charles, ‘Democracy and Distortion’]. For a detailed discussion of Gerken’s and Charles’s theories, see Part III.D, below.

15 Yasmin Dawood, ‘Democratic Rights as Structural Rights: Rethinking the Law of Democracy’ [unpublished] [Dawood, ‘Democratic Rights as Structural Rights’]. Some of the rights fall within the ambit of section 3 of the Charter, while others attach to the Charter’s commitment to the principle of democracy.

16 *Saskatchewan Reference*, supra note 3 at 183. The Charter, supra note 1, s 3, provides that ‘[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.’

17 *Figueroa*, supra note 3 at para 51.

18 For a normative argument about the illegitimacy of partisan self-dealing in the rules of the democratic process, see Yasmin Dawood, ‘Democracy and the Problem of the Partisan State’ in Sanford Levinson, ed, *Nomos LIV: Loyalty* [forthcoming in 2012] [Dawood, ‘Partisan State’]; Yasmin Dawood, ‘The Antidomination Model and the Judicial Oversight of Democracy’ (2008) 96 Geo LJ 1411 at 1438–9 [Dawood, ‘Antidomination Model’].

standard of non-partisanship for the creation of electoral rules. By engaging in its traditional function of enforcing rights, the Court could thereby remedy the structural pathologies of the democratic process. In addition, I suggest that the Court should not automatically defer to Parliament when reviewing laws that govern the democratic process. As structural theorists have pointed out, the Court has greater competence and legitimacy than does Parliament to evaluate legislative self-interest, and for this reason, the Court should not be deferential to Parliament when it comes to the ground rules of democracy.<sup>19</sup> By recognizing the right to a fair and legitimate democratic process, the Court can use the conceptual resources within a rights regime to address structural harms.

There are three main advantages to the structural rights approach proposed in this article. In the first place, it suggests that it is possible for courts to regulate the structure of institutions by using an individual rights regime. In particular, I argue that the Supreme Court should be designing democratic rights instead of directly regulating the democratic process. The second advantage to the structural rights approach is that it is consistent with the Court's law of democracy jurisprudence. Although I am in favour of the structural turn in the Canadian law of democracy field,<sup>20</sup> I suggest that the central challenge facing the field is to determine how best to adjust the structural approach so that it fits within the existing jurisprudence under the Charter.<sup>21</sup> Instead of simply transplanting the American structural approach to the Canadian context, this article develops a structural approach that is consistent with the Court's law of democracy jurisprudence and the Charter's rights orientation. The third advantage of the structural rights approach is that it envisions a judicial role that is in keeping with the Charter's careful balancing of governmental functions. In particular, it enables courts to respond to partisan self-dealing without requiring too extensive an intervention in the democratic process.<sup>22</sup>

This article proceeds in four parts. Part II describes the structural approaches in the American and Canadian law of democracy literatures, respectively. Part III presents the concept of structural rights and it then locates structural rights theory within the larger literature on rights. In

<sup>19</sup> See Part V.B, below, for a discussion.

<sup>20</sup> See *supra* note 11.

<sup>21</sup> Colin Feasby has devoted considerable attention to this question, and, as described below in Part II.B, he has developed a nuanced account of how the Supreme Court could apply the insights of the structural approach to the law of the democratic process.

<sup>22</sup> Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999) at 9–14, 25–31 [Sunstein, *One Case at a Time*].

addition, this part argues that the Supreme Court should design democratic rights that can be used to remedy structural deficiencies in the democratic process. Indeed, I claim that the Court has already been following a similar approach because it has recognized a number of democratic rights that it has used to regulate the democratic process. Part III then argues that the Court should explicitly recognize the right to a fair and legitimate democratic process as a purpose of section 3, and it also demonstrates that this right is consistent with the values that the Court has already endorsed in its law of democracy jurisprudence.

In addition, Part III locates the structural rights approach within the law of democracy literature. Scholars in the US law of democracy context, most notably Heather Gerken and Guy Charles, have argued that the US Supreme Court has used individual rights doctrines to regulate the democratic process.<sup>23</sup> The structural rights approach likewise suggests that courts should use the language and logic of individual rights to regulate the structure of political institutions. The structural rights approach departs from other rights-based structural approaches in a couple of ways. First, the structural rights approach is based on a new theory of democratic rights. Second, this article proposes that courts should be designing democratic rights to regulate the democratic process. Although many election law scholars contend that the individual rights approach is ill-suited to remedy structural concerns, I suggest that the problem is not with rights per se but with the design of the specific rights that are available in the doctrine. For this reason, I claim that courts and commentators should specifically design the internal structure of rights so that these rights can achieve certain institutional objectives.

Part IV focuses on two cases studies – electoral redistricting and political finance – to demonstrate, first, that the Supreme Court has been reluctant to acknowledge the problem of partisan self-dealing and, second, that the Court lacks the conceptual tools to respond to this issue. Part V uses these case studies to consider how the Supreme Court could adopt a structural rights approach. This part also analyses the structural rights approach with specific reference to theories of dialogue and deference. In particular, this part considers two problems that arise with respect to the judicial review of the democratic process: first, the risk of judicial overreaching; and second, the problem that courts are not especially well suited to making the kinds of complex regulations that are required in, for instance, electoral redistricting or campaign finance

<sup>23</sup> Gerken, 'Doctrinal Interregnum,' supra note 14 at 512; Charles 'Democracy and Distortion,' supra note 14 at 657. For a detailed discussion of Gerken's and Charles's theories, see Part III.D, below.



regulation.<sup>24</sup> The structural rights approach takes both of these problems into consideration, while reserving a supervisory role for courts in the democratic process.<sup>25</sup> Instead of directly intervening in the political process, the Court would redress the structural deficiencies of the democratic process by engaging in its traditional function of enforcing democratic rights.<sup>26</sup>

In sum, the structural rights approach proposed in this article not only provides an alternative paradigm for the Supreme Court's law of democracy cases; it also offers a new way to conceptualize democratic rights. While the focus of this article is on democratic rights (and more specifically, those democratic rights that are concerned with voting and participation), structural rights theory could also be relevant for other kinds of rights, such as the right to equality and the right to freedom of expression. In addition, this article's analysis of how rights can be used to remedy structural pathologies contributes to the growing literature on the comparative law of democracy.<sup>27</sup> Courts in other jurisdictions could adopt a structural rights approach to remedy the pathologies of the democratic process. The concept of structural rights can also have fruitful application within democratic theory, which has paid increasing

<sup>24</sup> See Cass R Sunstein & Adrian Vermeule, 'Interpretation and Institutions' (2003) 101 *Mich L Rev* 885 at 886; Michael S Kang, 'De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform' (2006) 84 *Washington University Law Review* 667 at 691, arguing that redistricting 'is simply a legislative task for which courts lack the necessary democratic pedigree and institutional resources.'

<sup>25</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) at 103 [Ely], arguing that the role of the courts is to prevent stoppages, such as the denial of the vote, in the democratic process.

<sup>26</sup> My thanks to Kent Roach for very helpful comments on this point.

<sup>27</sup> Allison R Hayward, 'Regulation of Blog Campaign Advocacy on the Internet: Comparing US, German, and EU Approaches' (2008) 16 *Cardozo J Int'l & Comp L* 379; David Schleicher, 'What If Europe Held an Election and No One Cared?' (2011) 52 *Harv Int'l LJ* 109; Herbert A Johnson, 'Judicial Institutions in Emerging Federal Systems: The Marshall Court and the European Court of Justice' (2000) 33 *J Marshall L Rev* 1063; Kieran Williams, 'Judicial Review of Electoral Thresholds in Germany, Russia and the Czech Republic' (2005) 4 *Election LJ* 191; Richard Albert, 'Constitutional Handcuffs' (2010) 42 *Ariz St LJ* 663; Richard Albert, 'Counterconstitutionalism' (2008) 31 *Dal LJ* 1; Samuel Issacharoff, 'Constitutionalizing Democracy in Fractured Societies' (2004) 82 *Tex L Rev* 1861; Samuel Issacharoff, 'Democracy and Collective Decision Making' (2008) 6 *International Journal of Constitutional Law* 23; Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2011) 99 *Geo LJ* 961; Samuel Issacharoff, 'Fragile Democracies' (2007) 120 *Harv L Rev* 1405; Yigal Mersel, 'The Dissolution of Political Parties: The Problem of Internal Democracy' (2006) 4:1 *International Journal of Constitutional Law* 84; Youngjae Lee, 'Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective' (2005) 53 *Am J Comp L* 403.

attention in recent years to the interaction between democratic values and democratic institutions.<sup>28</sup>

## II *Structural approaches to the law of democracy*

### A *STRUCTURAL APPROACHES IN THE AMERICAN LAW OF DEMOCRACY LITERATURE*

There are two main paradigms in the American scholarly literature on the law of democracy. The first paradigm is the ‘individual rights’ or ‘equal protection’ approach. This approach is the traditional approach used by courts in the United States to resolve conflicts over the laws that govern the political process.<sup>29</sup> Under this approach, courts employ a balancing test in which an individual’s right to equal protection under the law is weighed against the interests of the state. This approach is used, for example, when the formal right to access to the vote has been denied<sup>30</sup> or when vote dilution has occurred as a result of a new redistricting map.<sup>31</sup>

The second paradigm is the ‘political markets’ or ‘structural’ approach.<sup>32</sup> The roots of this approach lie in John Hart Ely’s process school of thought. Ely argued that the Supreme Court should engage in judicial review when the political market is malfunctioning in a systematic way.<sup>33</sup> Ely identified two kinds of malfunction in the democratic

28 See Geoffrey Brennan & Alan Hamlin, *Democratic Devices and Desires* (Cambridge, UK: Cambridge University Press, 2000); Gerry Mackie, *Democracy Defended* (Cambridge, UK: Cambridge University Press, 2003); Adam Przeworski, Susan C Stokes, & Bernard Manin, eds, *Democracy, Accountability, and Representation* (Cambridge, UK: Cambridge University Press, 1999); Andrew Reynolds, ed, *The Architecture of Democracy* (Oxford: Oxford University Press, 2002); Jeffrey K Tulis & Stephen Macedo, eds, *The Limits of Constitutional Democracy* (Princeton, NJ: Princeton University Press, 2010).

29 See Hasen, *Supreme Court*, supra note 9 at 4–46.

30 See *South Carolina v Katzenbach*, 383 US 301 (1966) (literacy tests); *Harper v Virginia Board of Elections*, 383 US 663 (1966) (poll taxes).

31 In *White v Regester*, 412 US 755 (1973) and *Whitcomb v Chavis*, 403 US 124 (1971), the Supreme Court recognized the claim of minority vote dilution.

32 The structural approach within the American law of democracy literature is one of several structural approaches within constitutional theory. See J Harvie Wilkinson, III, “Our Structural Constitution” (2004) 104 Colum L Rev 1687 at 1687–8. Wilkinson defines ‘structural’ as ‘those provisions that appear to direct responsibility for a decision to a particular branch of the federal government or to the states’; *ibid* at 1688. Charles Black has endorsed a structural approach to constitutional interpretation; see Charles L Black, Jr, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969) at 6. Philip Bobbitt has identified the structural approach as one of six modalities of constitutional argument; see Philip Bobbitt, *Constitutional Interpretation* (Williston, VA: Blackwell, 1991) at 12–3.

33 Ely, supra note 25 at 103.

process. The first occurs when ‘the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.’<sup>34</sup> The second type of malfunction occurs when ‘representatives beholden to an effective majority are systematically disadvantaging some minority.’<sup>35</sup> Ely argued that elected representatives could not be trusted with identifying either of these problems. For this reason, the role of the Court is to prevent the political market from systematically malfunctioning. Ely based this ‘participation-oriented, representation-reinforcing’ theory of judicial review on a process-based interpretation of the US Constitution.<sup>36</sup>

The problem of democratic stoppages was further theorized by Michael Klarman, who proposed an anti-entrenchment theory of judicial review.<sup>37</sup> According to Klarman, judicial review can be justified to the extent that it remedies legislative action that entrenches incumbent representatives.<sup>38</sup> Legislative entrenchment occurs when representatives act contrary to the preferences of their constituents in order to perpetuate their hold on office.<sup>39</sup> It is evident in such practices as incumbency protection, restrictive ballot access laws, and malapportionment.<sup>40</sup>

Uniting these concerns about process and entrenchment, Samuel Issacharoff and Richard Pildes have developed the political markets approach. They argue that the democratic process is ‘akin in important respects to a robustly competitive market – a market whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition.’<sup>41</sup> Partisan competition is essential to achieve governmental accountability and responsiveness.<sup>42</sup> The major political parties, however, use legal rules to lockup political institutions, thereby providing permanent political advantage to one political party.<sup>43</sup> Examples of lockups include partisan gerrymandering and rules designed to prohibit the emergence of third parties.<sup>44</sup> The loss of political competition leads to a loss of electoral accountability.<sup>45</sup> As Issacharoff observes,

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* at 87, 92.

<sup>37</sup> Michael J Klarman, ‘Majoritarian Judicial Review: The Entrenchment Problem’ (1997) 85 *Geo LJ* 491 at 497–8.

<sup>38</sup> *Ibid.* at 510.

<sup>39</sup> *Ibid.* at 498.

<sup>40</sup> *Ibid.* at 502.

<sup>41</sup> Issacharoff & Pildes, *supra* note 5 at 646.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* at 646–7.

<sup>44</sup> *Ibid.* at 681.

<sup>45</sup> Pildes, ‘Foreword,’ *supra* note 5 at 40, 43.

the protection of partisan gerrymandering results in a ‘cartelized political market,’ in which the competitiveness of the political process is undermined by the ability of elected officials to draw safe districts.<sup>46</sup>

Political markets theorists describe their theory as a *structural* approach to the judicial supervision of democracy.<sup>47</sup> As Pildes notes, judicial review of democratic processes constitutes a ‘functional problem in institutional design,’ one that implicates the ‘systemic consequences that institutional structures and legal rules generate for political practice.’<sup>48</sup> Political markets theorists argue that the traditional individual rights approach used by courts is ill-equipped to address the structural aspect of most election law cases. Indeed, the individual rights approach can damage and distort the political process because individual rights doctrines cannot remedy threats to the competitive legitimacy of the system.<sup>49</sup> Rather than engaging in balancing tests, courts should openly recognize that the adjudication of the law of democracy requires structural solutions for structural problems.<sup>50</sup> As Pildes notes, political rights cases are ‘best analyzed in terms of more comprehensive structural perspectives on democratic politics.’<sup>51</sup>

The structural approach thus mandates a functional justification for judicial review, one in which the law is used to limit partisan or incumbent self-entrenchment.<sup>52</sup> Pildes argues that it is the task of courts to constrain ‘partisan or incumbent self-entrenchment that inappropriately manipulates the ground rules of democracy.’<sup>53</sup> Thus, political markets theorists support a fairly robust role for courts in the democratic process. Courts must intervene to promote partisan competition in the political arena and to ensure a more accountable representation.<sup>54</sup> Judicial intervention is required ‘whenever self-interested political actors employ political power to insulate themselves from the political competition required to make electoral accountability meaningful.’<sup>55</sup> The role of the Supreme Court is to destabilize these anti-competitive lockups in order to ensure a more accountable representation.<sup>56</sup>

46 Issacharoff, ‘Political Cartels,’ *supra* note 5 at 600.

47 Issacharoff & Pildes, *supra* note 5 at 646; Issacharoff, ‘Political Cartels,’ *ibid* at 645.

48 Pildes, ‘Foreword,’ *supra* note 5 at 41.

49 Issacharoff, ‘Political Cartels,’ *supra* note 5 at 600, 645; Pildes, ‘Foreword,’ *ibid* at 40.

50 Pildes, ‘Foreword,’ *ibid* at 44–6.

51 Pildes, ‘Political Competition,’ *supra* note 5 at 1606.

52 Pildes, ‘Foreword,’ *supra* note 5 at 154.

53 *Ibid*.

54 Issacharoff & Pildes, *supra* note 5 at 644.

55 Pildes, ‘Foreword,’ *supra* note 5 at 46.

56 Issacharoff & Pildes, *supra* note 5 at 644.

The political markets approach has been subject to various critiques in the literature.<sup>57</sup> One criticism is that the political markets approach does not provide a baseline against which it is possible to measure when the right level of electoral competition has been reached.<sup>58</sup> Another criticism is that the political markets approach underestimates the amount of partisan competition that already exists.<sup>59</sup> Critics have also argued that the evidence does not demonstrate that lockup mechanisms such as partisan gerrymandering are the reasons incumbents enjoy a high re-election rate. Incumbents in the Senate, for example, fare well in state-wide elections.<sup>60</sup> Another criticism is that the strong two-party system in the United States is not caused by obstacles to third parties but by a host of structural features including single-member districts, direct primaries and presidential elections.<sup>61</sup> Scholars have also argued that the structural approach envisions far too robust a role for the courts. Richard Hasen contends, for example, that structural approaches ‘evinced judicial hubris, a belief that judges appropriately should be cast in the role of supreme political regulators.’<sup>62</sup> Political markets theorists argue, however, that if courts could protect the ‘second-order conditions’ of electoral competition, there would be less need for judicial intervention to protect ‘first-order issues’ of individual rights.<sup>63</sup> Despite the criticisms of the structural approach, it continues to be highly influential in the American law of democracy literature.

#### B THE STRUCTURAL TURN IN THE CANADIAN LAW OF DEMOCRACY FIELD

Many scholars in the Canadian law of democracy field have argued that the Supreme Court of Canada should adopt the structural approach, or a version thereof, to respond to the problem of partisan self-entrenchment.<sup>64</sup> These scholars have applied the structural approach to a

<sup>57</sup> For a discussion of these critiques, see Dawood, ‘Antidomination Model,’ *supra* note 18 at 1423–5, 1428.

<sup>58</sup> Richard L Hasen, ‘The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes’ (1998) 50 *Stan L Rev* 719 at 724.

<sup>59</sup> Nathaniel Persily, ‘Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders’ (2002) 116 *Harv L Rev* 649 at 654.

<sup>60</sup> *Ibid* at 664–5.

<sup>61</sup> Hasen, *Supreme Court*, *supra* note 9 at 138–56; Daniel H Lowenstein, ‘The Supreme Court Has No Theory of Politics – And Be Thankful for Small Favors’ in David K Ryden, ed, *The US Supreme Court and the Electoral Process*, 1st ed (Washington, DC: Georgetown University Press, 2000) 262 at 301; Bruce E Cain, ‘Garrett’s Temptation’ (1999) 85 *Va L Rev* 1589 at 1600.

<sup>62</sup> Hasen, *Supreme Court*, *ibid* at 1428.

<sup>63</sup> Pildes, ‘Political Competition,’ *supra* note 5 at 1619.

<sup>64</sup> See *supra* note 11.

number of topics in Canadian politics, including electoral redistricting,<sup>65</sup> campaign finance,<sup>66</sup> the regulation of political parties,<sup>67</sup> the 2006 Accountability Act,<sup>68</sup> public subsidies and political party funding,<sup>69</sup> candidate deposits,<sup>70</sup> unlimited pre-election spending,<sup>71</sup> political gerrymandering at the municipal level,<sup>72</sup> and floor crossing.<sup>73</sup> Given the number of scholars who have argued for a structural approach to the judicial supervision of democracy in Canada, I describe this development in the field as a ‘structural turn.’ The objective of this section is to canvass some of the conceptual themes in this literature.

Heather MacIvor is one of the first scholars to make a structural argument to describe the tendency of political parties in Canada to use election laws to entrench their power. In a 1996 article entitled ‘Do Canadian Political Parties Form a Cartel?’ MacIvor considers whether the cartel theory of party organization can be applied to Canada’s political parties at the federal level.<sup>74</sup> The basic idea behind the cartel model, as elaborated in the work of Richard Katz and Peter Mair, is that political parties become less dependent on society for the resources they require and more dependent on the state, which is under their control.<sup>75</sup> The leaders of cartel parties follow their own narrow interests rather than the interests of the people. As MacIvor notes, all ‘participants in the cartel seek to promote the security of the “ins” and minimize challenges from the “outs.”’<sup>76</sup> Under a cartel model, the democratic process is geared

65 See Part IV.A, below.

66 See Part IV.B, below.

67 MacIvor, ‘Cartel,’ supra note 11; MacIvor, ‘Contested Status,’ supra note 11; MacIvor, ‘Party Politics,’ supra note 11.

68 Feasby, ‘Constitutional Questions,’ supra note 1 at 517, 528–9; see Part V.A, below for a discussion of the *Accountability Act*.

69 Jansen & Young, supra note 11; Feasby, ‘Small Parties,’ supra note 11. Parliament has passed a law that establishes a schedule for eliminating the \$2-per-voter taxpayer’s subsidy for political parties. The subsidy will be eliminated by 2016. The measures came into effect in April 2012. See *Canada Elections Act*, SC 2000, c 9, s 435.01(2), as amended by *An Act to implement certain provisions of the 2011 budget as updated on June 6, 2011 and other measures*, SC 2011, c 24, s 181.

70 Charney & Ellis, supra note 11.

71 Young, ‘Campaign Finance,’ supra note 11.

72 Epstein, supra note 11.

73 Eltis, supra note 11.

74 MacIvor, ‘Cartel,’ supra note 11 at 317–8. For an opposing view, see Young, ‘Political Competition,’ supra note 11 at 340, arguing that despite the collusion of the major parties over election law, such parties do not constitute cartel parties.

75 MacIvor, ‘Cartel,’ *ibid* at 318. See also Richard S Katz & Peter Mair, ‘Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party’ (1995) 1 *Party Politics* 5, discussed in MacIvor, ‘Cartel,’ *ibid* at 317–22; Richard S Katz & Peter Mair, ‘The Cartel Party Theory: A Restatement’ (2009) 7 *Perspectives on Politics* 753.

76 MacIvor, ‘Cartel,’ *ibid* at 320.

toward ensuring the election of members of the cartel.<sup>77</sup> In her study, MacIvor engages in a detailed analysis of Canada's election laws, and she concludes that the major parties 'set the rules under which their members play the electoral game.'<sup>78</sup> After canvassing the evidence, MacIvor concludes that the 'election laws benefit the three major parties who wrote them, and harm the smaller and newer parties.'<sup>79</sup>

In a later article, MacIvor further elaborates her structural model. She argues that the courts have taken two conflicting approaches to the status of political parties under the Charter. The first approach is the 'party-equality' approach, while the second approach is the 'two-tier' approach. Under the party-equality approach, the state is not permitted to disadvantage smaller parties by denying them various benefits made available to the larger parties.<sup>80</sup> Under the two-tier approach, by contrast, the state is permitted to pass cartel laws that serve to enhance the interests of the larger parties and undermine the interests of the smaller parties.<sup>81</sup> Dominant parties use their control of the legislature to 'manipulate the electoral laws to penalize smaller and newer parties which might seek to challenge their dominance.'<sup>82</sup> MacIvor applies her theory to the Supreme Court's decision in *Figueroa v Canada*.<sup>83</sup> At issue in *Figueroa* was the constitutionality of a requirement that a political party nominate candidates in at least fifty electoral districts in order to register as a political party.<sup>84</sup> Registered political parties are granted a number of benefits under the Canada Elections Act.<sup>85</sup> A majority of the Supreme Court held that the fifty-candidate rule violated section 3 of the Charter and was not justifiable under section 1.<sup>86</sup> MacIvor demonstrates that the Court majority adopted a party-equality approach, while the government espoused a two-tier approach.<sup>87</sup> This research sheds light on the propensity of the major parties to set the rules to benefit themselves and to harm the smaller and newer parties.<sup>88</sup> MacIvor's cartel theory of politics

<sup>77</sup> Ibid.

<sup>78</sup> Ibid at 325.

<sup>79</sup> Ibid.

<sup>80</sup> MacIvor, 'Contested Status,' supra note 11 at 482; MacIvor, 'Party Politics,' supra note 11 at 5.

<sup>81</sup> MacIvor, 'Contested Status,' ibid at 491.

<sup>82</sup> Ibid at 483.

<sup>83</sup> *Figueroa*, supra note 3; MacIvor, 'Party Politics,' supra note 11 at 6–18.

<sup>84</sup> *Figueroa*, ibid at para 3.

<sup>85</sup> Ibid at para 4. These benefits include the right to have party affiliations listed on the ballot, to issue tax receipts for donations received outside the election period, and to transfer unspent election funds to the party; ibid.

<sup>86</sup> Ibid at para 90.

<sup>87</sup> MacIvor, 'Party Politics,' supra note 11 at 14, citing *Figueroa*, supra note 3 at paras 39–40.

<sup>88</sup> MacIvor, 'Cartel,' supra note 11 at 325.

addresses the same concerns as the political markets approach: the propensity of political parties to enact self-serving laws that entrench their power.

Colin Feasby, who is best known for his important work on the egalitarian model,<sup>89</sup> is one of the first scholars to apply Samuel Issacharoff's and Richard Pildes's political markets approach to the Supreme Court of Canada's election law decisions.<sup>90</sup> Feasby contends that members of Parliament, like their political counterparts in the United States, are tempted by self-interest when they fashion the laws governing the electoral arena.<sup>91</sup> As he puts it, '[T]he problem with rules governing elections is that members of Parliament are in a fundamental conflict of interest: they are both the rule-makers and the subjects of the rules.'<sup>92</sup> Feasby thus embraces the insight of the political markets approach that judicial review 'must be guided, at least in part, by a sensitivity posed by self-serving behaviour by legislators.'<sup>93</sup>

Feasby applies a structural analysis to the Supreme Court's election law cases, in particular, the Court's campaign finance decision in *Harper v Canada*.<sup>94</sup> In *Harper*, the Court majority upheld the constitutionality of spending limits on third parties (essentially all participants in the electoral process except political parties and candidates).<sup>95</sup> In upholding the limitations, the majority endorsed Feasby's egalitarian model.<sup>96</sup> As Feasby argues, McLachlin CJ and Major J, in their dissenting opinion in *Harper*, focused on the problem that the spending limits disallowed the important contributions that third parties would otherwise make to the electoral discourse.<sup>97</sup> Feasby observes that 'from a structural perspective third parties play a unique and valuable role.'<sup>98</sup> Third parties play what Feasby calls a 'dual role,' in that they both enhance the democratic process by bringing in new perspectives and undermine the democratic process by tilting the electoral playing field.<sup>99</sup> At the same time, 'candidates and political parties, particularly incumbents, share a common interest

89 Feasby, 'Egalitarian Model,' supra note 4.

90 Feasby, 'Democratic Process,' supra note 11 at 273–7; Feasby, 'Political Finance,' supra note 11 at 266–7.

91 Feasby, 'Political Finance,' *ibid* at 264.

92 Feasby, 'Constitutional Questions' supra note 1 at 516; see also Feasby, 'Political Finance,' *ibid* at 266.

93 Feasby, 'Democratic Process,' supra note 11 at 277.

94 *Ibid* at 238–9, 249–62, 286–8.

95 *Harper*, supra note 3 at para 121.

96 *Ibid* at para 62.

97 Feasby, 'Democratic Process,' supra note 11 at 261.

98 *Ibid*.

99 *Ibid* at 263.



in reducing the chances of the unexpected,' and for this reason, it is possible that legislators 'might be tempted by self-interest to enact third party spending limits that are more stringent' than necessary.<sup>100</sup>

In addition, Feasby has developed a comprehensive account of how the Supreme Court of Canada should respond to structural threats in cases involving the democratic process. He refers to his approach as 'process theory lite.'<sup>101</sup> Feasby argues that 'an approach akin to [Richard] Hasen's approach to contested political equality rights is consistent with the Supreme Court of Canada's recent jurisprudence of the democratic process.'<sup>102</sup> Richard Hasen is the leading proponent of the individual rights / equal protection approach in the American election law literature. Although Hasen is a critic of the political markets approach, his theory attends to one of the main concerns of process theory – the distrust of elected officials.<sup>103</sup> Hasen is concerned about the potential for self-serving legislation being enacted by elected representatives, and he therefore argues that courts should be sceptical of legislative means.<sup>104</sup>

There are two steps to Feasby's proposed approach. In the first step, courts should be deferential in their section 1 analysis when assessing whether or not the government has identified a pressing and substantial objective.<sup>105</sup> The reason is that Parliament is better suited to determining the principles and values that govern the democratic process.<sup>106</sup> In the second step, courts should not be deferential when engaging in the proportionality test under section 1. In order to redress the possibility of partisan rule-making, courts must be vigilant when assessing the means chosen by the government.<sup>107</sup> Feasby argues that a 'strict application of the proportionality aspects of the section 1 test, especially minimal impairment, will significantly reduce the risk of partisan and self-interested rule-making.'<sup>108</sup> In short, courts should defer to the government's values but not to its legislative means.

As Feasby notes, this two-step approach is in keeping with the usual approach of the Supreme Court. In most Charter cases, the Court defers to the government's objectives and shows less deference to the means. Feasby demonstrates that the Court has adopted a similar approach in its law of democracy cases, including *Libman v Quebec (AG)*, *Thomson*

100 Ibid at 264.

101 Ibid at 240.

102 Ibid at 282.

103 Ibid at 277–80.

104 Ibid at 282.

105 Feasby, 'Constitutional Questions,' supra note 1 at 544.

106 Feasby, 'Democratic Process,' supra note 11 at 288–9.

107 Feasby, 'Constitutional Questions,' supra note 1 at 544.

108 Ibid.

*Newspapers Co v Canada (AG)*, *Sauvé v Canada (AG)*, and *Figueroa v Canada (AG)*; that is, the Court was deferential as to Parliament's objectives, yet sceptical as to the means chosen to achieve those objectives.<sup>109</sup> He argues that, although the Court followed this approach in these cases, it lacked a principled rationale for doing so. According to Feasby, the insight of the political markets approach that there exists an 'inherent conflict of interest in Members of Parliament setting the rules of the political game' provides the best rationale.<sup>110</sup> Feasby thus opts for a carefully circumscribed role for process theory, one that is consistent with Patrick Monahan's theory of judicial review, the egalitarian model, and some of the Court's law of democracy cases.<sup>111</sup>

In comparison to Feasby, Christopher Brecht and Laura Pottie argue for a more robust judicial role in the democratic process. They contend that Parliament has an established tendency 'to legislate in its own self-interest'<sup>112</sup> by enacting legislation that 'preserves the status quo by giving preferential access to resources to incumbents and/or large established parties.'<sup>113</sup> For this reason, Parliament should be obligated to provide clear and convincing evidence that restrictions on participation are required.<sup>114</sup> Brecht and Pottie claim that Parliament's 'self-interest poses a far greater threat to the integrity of our democratic system and public confidence' than does the electoral advertising that Parliament regulates and restricts.<sup>115</sup> They observe that many election laws are 'clearly designed to protect and promote established parties and/or incumbents.'<sup>116</sup> For this reason, the Court should not defer to Parliament's choices.<sup>117</sup> In addition, Brecht and Pottie argue that the egalitarian model, while useful in certain contexts, does not address the range of participants in the electoral arena or the breadth of regulations that have been adopted by Parliament.<sup>118</sup>

In a recent book, Christopher Manfredi and Mark Rush also apply the political markets and structural approaches to the Canadian context.<sup>119</sup>

<sup>109</sup> Feasby, 'Democratic Process,' supra note 11 at 282–6.

<sup>110</sup> Ibid at 285.

<sup>111</sup> Ibid at 277–80.

<sup>112</sup> Brecht & Pottie, supra note 11 at 300.

<sup>113</sup> Ibid at 292.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid at 301.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid at 302.

<sup>118</sup> Ibid at 292.

<sup>119</sup> Manfredi & Rush, *Judging Democracy*, supra note 11. For a discussion of the book's arguments, see Yasmin Dawood, 'Judging the Law of Democracy' (2009) 8 Election LJ 141.

In an article comparing the election law decisions of the US Supreme Court and the Supreme Court of Canada, they note that ‘both courts have begun to discuss the problems of incumbent entrenchment and “lockups” of the political process in the context of campaign-spending cases.’<sup>120</sup> In addition, they argue that the ‘the Canadian Court has also evinced an increasing suspicion of legislative attempts to control the political marketplace.’<sup>121</sup> They focus, in particular, on Chief Justice McLachlin’s dissent in *Harper*, arguing that her dissent is ‘cast in terms similar to those that comprise the entrenchment/lockup discussion in the United States.’<sup>122</sup> They note that, in three election law cases (*Libman*, *Figueroa*, and *Harper*), McLachlin CJ has consistently invalidated ‘legislation that, under the guise of enhancing the equality or fairness of the political process, worked to make the process less fair.’<sup>123</sup> Manfredi and Rush are in agreement with Bredt and Pottie’s observation that the egalitarian model does not apply to some of the Court’s decisions.<sup>124</sup>

Like MacIvor, Manfredi and Rush are critical of Parliament when it enacts laws that give incumbents the ‘incentive to behave in a cartel-like manner.’<sup>125</sup> Manfredi and Rush are also in agreement with Feasby when they observe that the ‘government faces a conflict of interest when it regulates the process by which it is reconstituted, and that the Court cannot defer to legislative justifications for the election laws without subjecting them to careful scrutiny.’<sup>126</sup> For this reason, Manfredi and Rush urge that the legislature should not have the final say over the rules that govern the democratic model as in the dialogic model of constitutional interpretation.<sup>127</sup>

In a recent article also applying the American structural approach to the Canadian law of democracy, Michael Pal shares the concerns of other commentators that political actors are engaging in the self-serving manipulation of the democratic process.<sup>128</sup> He identifies three ‘break-downs’ or ways in which political insiders engage in partisan self-dealing

120 Manfredi & Rush, ‘Evolution and Convergence,’ supra note 11.

121 Ibid.

122 Ibid. For a discussion of the *Harper* decision, see Part IV.B, below. As I suggest there, McLachlin CJ’s language in the dissent is similar to that of a structural approach, but she does not mention structural concerns explicitly. See Dawood, ‘Campaign Finance Reform,’ supra note 11 at 286 for a discussion of McLachlin CJ’s dissent in the *Harper* case.

123 Manfredi & Rush, ‘Evolution and Convergence,’ supra note 11 at 466.

124 Ibid at 470.

125 Manfredi & Rush, ‘Deference and Democracy,’ supra note 11 at 36.

126 Ibid.

127 Ibid.

128 Pal, supra note 11 at 302.

to lockup democratic institutions; namely partisan, incumbent, and interest entrenchment breakdowns.<sup>129</sup> Pal argues that the Supreme Court should adopt a structural approach to prevent these breakdowns.<sup>130</sup>

The structural approach is closely connected to the process school of thought. Monahan has developed a process theory of democracy for the Canadian context.<sup>131</sup> Monahan argues that Ely's representation-reinforcing theory of judicial review 'actually offers a far more convincing account of the purposes underlying the Canadian *Charter*.'<sup>132</sup> He contends that the 'central focus of judicial review should be the integrity of the political process itself'<sup>133</sup> and argues that the Supreme Court should protect two main values: democracy and community. There are two main democratic principles. The first is a 'right of equal access to and participation in the political process': the courts should protect the 'basic infrastructure of liberal democracy – rights of assembly, debate and free elections.'<sup>134</sup> The second principle is that courts should ensure that the nation's political, social, and economic arrangements are not frozen in place and that they are subject to revision.<sup>135</sup> Monahan's second principle recalls Ely's concern with the propensity of those in power to entrench their authority.

In sum, the Canadian law of democracy field has focused considerable attention on structural approaches to the problem of partisan self-dealing with respect to a range of election law topics. There exists a shared concern that political insiders are manipulating the rules of the electoral game in order to secure a partisan advantage. Although I agree with the objective of the structural turn, I suggest that the challenge facing the field is to determine how best to adjust the structural approach so that it fits within the existing election law jurisprudence under the Charter. As outlined above, Feasby has argued that the Supreme Court could integrate the structural approach into its existing jurisprudence by deferring to the government's objectives but not to its means.<sup>136</sup> In the next section, I propose an approach that uses the mechanism of rights to achieve structural objectives.

<sup>129</sup> *Ibid* at 331.

<sup>130</sup> *Ibid* at 344–5.

<sup>131</sup> Patrick J Monahan, 'Judicial Review and Democracy: A Theory of Judicial Review' (1987) 21 *UBCL Rev* 87 at 89.

<sup>132</sup> *Ibid* at 90.

<sup>133</sup> *Ibid* at 89.

<sup>134</sup> Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 124.

<sup>135</sup> *Ibid* at 125.

<sup>136</sup> See text accompanying note 94ff.

III *A structural rights approach*

This part sets forth a new structural approach – which I term a structural rights approach – that would enable the Supreme Court of Canada to respond effectively to the problem of partisan self-dealing. After describing the concept of structural rights, this part claims that the Court should design individual rights to regulate the structure of democratic institutions. To this end, this part argues that the Court should recognize a right to a fair and legitimate democratic process, and it shows that this right is consistent with the Court’s existing election law jurisprudence. Finally, this part situates the structural rights approach within the US election law literature; in particular, with respect to those theories that argue that rights can be employed to regulate the democratic process.

A *THE CONCEPT OF STRUCTURAL RIGHTS*

At the heart of the structural rights approach is a new conception of rights, which I term ‘structural rights.’ I define structural rights as individual rights that take into account the broader institutional framework within which rights are defined, held, and exercised. Rights do not exist in a vacuum but are, instead, exercised within a particular political, institutional, and societal context. A structural rights approach is thus attentive to the larger social and political landscape within which individuals hold and exercise their rights. Structural rights theory can be applied to many kinds of individual rights, but this theory has particular salience for democratic rights. I argue that democratic rights have both an individual dimension and an institutional dimension. Individuals are the rights holders; yet, the exercise of these rights takes place within a particular political, institutional, and societal context.

Indeed, I claim that democratic rights are not even intelligible in the absence of institutions and processes. Democratic rights, unlike some individual rights, are not pre-political. Consider, for example, the right to vote. The right to vote presupposes the existence of an entire infrastructure of institutions and actors including elections, candidates, electoral districts, vote counting mechanisms, political parties, and legislatures. By contrast, other individual rights, such as the right to liberty, necessarily inhere in individuals and are not dependent upon the existence of a prior institutional framework.<sup>137</sup> Structural rights theory thus offers a new way to account for the individual and institutional dimensions of democratic rights. Rather than treating rights and structure as two distinct phenomena, the approach proposed here argues for a different

<sup>137</sup> My thanks to Lisa Austin for a very helpful discussion on this point.

conception of rights in the democratic context. On this view, rights and structure are not distinct; instead, structure is contained within the very definition of a right. The concept of structural rights provides an alternative way to capture the complex nature of democratic rights.

To further elaborate the theory of structural rights, it is helpful to situate it within the scholarly literature on rights. Although there is little consensus on the meaning and justification of rights,<sup>138</sup> it is possible to identify the broad contours of the field. As a start, rights can be defined as the ‘legal or moral recognition of choices or interests to which particular weight is attached.’<sup>139</sup> Rights are ‘claims to entitlements that individuals . . . can justifiably make on other people and organizations.’<sup>140</sup> Scholars have categorized the nature of rights in various ways. Rights are often classified as moral rights or legal rights.<sup>141</sup> Moral rights are universal rights that necessarily inhere in each individual by virtue of their status as human beings.<sup>142</sup> These rights, which are often called ‘natural rights,’ are grounded in the inherent dignity of individuals. Natural rights are treated as absolute and even inviolable. John Locke, for example, argued that men have certain natural rights, such as the right to liberty, which place constraints on the authority of the state.<sup>143</sup>

By contrast, legal rights are recognized by law, and they imply a power that can be exerted over others.<sup>144</sup> Legal rights can encompass civil and political rights and, less commonly, economic, social, and cultural rights.<sup>145</sup> Rights are, as Dworkin put it, ‘trumps’ that act as vetoes

138 Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge, UK: Cambridge University Press, 1993) at 203.

139 Iain McLean, ed, *The Oxford Concise Dictionary of Politics* (Oxford: Oxford University Press, 1996) *sub verbo* ‘Rights’ at 433–4.

140 Tom Campbell, *Rights: A Critical Introduction* (London: Routledge, 2006) at xi.

141 Stephen Holmes & Cass R Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: WW Norton, 1999) at 17 [Holmes & Sunstein].

142 Leif Wenar, ‘Rights’ (2005, rev’d 2011), online: Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/rights>> at section 6 [Wenar, ‘Rights’]. HLA Hart described rights as ‘forming a kind of moral property of individuals to which they are as individuals entitled’; HLA Hart, ‘Are There Any Natural Rights?’ in Jeremy Waldron, ed, *Theories of Rights* (New York: Oxford University Press, 1984) at 83.

143 John Locke, *Two Treatises of Government*, ed by Peter Laslett (Cambridge, UK: Cambridge University Press, 1988).

144 *Ibid.*

145 Certain rights are also referred to as human rights. Human rights can be defined as those ‘rights possessed by all human beings simply as human beings’; Peter Jones, *Rights* (London: MacMillan 1994) at 81 [Jones]. Human rights are natural rights in the sense that they exist whether or not they are recognized by law. That being said, many human rights are recognized by law and take the form of legal rights, at least in certain jurisdictions.

in the face of other competing interests.<sup>146</sup> It is worth noting that, for Dworkin, the state is permitted to override a right in order ‘protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit.’<sup>147</sup> But a state may not override a right on the grounds of aggregate welfare.<sup>148</sup> An important distinction that is often drawn with respect to legal rights is the difference between negative rights and positive rights. Negative rights entitle the right holder to freedom from interference by others. Many constitutional rights take the negative form; for instance, the freedom of speech is a negative right that affords the right-holder freedom from interference by the state. On this view, rights act like ‘shields’ to protect individuals from state abuse.<sup>149</sup> Positive rights, by contrast, entitle the right holder to a specific service or treatment. Economic and welfare rights often take a positive form.<sup>150</sup>

Structural rights are legal rights rather than moral rights. In addition, as mentioned above, structural rights theory is particularly applicable to democratic rights. The most important democratic right is the right to vote.<sup>151</sup> Democratic rights are also thought to encompass the right to political participation, which is construed more broadly than voting. In addition, democratic rights can encompass the rights to free speech, discussion and debate. Finally, democratic rights can also include associational rights that would, for instance, enable political parties to form and engage in politics. This article focuses, however, on those democratic rights that are concerned with voting and participation.

Scholars have also investigated the ways in which rights are relational. For example, Wesley Hohfeld’s influential thesis is based on the idea that rights are ultimately a relationship between two parties. Under Hohfeld’s system, there are four basic forms of legal rights: the claim, the liberty,

146 Dworkin argues that ‘[i]ndividual rights are political trumps held by individuals’; Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978) at xi.

147 Ibid at 191.

148 Ibid; William A Edmundson, *An Introduction to Rights* (Cambridge, UK: Cambridge University Press, 2004) at 145.

149 Holmes & Sunstein, *supra* note 141 at 36.

150 Ibid at 40. The negative rights/positive rights dichotomy can be criticized because it fails to take into account that the protection of negative rights (in the form of remedies) is costly. Holmes and Sunstein argue that, for this reason, ‘all legally enforced rights are necessarily positive rights’; *ibid* at 43. This is because all rights ‘are claims to an affirmative governmental response’; *ibid* at 44. For example, the protection of rights requires that the state ‘maintain(s) and make(s) accessible complex and relatively transparent legal institutions within which the cumbersome formalities of fair, public, and understandable adjudication occur’; *ibid* at 53.

151 Jones, *supra* note 145 at 173.

the power, and the immunity.<sup>152</sup> Each of these forms has its own internal structure which determines the relationship between the right holder and others.<sup>153</sup> A right is a ‘claim’ when the right holder exerts a claim upon another individual and that individual owes a corresponding duty to the right holder. For Hohfeld, rights in a strict sense are claim rights. A right is a ‘liberty’ when the right holder has a liberty to act and another party has no right to prevent that action. A right is a ‘power’ when it allows the right holder to change a legal relationship with another party and the other party to the relationship holds a corresponding liability of not being able to prevent the change in the legal relationship. A right is an ‘immunity’ when the right holder is not liable or subject to the power of another person.<sup>154</sup> Under Hohfeld’s analysis, every right ‘is ultimately reducible to a relation between two parties.’<sup>155</sup>

Jennifer Nedelsky’s relational conception of rights likewise focuses on the constitutive function of rights. She argues that ‘what rights in fact do and have always done is construct relationships – of power, of responsibility, of trust, of obligation.’<sup>156</sup> In her landmark work, *Law’s Relations*, Nedelsky argues that ‘[q]uestions of rights (and law more generally) are best analyzed in terms of how they structure relations.’<sup>157</sup> Under Nedelsky’s relational theory, rights are not treated as ‘trumps’ that override democratic processes but are instead seen as both emerging from and constituting those very processes.<sup>158</sup> For Nedelsky, the purpose of ‘equal constitutional rights is to structure relations so that people treat each other with a basic respect, acknowledge and foster each other’s dignity, even as they acknowledge and respect differences.’<sup>159</sup> Duncan Ivison also espouses a relational account of rights:

Any account of rights will need to show how they operate as a *system*, or a *structure* of entitlements and responsibilities. In particular, they represent a particular distribution of freedom and authority. Rights entail, as we have already seen, various correlative and reciprocal duties, permissions, immunities, liberties and

152 Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, CT: Yale University Press, 1919).

153 Wenar, ‘Rights,’ supra note 142 at section 2.1.

154 Duncan Ivison, *Rights* (Montreal: McGill-Queen’s University Press, 2008) at 11 [Ivison].

155 Jones, supra note 145 at 14.

156 Jennifer Nedelsky, ‘Reconceiving Rights as Relationship’ (1993) 1 *Rev Const Stud* 1 at 13 [Nedelsky, ‘Reconceiving Rights’].

157 Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at 65.

158 Nedelsky, ‘Reconceiving Rights’ supra note 156 at 10–1.

159 Ibid at 21.



powers. They establish patterns of relationships that impose benefits and burdens on people and institutions to varying degrees.<sup>160</sup>

For Ivison, rights embed individuals and groups in ‘a complex web of social and political institutions and norms’ inasmuch as they shield individuals from external interference.<sup>161</sup>

Structural rights are relational in the sense described by Nedelsky and Ivison, although the scope of the analysis extends beyond the immediate parties to the rights relationship. A structural right is intelligible only once we have taken into account the larger institutional infrastructure within which the right is exercised. Structural rights focus not only on the relationships between individuals; they are also concerned with the interactions between individuals and institutions, and the relationships that exist among institutions insofar as these interconnections affect the exercise of the right in question. Although the focus of this article is on democratic rights (and specifically those democratic rights that are concerned with voting and participation), one can fruitfully apply the concept of structural rights to other kinds of rights, including the right to freedom of expression and the right to equality.<sup>162</sup>

#### B *DESIGNING DEMOCRATIC RIGHTS*

As discussed in Part III.D below, scholars in the US law of democracy field have argued that the US Supreme Court uses individual rights doctrines to adjudicate the structural dimension of election law cases. The present article likewise contends that it is possible for courts to regulate the structure of institutions by using an individual rights regime. In addition, I claim that the Court should be designing democratic rights to remedy the structural deficiencies in the democratic process. Although proponents of the structural approach claim that the individual rights approach cannot redress structural harms, I argue that the problem lies instead with the design of the particular individual rights that are available in the cases. Poorly designed rights are ill-suited to achieve certain institutional aims. By contrast, well-designed rights can be used by courts to shape and regulate a wide array of institutions. Ideally, rights should be designed so that they, first, counteract the structural deficiency at issue, and second, follow the principles, values, and methodology of the existing jurisprudence to the extent possible. For this reason, I argue that courts should regulate democratic institutions by designing individual rights that can achieve particular structural ends.

<sup>160</sup> Ivison, *supra* note 154 at 21.

<sup>161</sup> *Ibid.*

<sup>162</sup> Dawood, ‘Campaign Finance Reform,’ *supra* note 11 at 285–7.

There are two advantages to this approach. First, the design and enforcement of rights is better suited to the institutional capacities and limitations of courts. Second, there is less danger of judicial overreaching if courts are engaged in their traditional function of recognizing and enforcing democratic rights, as compared, for example, to the more extensive judicial function contemplated by the structural approach. In this way, structural rights theory allows us to use the resources within a rights regime, which privileges the rights of individuals, to address the structural dimension of democratic participation and governance.

As I argue elsewhere, the Supreme Court of Canada has already designed a number of rights in its law of democracy cases, and it has used these rights to regulate the democratic process. The Court has interpreted the right to vote and the Charter's commitment to democracy as encompassing various additional democratic rights, including (1) the right to effective representation, (2) the right to meaningful participation, (3) the right to an equal vote, and (4) the right to a free and informed vote.<sup>163</sup> The Court employs the methodology of the 'purposive approach' when it interprets the meaning of a Charter right, such as the section 3 right to vote.<sup>164</sup> Under the purposive approach, the Court identifies the scope or value of a Charter right by 'specif[ying] the purpose underlying' the right or by 'delineat[ing] the nature of the interests it is meant to protect.'<sup>165</sup> As Justice Dickson stated in *R v Big M Drug Mart*, the 'proper approach to the definition of rights and freedoms guaranteed by the Charter was a purposive one.'<sup>166</sup> Under such an approach, 'the meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.'<sup>167</sup> The Court's recognition of the 'right to effective representation' as the purpose of section 3 is an example of the purposive approach.<sup>168</sup> I suggest that, when the Court uses the purposive approach to interpret the right to vote as encompassing subsidiary democratic rights, the Court is, in effect, designing new democratic rights. For the purposes of this article, the term 'designing democratic rights' encompasses the Court's purposive approach to the interpretation of Charter rights.

163 Dawood, 'Democratic Rights as Structural Rights,' *supra* note 15.

164 I am indebted to Lorraine Weinrib for very helpful comments on the Supreme Court's purposive approach to rights interpretation.

165 *Hunter v Southam*, [1984] 2 SCR 145 at 157.

166 *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 116.

167 *Ibid.*

168 *Saskatchewan Reference*, *supra* note 3 at 183.

In addition, I suggest that the four democratic rights mentioned above are best understood as structural rights.<sup>169</sup> The Court has described these rights as being held by individuals but is attuned to the ways in which the exercise of these democratic rights is influenced by the larger social and political infrastructure within which individuals find themselves; that is, to the systemic and institutional dimension of political participation. Thus, although the Supreme Court of Canada does not employ the language of structural rights, its elaboration of democratic rights has a structural rights dimension. For example, the right to meaningful participation can be understood as a structural right. This right was first announced by the Supreme Court in *Haig v Canada*<sup>170</sup> and later elaborated at length in *Figueroa v Canada*.<sup>171</sup> At issue in *Figueroa* was the constitutionality of certain regulations that discriminated against smaller political parties.<sup>172</sup> Writing for the majority in *Figueroa*, Iacobucci J stated that the purpose of section 3 includes ‘the right of each citizen to play a meaningful role in the electoral process.’<sup>173</sup> The Court found that political parties are essential for the participation of ordinary citizens, since political parties act ‘as both a vehicle and outlet for the meaningful participation of individual citizens in the electoral process.’<sup>174</sup> Because political parties are essential to participation, the Court struck down the regulations. What is important here is that, on this view, the right to meaningful participation is a structural right because it is based on the idea that an individual’s ability to participate is affected by the broader institutional framework within which her participation takes place.

### C THE RIGHT TO A FAIR AND LEGITIMATE DEMOCRATIC PROCESS

This article argues that the Supreme Court should recognize the right to a fair and legitimate democratic process as a purpose of the right to vote. The present section sets out to show, first, that the right to a fair and legitimate democratic process is designed to counteract the problem of partisan self-dealing, and second, that this right is consistent with the principles and values of the Court’s existing law of democracy cases.

#### 1 *designing a right to respond to partisan self-dealing*

To see why the right to a fair and legitimate democratic process provides a defence against partisan self-dealing, it is helpful to examine the

<sup>169</sup> Dawood, ‘Democratic Rights as Structural Rights,’ supra note 15.

<sup>170</sup> Supra note 3 at 1031.

<sup>171</sup> Supra note 3.

<sup>172</sup> Ibid at para 39.

<sup>173</sup> Ibid at para 25.

<sup>174</sup> Ibid at para 39.

structural approach in more detail. The structural approach is concerned with preventing certain harms to the democratic process, such as malfunctions, stoppages, and self-entrenching tactics. I argue that what defines and unites these democratic harms is that they involve an illegitimate exercise of power by public officials.<sup>175</sup> To develop a theoretical account of the illegitimate exercise of public power, I turn to republican accounts of freedom. As Philip Pettit explains, an individual has dominating power over another person to the extent that she has the capacity to interfere on an arbitrary basis in certain choices that the other person is in a position to make.<sup>176</sup> What makes an exercise of power illegitimate is the *arbitrariness* of the interference by the dominating agent. Arbitrariness occurs when an agent's actions are subject only to the *arbitrium* – the will or judgment – of the agent; that is, the actions are chosen without reference to the opinions or interests of those affected by the acts.<sup>177</sup> Specifically, an action is arbitrary when the interfering agent is not 'forced to track the interests and ideas of the person suffering the interference.'<sup>178</sup>

Democratic pathologies occur when public officials engage in an illegitimate exercise of power when crafting the ground rules of democracy. The exercise of power is illegitimate to the extent that it is arbitrary. In order for state action to be non-arbitrary, power must be exercised in 'a way that tracks, not the power-holder's personal welfare or world-view, but rather the welfare and world-view of the public.'<sup>179</sup> The pathologies of the democratic process have, at their core, an abuse of power in which the narrow interests of power holders, rather than the interests of the public, are served. This abuse of power can be described as self-dealing; that is, an illegitimate exercise of power that benefits the partisan interests of public officials at the expense of the public good. Partisan self-dealing is unfair and illegitimate because elected representatives are promoting their partisan interests at the expense of the public interest.<sup>180</sup>

This unifying theoretical basis of all structural harms – the illegitimate exercise of public power – can be used to translate structural problems into the language of rights. The problem of partisan self-dealing can be converted into a right to a fair and legitimate democratic process. That is, the right to a fair and legitimate democratic process can be treated as

175 See Dawood, 'Antidomination Model,' supra note 18 at 1428–39.

176 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (New York: Oxford University Press, 1997) at 52.

177 Ibid at 55.

178 Ibid.

179 Ibid at 56.

180 See Dawood, 'Partisan State,' supra note 18.

the conceptual equivalent of a democratic process that is free from partisan rule-making. The right to a fair and legitimate democratic process is a structural right because it is an individual right that is based upon a particular system-wide organization and exercise of political power; that is, an organization and exercise of power that can be described as fair and legitimate. By recognizing the right to a fair and legitimate democratic process, the Court can use the conceptual resources within a rights regime to address the structural problem posed by partisan self-dealing.

## 2 *fairness, legitimacy, and the law of democracy*

As described above, the Supreme Court has already recognized a number of democratic rights in its decisions, and it has used these rights to regulate the democratic process. If the Court recognized the right to a fair and legitimate democratic process as a purpose of the right to vote, it would be following its existing practice of interpreting the right to vote as encompassing subsidiary democratic rights. The right to a fair and legitimate democratic process is also consistent with the values that the Supreme Court has already recognized and protected in its decisions. Not only has the Court noted that section 3 protects a right to 'participate in a fair election,'<sup>181</sup> but it has also repeatedly emphasized the importance of fairness and legitimacy in its law of democracy jurisprudence.<sup>182</sup>

Before turning to the Court's decisions, it is important to first consider the findings of the 1991 Royal Commission on Electoral Reform and Party Financing, also known as the Lortie Commission. The Court often refers to the findings of the Lortie Commission in its law of democracy decisions. The Lortie Commission identified the promotion of fairness as the 'preeminent value' of democracy.<sup>183</sup> It stated that 'fairness is now regarded as fundamental'<sup>184</sup> and that it is a 'pressing, legitimate concern of the electoral process.'<sup>185</sup> In addition, '[f]airness in a free and democratic society presupposes a foundation of justice, in which the equality of citizens to participate in governance requires a fair opportunity to influence political institutions and public policy.'<sup>186</sup> For example, the Commission found that electoral laws promote fairness when they ensure that the electoral discourse is not dominated by those who have the most

181 *Figueroa*, supra note 3 at para 51.

182 See Feasby, 'Egalitarian Model,' supra note 4 at 17 for a history of the Court's rulings on fairness in the democratic process.

183 Royal Commission on Electoral Reform and Party Financing, *Final Report: Reforming Electoral Democracy* (Ottawa: The Commission, 1991), vol 1 at 321.

184 *Ibid* at 13.

185 *Ibid* at 16.

186 *Ibid* at 13.

wealth.<sup>187</sup> The right to vote ‘can be politically meaningful . . . only if the electoral process itself is fair.’<sup>188</sup> The Commission emphasized that it is the ‘predominant view of Canadians that the federal electoral process must first and foremost reflect and promote fairness.’<sup>189</sup> Fairness is the ‘central value that must inform electoral laws if they are to promote the desired outcome of the equality of citizens in the exercise of their democratic rights and freedoms.’<sup>190</sup> The meaningful exercise of the right to vote ‘demands fair election laws and administrative mechanisms.’<sup>191</sup>

In addition to the value of fairness, the Lortie Commission also emphasized the importance of enhancing public confidence in the integrity of the electoral process:

The integrity of the electoral process must be enhanced if Canadians are to be fully confident that their democratic rights are secure. Among other things, integrity means that any undue influence from financial contributions to candidates and parties is curtailed, that the policies and practices of the media in election coverage and political advertising do not manipulate voters, that elections are administered independently and impartially, and that the election law is effectively and reasonably enforced.<sup>192</sup>

Public confidence in the democratic system requires the ‘impartial enforcement of the electoral law.’<sup>193</sup>

It is worth noting that the Lortie Commission was particularly concerned about the problem of partisan gerrymandering because it diminished ‘the priority attached to legitimate principles of representation.’<sup>194</sup> The 1964 Electoral Boundaries Readjustment Act was an important reform because it ‘removed the drawing of electoral boundaries from partisan politics.’<sup>195</sup> The Lortie Commission observed that, under the prior system, in which Parliament conducted the boundary drawing, members of Parliament were ‘in a conflict of interest.’<sup>196</sup> In order to enhance public confidence in the integrity of the electoral process, elections must be ‘administered independently and impartially.’<sup>197</sup> The Lortie Commission also connected the values of fairness and integrity: ‘Our

187 Ibid at 13–4.

188 Ibid at 14.

189 Ibid.

190 Ibid.

191 Ibid.

192 Ibid at 16.

193 Ibid.

194 Ibid at 138.

195 Ibid at 140.

196 Ibid.

197 Ibid at 421.

independent and impartial system to register voters and administer the vote thus promotes fairness, as well as the integrity of the electoral process.<sup>198</sup> Fairness and integrity are mutually reinforcing values.

In its law of democracy decisions, the Supreme Court has repeatedly emphasized the importance of electoral fairness. The Court noted in *Libman*, for example, that the Lortie Commission ‘recognized that spending limits are essential to ensure the primacy of the principle of fairness in democratic elections.’<sup>199</sup> The principle of electoral fairness ‘flows directly from a principle entrenched in the Constitution: that of the political equality of citizens.’<sup>200</sup> The Court also stated that the ‘principle of fairness presupposes that certain rights or freedoms can legitimately be restricted in the name of a healthy electoral democracy.’<sup>201</sup> The Court noted that the ‘majority of Canadians agree with limiting election spending in order to promote fairness as a fundamental value of democracy.’<sup>202</sup> Likewise, in *Harper*, the Court asserted that the ‘overarching objective of the regime is to promote electoral fairness by creating equality in the political discourse.’<sup>203</sup> The Court also stated that the ‘advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system.’<sup>204</sup> Similarly, in *Bryan*, the Court observed that the ‘subjective perceptions of Canadian voters that the electoral system is fair is a vital element in the value of the system.’<sup>205</sup>

The Court has also emphasized the importance of protecting the public confidence in the integrity of the democratic process. For the purposes of this article, I will use the conceptual shorthand of ‘legitimacy’ to stand for the ‘public confidence in the integrity of the democratic process.’ In *Sauvé II*, McLachlin CJ posited that courts must be ‘vigilant in fulfilling their constitutional duty to protect the integrity of this system’ when ‘legislative choices threaten to undermine the foundations of the participatory democracy.’<sup>206</sup> In *Harvey*, LaForest J stated that the objective of ‘maintain[ing] and enhanc[ing] the integrity of the electoral process’ is ‘always of pressing and substantial concern in any society that purports to operate in accordance with the tenets of a free and democratic society.’<sup>207</sup> Likewise, in *Figueroa*, the government identified the

198 Ibid at 14.

199 Supra note 3 at para 47.

200 Ibid.

201 Ibid.

202 Ibid.

203 Supra note 3 at para 63.

204 Ibid.

205 Supra note 3 at para 25.

206 Supra note 3 at para 15.

207 Supra note 3 at para 38.

‘preservation of the integrity of the electoral financing regime’ as one of the objectives behind the regulations governing registered party status.<sup>208</sup> The Court stated that it ‘already has determined that preserving the integrity of the electoral process is a pressing and substantial concern in a free and democratic state.’<sup>209</sup> In *Harper*, the Court noted that confidence in the electoral process is ‘essential to preserve the integrity of the electoral system which is the cornerstone of Canadian democracy.’<sup>210</sup> In *Bryan*, Abella J acknowledged the ‘significance of maintaining public confidence in electoral fairness and the integrity of the electoral system.’<sup>211</sup> Abella J quoted Bastarache J’s statement in *Harper* that ‘[p]erception is of utmost importance in preserving and promoting the electoral regime in Canada . . . Electoral fairness is key.’<sup>212</sup> Fairness and the public confidence in the integrity of the electoral system (or legitimacy) are closely intertwined values.

To be sure, the concepts of ‘fairness’ and ‘legitimacy’ would require additional theorizing in the context of actual cases. For example, the Court should not tie legitimacy too closely to popular opinion because the Court should have the ability to assess independently the legitimacy of a particular institutional arrangement.<sup>213</sup> Although fairness and legitimacy are open to judicial interpretation, it is important to note that the Supreme Court has already recognized the fundamental importance of electoral fairness and legitimacy in a number of its law of democracy decisions. By recognizing a right to a fair and legitimate democratic process as a purpose of section 3, the Court would formally acknowledge an existing dimension of its jurisprudence.

#### D RIGHTS, STRUCTURE, AND THE LAW OF DEMOCRACY

In the American law of democracy literature, the individualist and structural approaches are usually viewed as being mutually exclusive. Some scholars have argued, however, that many of the problems afflicting the democratic process and their proposed solutions contain both individualist and structural elements. Here, I consider the arguments of US election law scholars about the ways in which the individualist and structural approaches are often intertwined in the US Supreme

<sup>208</sup> *Supra* note 3 at para 71.

<sup>209</sup> *Ibid* at para 72.

<sup>210</sup> *Supra* note 3 at para 103.

<sup>211</sup> *Supra* note 3 at para 104, Abella J dissenting.

<sup>212</sup> *Ibid*, citing *Harper*, *supra* note 3 at para 82.

<sup>213</sup> My thanks to Colin Feasby for very helpful comments on how the Supreme Court ought to interpret the concepts of fairness and legitimacy. As Colin points out, the Court would also need to decide what electoral fairness might demand in a given case.



Court's decisions. There are important conceptual affinities between their positions and the structural rights framework developed in this article.

Gerken argues that, even though the US Supreme Court follows the individual rights approach in its election law cases,<sup>214</sup> the Court does regulate 'the structure of the democratic process' when it decides such questions as 'the role political parties play, how much power minorities will wield, how much political competition there will be, and what form it will take.'<sup>215</sup> In a partisan gerrymandering case, for example, courts cannot assess the fairness of an electoral scheme without examining the structure of the democratic process.<sup>216</sup> The problem is that the individual rights approach is 'often ill-suited' to the task of making these kinds of structural determinations.<sup>217</sup> Gerken points to *Georgia v Ashcroft*,<sup>218</sup> a redistricting case involving minority influence districts, as a case that 'comes closest to embodying a structural approach even though it is cloaked in the garb of traditional voting-rights doctrine.'<sup>219</sup> In the decision, the 'majority and dissent seemed to grasp that the distribution of legislative power hinged upon the decision and that their assessments of the case turned on a conception of democratic fairness.'<sup>220</sup> Gerken argues that *McConnell v Federal Election Commission*<sup>221</sup> represents a 'doctrinal interregnum,' in which the Court attempted to maintain the 'edifice' of the individual rights paradigm.<sup>222</sup>

Certain individual rights claims have distinct structural elements. Gerken argues that vote dilution is a 'discrete structural harm' because the 'identification of a concrete injury to members of relevant groups for dilution claims requires a baseline – that is, some theory about how power ought to be distributed systemwide.'<sup>223</sup> She suggests that discrete structural harms exist at a midway point between the individualist and structural approaches.<sup>224</sup> Measuring the harm of vote dilution, for example, requires attention to the relative treatment of a group, and this, argues Gerken, requires a structural judgment.<sup>225</sup> Although Justice Stevens

<sup>214</sup> Gerken, 'Doctrinal Interregnum,' supra note 14 at 512.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid at 507.

<sup>217</sup> Ibid at 512.

<sup>218</sup> 539 US 461 (2003) [*Georgia v Ashcroft*].

<sup>219</sup> Gerken, 'Doctrinal Interregnum,' supra note 14 at 514.

<sup>220</sup> Ibid.

<sup>221</sup> 540 US 93 (2003) [*McConnell*].

<sup>222</sup> Gerken, 'Doctrinal Interregnum,' supra note 14 at 517.

<sup>223</sup> Ibid at 521.

<sup>224</sup> Ibid at 522.

<sup>225</sup> Ibid.

in *Vieth v Jubelirer*<sup>226</sup> defined the harm of gerrymandering as ‘individual,’ Gerken contends that the injury seems ‘inescapably structural.’<sup>227</sup> She argues that there is a continuum of structural claims. Some structural claims ‘involve injuries to a discrete identifiable group, and thus share one of the great strengths of a traditional individual rights paradigm: they both ground judicial decision making in a concrete, identifiable harm.’<sup>228</sup> Other structural claims, however, ‘involve an “injury to the polity,” a harm that affects all of us.’<sup>229</sup> Although the polity-wide structural claims are harder for courts to remedy, Gerken notes that constitutional scholars have long observed that individual rights claims are not analytically pure and often involve a structural analysis.<sup>230</sup>

In addition, Gerken develops a new conceptual approach to vote dilution claims.<sup>231</sup> She argues that the right to an undiluted vote belongs to a larger category of individual rights that she terms ‘aggregate rights.’<sup>232</sup> Aggregate rights require a court ‘to consider the relative treatment of *groups* in determining whether an *individual* has been harmed.’<sup>233</sup> Gerken argues that voting rights claims can be viewed as falling along a spectrum. At one end of the spectrum are traditional individual rights, while at the other are group rights. Aggregate rights claims fall between the two extremes because they are ‘*individual* harms that are measured by reference to the treatment of a *group*.’<sup>234</sup> Gerken shows that, although the US Supreme Court did not openly address this aspect of vote dilution claims, its earlier case law had nonetheless moved in the direction of an aggregate rights approach.<sup>235</sup> Since *Shaw v Hunt*,<sup>236</sup> however, the Court has moved away from an aggregate rights approach and toward a highly individualistic notion of rights.<sup>237</sup> The conventional individual rights approach, however, cannot remedy aggregate harms like vote dilution because the very definition of the injury is based upon an

<sup>226</sup> 541 US 267 (2004).

<sup>227</sup> Gerken, ‘Doctrinal Interregnum,’ *supra* note 14 at 527.

<sup>228</sup> *Ibid* at 529.

<sup>229</sup> *Ibid*.

<sup>230</sup> *Ibid*.

<sup>231</sup> Heather K Gerken, ‘Understanding the Right to an Undiluted Vote’ (2001) 114 *Harv L Rev* 1663 [Gerken, ‘Undiluted Vote’].

<sup>232</sup> *Ibid* at 1667. Although Gerken focuses on vote dilution claims, she notes that the concept of aggregate rights can be applied to other kinds of cases and problems, including the one-person one-vote principle, Title VII disparate impact claims, and segregation claims; *ibid* at 1737–8.

<sup>233</sup> *Ibid* at 1666.

<sup>234</sup> *Ibid* at 1682.

<sup>235</sup> *Ibid* at 1689.

<sup>236</sup> 517 US 899 (1996).

<sup>237</sup> Gerken, ‘Undiluted Vote,’ *supra* note 231 at 1698–1700.

assessment of how the other group members are being treated.<sup>238</sup> Gerken's theory of aggregate rights demonstrates that, in the democratic context, individual rights can have a complex internal structure.

Guy-Uriel Charles has analysed the connections between the individual rights approach and the structural approach in considerable depth.<sup>239</sup> Charles argues for the concept of 'election law dualism': the idea that to 'effectively address most cases of political rights, particularly partisan gerrymandering, courts must be willing to explicitly deploy a rights-based framework that focuses on the individual while also employing a structural account that seeks to understand the pathologies of the political process in institutional terms.'<sup>240</sup> He defines a dualist claim as a 'a political rights claim that cannot be resolved effectively until courts address the manner in which individuals or groups are affected by political institutions.'<sup>241</sup> Charles points to numerous cases in which the US Supreme Court uses the language of individual rights when it is, in fact, also addressing structural concerns.<sup>242</sup> He considers a set of cases involving malapportionment and race to show that 'judgments that seem to be about individual rights reflect underlying structural considerations.'<sup>243</sup> In *Reynolds v Sims*,<sup>244</sup> for example, the US Supreme Court described the right impaired by the apportionment scheme as being individual in nature.<sup>245</sup> Charles observes, however, that the apportionment cases are 'inherently structural.'<sup>246</sup> Likewise in cases involving minority vote dilution the Court was ostensibly protecting individual rights but, in fact, was engaging in a structural analysis. Similarly, in *Georgia v Ashcroft*,<sup>247</sup> a case involving so-called coalition districts, the Court made certain structural assumptions while employing a rights framework.<sup>248</sup> Charles argues that the courts subject structural concepts, such

<sup>238</sup> Ibid at 1683.

<sup>239</sup> For an excellent discussion of the debate between the structural approach and the individual rights approach in the American law of democracy literature, see Guy-Uriel E Charles, 'Judging the Law of Politics' (2005) 103 Mich L Rev 1099 [Charles, 'Law of Politics'].

<sup>240</sup> Charles, 'Democracy and Distortion,' supra note 14 at 657.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid at 667, citing as examples, *Lucas v Forty-Fourth General Assembly of Colorado*, 377 US 713 (1964); *Reynolds v Sims*, 377 US 533 (1964) [*Reynolds v Sims*]; *Wesberry v Sanders*, 376 US 1 (1964); *Gray v Sanders*, 372 US 368 (1963).

<sup>243</sup> Ibid at 657.

<sup>244</sup> Supra note 242.

<sup>245</sup> Charles, 'Democracy and Distortion,' supra note 14 at 659.

<sup>246</sup> Ibid.

<sup>247</sup> Supra note 218.

<sup>248</sup> Ibid at 663.

as fairness, to a rights discourse in order to render them amenable to judicial review.<sup>249</sup>

Charles applies election law dualism to the central focus of his article: the US Supreme Court's treatment of partisan gerrymandering. He argues that the harm of partisan gerrymandering lies in the loss of legitimacy that arises from the distortions caused by the intentional manipulation of the democratic process.<sup>250</sup> Under a dualist approach to partisan gerrymandering, courts would use 'ex ante administrable standards,' such as the 'equipopulation principle,' the presumption of unconstitutionality, and the bizarre-shape test from *Shaw v Reno*.<sup>251</sup> Charles also argues that courts can borrow certain conventions, such as doctrines on ripeness and standing, from the individual rights approach to cabin judicial discretion.<sup>252</sup> It is worth noting that Charles is suggesting that courts should use various individual rights *doctrines* rather than individual rights themselves to remedy partisan gerrymandering.

According to Charles, the symbiotic relationship between the individual rights approach and the structural approach has long been evident in the Court's cases and in scholarly commentaries. Pamela Karlan has argued, for instance, that the 'Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals . . . but rather to regulate the institutional arrangements within which politics is conducted.'<sup>253</sup> Charles suggests that some of the earlier work of structural theorists was more receptive to the overlap between rights and structure. He points to Richard Pildes's earlier argument for a structural conception of rights under which rights 'are best understood as the way constitutional law marks the boundaries between different spheres of political authority.'<sup>254</sup> Following Joseph Raz, Pildes contended that rights are 'better understood as a means of realizing certain collective interests.'<sup>255</sup> Under a structural view of rights, 'many constitutional rights are justified because, by serving the interests of the rights claimant, they

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid* at 608.

<sup>251</sup> *Ibid* at 670–3.

<sup>252</sup> *Ibid* at 650.

<sup>253</sup> Pamela S Karlan, 'Nothing Personal: The Evolution of the Newest Equal Protection from *Shaw v Reno* to *Bush v Gore*' (2001) 79 NCL Rev 1345 at 1346 [Karlan], discussed in Charles, 'Law of Politics,' *supra* note 239 at 1115.

<sup>254</sup> Richard H Pildes, 'Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law' (1993) 45 Hastings LJ 711 at 722; see Charles, 'Law of Politics,' *ibid* at 1115–7 for an analysis of Pildes' arguments about the structural nature of rights.

<sup>255</sup> Richard H Pildes, 'Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism,' (1998) 27 J Legal Stud 725 at 731, referencing Joseph Raz, 'Rights and Individual Well Being,' in Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon, 1995) 44 at 51–2.

serve collective interests in the realization of various common goods.<sup>256</sup> It appears that Charles's conception of the rights-structure relationship is closer to Karlan's position that the courts are using rights 'to regulate the institutional arrangements within which politics is conducted'<sup>257</sup> than it is to Pildes's view that rights are used by courts to achieve common goods.<sup>258</sup>

In *The Supreme Court and Election Law*, Richard Hasen defends a modified version of the individual rights / equal protection approach to election law.<sup>259</sup> Hasen's main argument is that courts should follow a minimalist approach when deciding election law cases.<sup>260</sup> Under this approach, the US Supreme Court should distinguish between core and contested equality rights when deciding election law cases.<sup>261</sup> The Court should protect the core of the three political equality rights by using a bright-line rule.<sup>262</sup> By contrast, if the right is a contested equality right, the Court should defer to legislatures by using a vague standard.<sup>263</sup> Although Hasen has criticized the structural approach for its reliance on robust judicial intervention,<sup>264</sup> he argues that courts should be alert to the problem of partisan self-dealing in election laws. One of the three equality rights is a 'collective action principle,' which seeks to prevent those in power from passing laws 'for the purpose of protecting their own positions through a stifling of political competition.'<sup>265</sup> The collective action principle has the same objective as the structural approach, namely to forestall threats to competitive legitimacy.

It should be noted, however, that Hasen's view of self-interested legislative conduct differs in important ways from the structural approach. Hasen contends that 'bad legislative intent,' which he defines as an

<sup>256</sup> Ibid at 733.

<sup>257</sup> Karlan, *supra* note 253 at 1346.

<sup>258</sup> Charles, 'Law of Politics,' *supra* note 239 at 1131.

<sup>259</sup> Hasen, *Supreme Court*, *supra* note 9 at 48–9.

<sup>260</sup> Ibid at 48–9.

<sup>261</sup> Ibid at 11, 81–92. Core and contested equality rights are distinguished on the basis of the level of social consensus supporting the right. Core rights are the product of social consensus; *ibid* at 7, 11, 80–1.

<sup>262</sup> Ibid at 7–8. The three equality rights are (1) the essential political rights principle, which includes free speech, non-discrimination in voting, and associational rights; (2) the anti-plutocracy principle, which limits 'the role that money may play in the allocation of political power'; and (3) the collective action principle; *ibid* at 73–5.

<sup>263</sup> Ibid. Hasen calls for judicial unmanageability – the idea that courts should use vague and unclear standards for articulating new equality rights. This minimalist strategy allows the Court to proceed cautiously in new territory and enables it to gain information before fully articulating a new equality rule; *ibid* at 48–9.

<sup>264</sup> Ibid at 13.

<sup>265</sup> Ibid at 89; see also Charles, 'Law of Politics,' *supra* note 239 at 1114, noting the structuralist elements of Hasen's theory, including the collective action principle.

intent to protect incumbents and political parties from political competition, is often difficult to identify and prove.<sup>266</sup> In addition, he argues that there are democratic benefits to certain anti-competitive practices such as incumbency protection.<sup>267</sup> The existence of such bad intent should trigger courts to take a ‘hard look’ at the election law in question and to engage in closer mean–ends scrutiny.<sup>268</sup> That is, courts should engage in sceptical, as opposed to deferential, balancing in order to police legislative self-interest indirectly.<sup>269</sup> At the very least, Hasen’s approach could be described as one that partially relies on the mechanism of rights to respond to the threat of partisan self-dealing.

The structural rights approach likewise suggests that it is possible for courts to regulate the structure of institutions by using an individual rights regime. As described above, the approach proposed here departs in certain ways from other rights-based structural arguments. First, the starting point for the structural rights approach is not the Supreme Court’s treatment of the individualist and structuralist elements of election law cases. Instead, the focus is on the nature of *rights*. This article proposes a new conceptualization of rights – structural rights – that has particular implications for democratic rights. The argument is that *all* democratic rights are inevitably structural rights because they require the existence of an institutional framework to be rendered intelligible. I argue that democratic rights necessarily have a structural dimension because an individual’s exercise of these rights presupposes and takes place within a pre-existing institutional framework. Rights and structure are not distinct; instead, structure is contained within the very definition of a right. Structural rights theory thus applies to all rights that arise in the election law context and not just certain rights or cases.<sup>270</sup>

In addition, I claim that the new conceptualization of rights has implications for the judicial review of election law cases. Specifically, I argue that courts and commentators should be designing democratic rights so

<sup>266</sup> Richard L. Hasen, ‘Bad Legislative Intent’ (2006) *Wis L Rev* 843 at 846.

<sup>267</sup> *Ibid* at 876. The rationale is that there are democratic benefits to having knowledgeable and experienced legislators who can be responsive to voters. Incumbency protection may be consistent with democratic principles because voters may be more effectively represented by knowledgeable and experienced legislators; *ibid*.

<sup>268</sup> *Ibid* at 846, 888.

<sup>269</sup> Hasen, *Supreme Court*, *supra* note 9 at 12.

<sup>270</sup> It is worth noting that the use of the term ‘structural’ in the context of ‘structural rights’ is arguably broader than the way in which the term is usually used in the law of democracy literature with respect to the ‘structural approach.’ Although the structural approach is described in broad terms in the law of democracy literature, it is often concerned with partisan and incumbent self-entrenchment and with cases involving race-based redistricting. Structural rights theory by contrast can be applied to any case involving democratic rights.

that these rights can remedy the structural deficiencies of the democratic process. Although scholars claim that the individual rights approach cannot be used to redress structural harms, I argue that the problem lies with the particular rights that are available in the cases rather than with rights per se. As discussed in Part III.B, I suggest that courts and commentators should engineer the internal structure of rights so that these rights can be used to regulate institutions.

#### IV *The problem of partisan self-dealing*

The problem of partisan self-dealing has occurred with respect to a number of topics in the Canadian law of democracy, including electoral redistricting, campaign finance, the regulation of political parties, the 2006 Accountability Act, public subsidies, candidate deposits, unlimited pre-election spending, political gerrymandering at the municipal level, and floor crossing.<sup>271</sup> This part considers two Supreme Court decisions – involving electoral redistricting and political finance, respectively – in which partisan self-dealing was arguably at issue. The objective of these case studies is to show, first, that the Court has demonstrated considerable reluctance to acknowledge the existence of partisan self-dealing, and second, that the Court has yet to develop the conceptual tools to respond adequately to this problem. These two case studies will be then used in Part V to describe how the right to a fair and legitimate democratic process would offer a new approach to the Court for addressing structural concerns.

##### A *ELECTORAL BOUNDARIES AND PARTISANSHIP*

Until the 1970s, partisan gerrymandering was an ‘integral part of Canadian politics.’<sup>272</sup> It was assumed after the adoption of independent boundary commissions that partisan considerations would cease to play a role in electoral redistricting.<sup>273</sup> In *Saskatchewan*

<sup>271</sup> See Part II.B, above.

<sup>272</sup> RK Carty, ‘The Electoral Boundary Revolution in Canada’ (1985) 15 *American Review of Canadian Studies* 273 at 273. See also John C Courtney, ‘Redistricting: What the United States Can Learn From Canada’ (2004) 3 *Election LJ* 488 at 491; Ron Levy, ‘Regulating Impartiality: Electoral Boundary Politics in the Administrative Arena’ (2008) 53 *McGill LJ* 1 at 5 [Levy], noting that ‘[o]vertly partisan decision making was thus previously the rule . . .’

<sup>273</sup> For a discussion of how boundary adjustment works, see John C Courtney, *Commissioned Ridings: Designing Canada’s Electoral Districts* (Montreal: McGill-Queen’s University Press, 2001) [Courtney, *Commissioned Ridings*]; Levy, *ibid* at 9, arguing that the process used to be partisan, and that the ambiguity of the current process helps to

*Reference*,<sup>274</sup> however, there were indications that the governing political party had engaged in partisan redistricting despite the existence of an independent boundary commission. In *Saskatchewan Reference*, the Supreme Court considered whether the provincial electoral boundaries violated the right to vote as protected by section 3 of the Charter. In Saskatchewan's redistricting map, there were variances in the population sizes of the electoral districts that were within plus or minus 25 per cent of the provincial quotient.<sup>275</sup> In addition, the urban districts had more voters on average than did the rural districts and were, therefore, under-represented as compared to the rural areas.<sup>276</sup> In a five-to-three decision, Justice McLachlin (as she was then) held on behalf of the majority that the electoral boundaries did not infringe the Charter.<sup>277</sup>

Many commentators have observed that the electoral boundaries at issue in the *Saskatchewan Reference* decision involved partisan rule-making.<sup>278</sup> The factual background of the case sheds helpful light on

control partisanship. Although there is a fair amount of malapportionment across the country, it is not directly associated with partisanship. As Russell Williams observes, 'despite an increasingly malapportioned electoral map, the absence of a clear partisan impact has also contributed to MP's willingness to adhere to the pluralist approach. Essentially, it is not clear that malapportionment has adverse affects on any particular party and as such, sitting MP's have kept redistribution a surprisingly non-partisan concern'; Russell Alan Williams, 'Canada's System of Representation in Crisis: The "279 Formula" and Federal Electoral Redistribution' (2009) 35:1 *American Review of Canadian Studies* 99 at 100–1. Williams notes, however, that malapportionment may emerge as a partisan problem in the future; *ibid* 118–9.

<sup>274</sup> *Supra* note 3. For discussions of Canada's approach to electoral redistricting, see Nicholas Aroney, 'Democracy, Community, and Federalism in Electoral Apportionment Cases: The United States, Canada, and Australia in Comparative Perspective' (2008) 58 *UTLJ* 421; Elizabeth Daly, 'Idealists, Pragmatists and Textualists: Judging Electoral Districts in America, Canada and Australia' (1998) 21 *BC Intl & Comp L Rev* 261; Charles Paul Hoffman, 'The Gerrymander and the Commission: Drawing Electoral Districts in the United States and Canada' (2005) 31 *Man LJ* 331.

<sup>275</sup> The provincial quotient is calculated by dividing the total voting population in the province by the number of ridings. The two northern ridings varied within plus or minus 50 percent of the provincial quotient; *Saskatchewan Reference*, *supra* note 3 at 175, 190.

<sup>276</sup> *Ibid* at 169.

<sup>277</sup> *Ibid* at 197.

<sup>278</sup> Ronald Fritz, 'Challenging Electoral Boundaries Under the *Charter*' (1999–2000) 5 *Review of Constitutional Studies* 1 at 4 [Fritz, 'Challenging']; Ronald E Fritz, 'The Saskatchewan Electoral Boundaries Case and Its Complications' in John C Courtney, Peter MacKinnon, & David E Smith, eds, *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Saskatoon, SK: Fifth House, 1992) 70 [Courtney, MacKinnon, & Smith] [Fritz, 'Saskatchewan Electoral Boundaries']; Mark Carter, 'Ambiguous Constitutional Standards and the Right to Vote,' (2011) 5 *Journal of Parliamentary and Political Law* 309 at 320–1 [Carter, 'Ambiguous Standards']; Mark Carter, 'Reconsidering the *Charter* and Electoral Boundaries' (1999) 22 *Dal LJ* 53 at 58 [Carter, 'Electoral



this issue. Saskatchewan adopted an independent boundary commission in 1971 as a response to an ongoing problem with partisan gerrymandering.<sup>279</sup> In 1987, the newly elected Progressive Conservative government under Premier Grant Devine passed the Electoral Boundaries Commission Act (EBCA).<sup>280</sup> The EBCA imposed two restrictions on the independent boundary commission that was charged with redrawing Saskatchewan's electoral districts. First, the Act required that the electoral map have twenty-nine urban electoral districts, thirty-five rural districts, and two northern districts.<sup>281</sup> Second, the Act provided that the urban ridings had to conform to existing municipal boundaries, which meant that the boundary commission could not create ridings that included both areas designated as rural and areas designated as urban.<sup>282</sup> In addition to imposing these two conditions, the legislation also allowed the population sizes of electoral districts to vary by as much as plus or minus 25 per cent of the provincial quotient.<sup>283</sup> The legislation allowed for the two northern ridings to vary by plus or minus 50 per cent of the provincial quotient.<sup>284</sup>

In the resulting electoral map, there were thirty-five rural districts, twenty-nine urban districts, and two northern districts. If, by contrast, the boundary commission had followed the one-person one-vote principle, there would have been thirty-three rural districts, thirty-two urban districts, and one northern district.<sup>285</sup> As a result of EBCA's restrictions, the urban districts had more voters on average than the rural districts.<sup>286</sup> The rural/urban seat quota was criticized because it meant that rural areas were over-represented, while urban areas were under-

Boundaries']; David Johnson, 'Canadian Electoral Boundaries and the Courts: Practices, Principles and Problems' (1994) 39 McGill LJ 224 at 228 [Johnson, 'Canadian Electoral Boundaries']; Manfredi & Rush, *Judging Democracy*, supra note 11; Christopher D Bredt & Markus F Kremer, 'Section 3 of the *Charter*: Democratic Rights at the Supreme Court of Canada' (2005) 17 NJCL 19 at 21-7 [Bredt & Kremer]; Janet Hiebert, 'Representation and the Charter: Should Rights be Paramount?' in Courtney, MacKinnon, & Smith, *ibid*, 1 at 6, 14; David J Bercuson & Barry Cooper, 'Electoral Boundaries: An Obstacle to Democracy in Alberta' in Courtney, MacKinnon, & Smith, *ibid*, 110 at 114-5, 122; Courtney, *Commissioned Ridings*, supra note 273 at 158-9.

<sup>279</sup> Fritz, 'Challenging,' *ibid* at 4; Fritz, 'Saskatchewan Electoral Boundaries,' *ibid* at 76.

<sup>280</sup> *Electoral Boundaries Commission Act*, SS 1986-87-88, c E-6.1.

<sup>281</sup> Fritz, 'Challenging,' supra note 278 at 4.

<sup>282</sup> *Ibid*.

<sup>283</sup> Carter, 'Electoral Boundaries,' supra note 278 at 57, citing James M Pitsula & Kenneth A Rasmussen, *Privatizing a Province: The New Right in Saskatchewan* (Vancouver: New Star Books, 1990) at 254-5 [Pitsula & Rasmussen].

<sup>284</sup> *Saskatchewan Reference*, supra note 3 at 190.

<sup>285</sup> Fritz, 'Challenging,' supra note 278 at 4.

<sup>286</sup> *Saskatchewan Reference*, supra note 3 at 169.

represented.<sup>287</sup> In fact, each rural vote was worth 14 per cent more than each urban vote.<sup>288</sup>

Not surprisingly, the electoral map benefitted the governing political party. As a result of EBCA, the NDP Party had twenty-one out of twenty-six electoral districts redrawn, while only ten out of thirty-eight of the governing Progressive Conservative Party's electoral districts were changed.<sup>289</sup> The fact that the electoral map favoured rural voters was also politically significant. The legislation enhanced the Progressive Conservatives' electoral support, which in the late 1980s was located primarily in the rural districts.<sup>290</sup> It was, therefore, an electoral benefit to the governing party to pass a law that enhanced its electoral support and undermined the electoral support of the minority party. As noted by Mark Carter, the provisions of EBCA 'assure that it will always represent as good an example of gerrymandering as Canadian history can provide.'<sup>291</sup> It is significant that the existence of an independent boundary commission did not prevent partisan influence on the redistricting process.

The Saskatchewan Court of Appeal held that the urban and rural ridings violated the section 3 right to vote while the two northern ridings were constitutional.<sup>292</sup> The Court of Appeal rejected the need for absolute equality and opted instead for 'relative or substantial equality of voting power.'<sup>293</sup> The Court of Appeal concluded that the electoral map did not provide relative or substantial equality of voting power, and furthermore, that such deviations could not be justified under section 1.<sup>294</sup>

### 1 *the supreme court majority opinion*

In a five-to-three decision, the Supreme Court held that the electoral boundaries did not violate the right to vote as protected by section 3 of the Charter.<sup>295</sup> The Court rejected the idea that electoral districts must adhere to the one-person, one-vote principle. In a key passage, McLachlin J stated that 'the purpose of the right to vote enshrined in s 3 of the Charter is not equality of voting power per se, but the right to

<sup>287</sup> Fritz, 'Saskatchewan Electoral Boundaries,' supra note 278 at 70.

<sup>288</sup> Johnson, 'Canadian Electoral Boundaries,' supra note 278 at 228.

<sup>289</sup> Carter, 'Electoral Boundaries,' supra note 278 at 57, citing Pitsula & Rasmussen, supra note 283 at 254–5.

<sup>290</sup> Ibid at 57.

<sup>291</sup> Carter, 'Ambiguous Standards,' supra note 278 at 321.

<sup>292</sup> *Reference Re Electoral Boundaries Commission Act (Sask)*, ss 14, 20 [1991] 78 DLR (4th) 449.

<sup>293</sup> Ibid at 463.

<sup>294</sup> Ibid at 477–81.

<sup>295</sup> *Saskatchewan Reference*, supra note 3 at 197.

“effective representation.”<sup>296</sup> The Court identified a number of factors that were relevant to effective representation.<sup>297</sup> Although parity of voting power is of ‘prime importance,’ the Court concluded that parity of voting power is not the only relevant factor.<sup>298</sup> In addition, the majority concluded that the disparity between the rural and urban areas did not violate the right to vote. The Court found that the quota of seats for the rural and urban areas coincided to a large degree with the voting populations of the two areas.<sup>299</sup> McLachlin J was also persuaded that rural areas are more difficult to serve because they present difficulties in terms of transportation and communication.<sup>300</sup> She held that the outcome, and the process by which the map was determined, did not infringe section 3.<sup>301</sup>

It is worth examining the majority’s opinion in some detail. McLachlin J immediately narrowed the scope of inquiry by concluding that the constitutional validity of EBCA was not at stake.<sup>302</sup> She held that the issue was whether the electoral boundaries themselves violated the right to vote as protected by the Charter. McLachlin J stated that

The actual allocation of seats between urban and rural areas is very close to the population distribution between those areas. The rural areas have 53.0 percent of the seats and 50.4 percent of the population. Urban areas have 43.9 percent of the seats and 47.6 percent of the population. The rural areas are, therefore, somewhat over-represented, and the urban areas somewhat under-represented, but these deviations are relatively small.<sup>303</sup>

A closer look at the facts, however, suggests that McLachlin J may have understated the size of the deviations. The difference in the percentage of seats is 9.1 per cent (53 per cent minus 43.9 per cent) and the difference in the percentage of the population is 2.8 percent (50.4 per cent minus 47.6 per cent). Although the percentages may be small, the net result was that the rural areas enjoyed a 9 per cent advantage over the

<sup>296</sup> Ibid at 183.

<sup>297</sup> Ibid at 184.

<sup>298</sup> Ibid. See Brian Studniberg, ‘Politics Masquerading as Principles: Representation by Population in Canada’ (2009) 34 Queen’s LJ 611 at 629. Studniberg argues that the Saskatchewan Court of Appeal’s interpretation of section 3 as mandating formal voter equality was ‘both more principled and more practical than the decision at the Supreme Court’; *ibid* at 645; Trevor Knight, ‘Unconstitutional Democracy? A Charter Challenge to Canada’s Electoral System’ (1999) 57 UT Fac L Rev 1.

<sup>299</sup> *Saskatchewan Reference*, *supra* note 3 at 192.

<sup>300</sup> *Ibid* at 195.

<sup>301</sup> *Ibid* at 197.

<sup>302</sup> See Robert G Richards & Thomson Irvine, ‘Reference re Provincial Electoral Boundaries: An Analysis’ in Courtney, MacKinnon, & Smith, *supra* note 278, 48 at 54 [Richards & Irvine].

<sup>303</sup> *Saskatchewan Reference*, *supra* note 3 at 192.

urban areas, even though the difference in population between the rural and urban areas was under 3 per cent.

It is also important to note the very narrow margins at issue, given how close the urban and rural populations, respectively, were to the 50 per cent mark. Small differences in the relative power between the urban and rural areas affected who held majority power and, by extension, which group would have a final say over the type of legislation that would be adopted (including future legislation governing redistricting). A small percentage difference between rural and urban seats was all that was required to determine the electoral majority. It is also noteworthy that the ridings could have been drawn in such a way that the percentage of seats would match the percentage of votes more closely. Although the rural districts might still have had a majority under a more proportional map (by one seat), the urban areas might have had greater bargaining power, given the narrow margin.

Despite the partisan dimension of EBCA, it is striking that there is only one reference to partisan influence in the majority opinion. McLachlin J observed that, because EBCA increased the allocation of seats to urban areas, this 'belies the suggestion that the 1989 Act was an unjustified attempt to adjust boundaries to benefit the governing party.'<sup>304</sup> In her decision, McLachlin J emphasized that she was concerned with the 'result obtained rather than the process,' although she did conclude that the process did not violate the right to vote.<sup>305</sup> She stated that the process was fair and that the boundary commission was not 'unduly constrained' by EBCA.<sup>306</sup> The involvement of the legislature did not 'render the process arbitrary or unfair.'<sup>307</sup> The majority opinion, however, did not question the legislature's involvement in the process; nor did it require the legislature to justify EBCA's restrictions.

## 2 *the dissenting opinion*

In a dissenting opinion, Justice Cory concluded that there had been an infringement of section 3 and furthermore that the government had failed to justify the infringements under section 1.<sup>308</sup> Cory J interpreted section 3 to require an investigation into both the result of the electoral map and the process by which the map was produced.<sup>309</sup> He

<sup>304</sup> Ibid at 193.

<sup>305</sup> Ibid at 189.

<sup>306</sup> Ibid at 194.

<sup>307</sup> Ibid.

<sup>308</sup> For a discussion of Cory J's focus on the process by which the electoral map was drawn, see Manfredi & Rush, *Judging Democracy*, supra note 11 at 73–6.

<sup>309</sup> Richards & Irvine, supra note 302 at 57–8.

compared the distribution of the current map with the distribution of the prior, 1981 map, which had achieved far greater voter parity. For instance, he noted that all the ridings – urban and rural – in the distribution map of 1981 were within 15 per cent of the provincial quotient.<sup>310</sup> The 1989 distribution map, which was drawn in accordance with the two restrictions, deviated far more from the provincial quotient than did the 1981 distribution map.<sup>311</sup> There were a number of ridings with deviations that were in excess of 15 per cent from the provincial quotient.<sup>312</sup> The under-representation, argued Cory J, was most evident in the urban ridings.<sup>313</sup> The differences between the 1989 map and the 1981 map persuaded him that the section 3 right to vote had been infringed.<sup>314</sup>

In the section 1 analysis, Cory J emphasized that the government had not provided any reason as to why it was not possible to follow the distribution of the 1981 electoral map. In addition, the government provided no explanation as to why the legislature ‘shackle[d] the Commission with the mandatory rural–urban allocation and the confinement of urban boundaries to municipal limits.’<sup>315</sup> Cory J contended that ‘it has not been established that there was a pressing or substantial need either to rigidly fix the number of urban and rural ridings in southern Saskatchewan or to confine the urban ridings to existing municipal boundaries.’<sup>316</sup> In addition, the statute did not minimally impair the rights of urban voters.<sup>317</sup> He concluded that

The fundamental right to vote should not be diminished without sound justification. To water down the importance and significance of an individual’s vote is to weaken the democratic process. Here no sound basis has been put forward to justify legislation which clearly has the effect of diminishing the rights of urban voters and reducing the representation of urban residents in the legislature. Democracy can all too easily be eroded by diluting voters’ rights and representation. Voting is far too important and precious a right to be unreasonably and unnecessarily diluted.<sup>318</sup>

<sup>310</sup> *Saskatchewan Reference*, supra note 3 at 166–7, Cory J, dissenting.

<sup>311</sup> *Ibid* at 169, Cory J, dissenting.

<sup>312</sup> *Ibid*, Cory J, dissenting.

<sup>313</sup> *Ibid*, Cory J, dissenting.

<sup>314</sup> *Ibid* at 169–70, Cory J, dissenting.

<sup>315</sup> *Ibid* at 173, Cory J, dissenting.

<sup>316</sup> *Ibid* at 174, Cory J, dissenting. In the section 1 analysis, Cory J found that the deviations in the northern regions were justified because of their sparse populations; *ibid*.

<sup>317</sup> *Ibid* at 173, Cory J, dissenting.

<sup>318</sup> *Ibid* at 174, Cory J, dissenting.

Cory J asserted that legislative interference with the right to vote ‘risk[s] bringing the democratic process itself into disrepute.’<sup>319</sup> Despite Cory J’s strong criticisms of the government’s position, it is interesting that he too does not squarely confront the issue of partisan gerrymandering, focusing instead on the absence of an explanation for the decision reached by the legislature. Like the Court majority, Cory J alludes to the issue of partisan self-entrenchment in a single reference. He states that the ‘haunting spectre of “rotten boroughs” is not that far removed as to be forgotten.’<sup>320</sup>

### 3 *partisanship and electoral redistricting*

According to some commentators, the Supreme Court misinterpreted the history of electoral boundary adjustment in Canada by not paying sufficient attention to partisanship.<sup>321</sup> As Kent Roach notes, the Saskatchewan Court of Appeal focused on the troubling aspects of Canada’s electoral history, such as partisan gerrymandering, the existence of rotten boroughs, and the denial of the vote to women and minorities.<sup>322</sup> One of the factums to the Supreme Court argued that the electoral map was gerrymandered specifically to enhance the electoral support of the Progressive Conservative government.<sup>323</sup> Roach observes that in ‘seeking to minimize the shortcomings of the Saskatchewan legislation, McLachlin J engaged in questionable political science.’<sup>324</sup> Despite these shortcomings, Roach is supportive of the Court’s decision because it was consistent with the Court’s commitment to minorities and other non-majoritarian communities of interest and because the urban voice was not shut out of the political process.<sup>325</sup>

Carter interprets the *Saskatchewan Reference* decision as establishing the proposition that the motivation of the political party in power will not be questioned.<sup>326</sup> He argues that, although the decision does not permit

<sup>319</sup> Ibid at 172, Cory J, dissenting.

<sup>320</sup> Ibid, Cory J, dissenting.

<sup>321</sup> For other discussions of the partisan gerrymandering at issue in *Saskatchewan Reference*, see *supra* note 278.

<sup>322</sup> Kent Roach, ‘One Person, One Vote? Canadian Constitutional Standards for Electoral Distribution and Districting’ in David Small, ed, *Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform* (Toronto: Dundurn Press & Royal Commission on Electoral Reform and Party Financing, Canada Communications Group, 1991) 1 at 10.

<sup>323</sup> Johnson, *supra* note 278 at 228.

<sup>324</sup> Kent Roach, ‘Chartering the Electoral Map into the Future’ in Courtney, MacKinnon, & Smith, *supra* note 278, 200 at 205.

<sup>325</sup> Ibid at 200–1, 208. But see Michael Pal & Sujit Choudhry, ‘Is Every Ballot Equal? Visible-Minority Vote Dilution in Canada’ (2007) 13 *Choices* 1, arguing that the decision enables minority vote dilution.

<sup>326</sup> Carter, ‘Electoral Boundaries,’ *supra* note 278 at 58.

partisan gerrymandering, it effectively enables political parties to disguise their actions.<sup>327</sup> Carter observes that the Court's decision 'is stunning for the "antiseptic" tone of the majority opinion which . . . upheld the EBCA as an example of the kind of neutral, conscientious stewardship of the provincial electoral system which it so clearly was not.'<sup>328</sup> He concludes that the 'creation of unequal voting districts to bolster a weak basis of political support is a form of bad faith and an abuse of power.'<sup>329</sup>

This electoral boundaries case study shows that the existence of independent boundary commissions, while helpful, does not fully eliminate partisan rule-making. It also shows that the Court majority was reluctant to wade into the political thicket, despite the partisan motives behind EBCA.<sup>330</sup> Both the majority and the dissenting opinions are notable for having avoided any in-depth discussion of the problem of partisan self-dealing. It might be argued that the partisan self-entrenchment at issue here was not sufficiently urgent to justify judicial intervention because urban voters were not shut out of the political process. In the *Saskatchewan Reference* decision, however, the Court did not even consider the issue. Even if the Court had ultimately determined that the structural concerns were not serious enough to justify striking down the redistricting legislation, it should have had the legal tools to raise and consider the question in a way that was consistent with its judicial function.

#### B POLITICAL FINANCE AND PARTISANSHIP

As many commentators have observed, another arena which raises the issue of partisan self-dealing is political finance, also known as campaign finance.<sup>331</sup> In 2004, the Supreme Court issued a decision on campaign finance in *Harper*.<sup>332</sup> At issue in *Harper* was the constitutionality of certain provisions of the Canada Elections Act, which placed significant limitations on third party spending.<sup>333</sup> 'Third party spending' refers to

<sup>327</sup> Ibid.

<sup>328</sup> Carter, 'Ambiguous Standards,' supra note 278 at 321.

<sup>329</sup> Carter, 'Electoral Boundaries,' supra note 278 at 58.

<sup>330</sup> See also Richards & Irvine, supra note 302 at 62, predicting that the Court will be reluctant to adjudicate the problem of partisan gerrymandering.

<sup>331</sup> Several commentators have noted that the *Harper* case raises questions of partisan self-dealing and incumbent self-entrenchment. See Feasby, 'Constitutional Questions,' supra note 1; Feasby, 'Political Finance,' supra note 11; Manfredi & Rush, 'Evolution and Convergence,' supra note 11; Manfredi & Rush, *Judging Democracy*, supra note 11; Rush & Manfredi, 'Deference and Democracy,' supra note 11; Dawood, 'Campaign Finance Reform,' supra note 11 at 286, 288, 292.

<sup>332</sup> Supra note 3.

<sup>333</sup> See *Canada Elections Act*, SC 2000, c 9. For a history of the *Harper* decision and a discussion of political finance, see Richard Haigh, 'He Hath a Heart of Harping: Stephen

campaign spending that is conducted by individuals or groups that are neither candidates nor political parties – in other words, all citizens, interest groups, and corporations. The central provisions of the Act were struck down at the trial<sup>334</sup> and appellate levels<sup>335</sup> as violations of the Charter's guarantees of freedom of expression and association.

A six-member majority of the Supreme Court of Canada upheld the constitutionality of the third party spending limits. Writing for the majority, Justice Bastarache endorsed 'the egalitarian model of elections adopted by Parliament as an essential component of our democratic society.'<sup>336</sup> The egalitarian model is premised on the notion that 'individuals should have an equal opportunity to participate in the electoral process.'<sup>337</sup> Under this model, wealth is the main obstacle that prevents individuals from enjoying an equal opportunity to participate in the electoral process.<sup>338</sup> Spending limits are thus required to prevent the most affluent citizens from monopolizing electoral discourse and thereby preventing other citizens from participating on an equal basis. The Court found that Parliament's third party spending rules were 'clearly structured on the egalitarian model of elections' because their objective is to 'promote electoral fairness by creating equality in the political discourse.'<sup>339</sup> The Court held that, although the spending limits infringed upon the freedoms of expression and association guaranteed by the Charter,<sup>340</sup> the provisions were nonetheless justifiable under section 1.<sup>341</sup>

In contrast, Chief Justice McLachlin and Justice Major, who wrote the dissenting opinion in *Harper*, argued that the spending limits imposed a 'virtual ban' on citizens who wished to participate in the political

Harper and Election Spending in a Spendthrift Age' (2005) 29 Sup Ct L Rev (2d) 305 at 306–11; Andrew Geddis, 'Liberté, Egalité, Argent: Third Party Election Spending and the Charter' (2004) 42 Alta L Rev 429 at paras 18–25; J Smith & H Bakvis, 'Judicial Review and Electoral Law' in M Westmacott & H Mellon, eds, *Political Dispute and Judicial Review: Assessing the Work of the Supreme Court of Canada* (Toronto: Nelson, 2000). See also Robert E Charney & S Zachary Green, 'It's My Party and I'll Run If I Want To: *Figueroa*, *Harper* and the Animal Alliance Environment Voters Party' (2006–7) 21 National Journal of Constitutional Law 257 at 269–70, arguing that the Supreme Court's decisions provide incentives for third parties to register as political parties in order to avoid stringent spending limits.

334 [2001], 93 Alta LR (3d) 281 (Alta QB).

335 [2002], 14 Alta LR (4th) 4 (Alta CA).

336 *Harper*, supra note 3 at para 62.

337 *Ibid* at para 62.

338 *Ibid*, citing Feasby, 'Egalitarian Model,' supra note 4.

339 *Ibid* at para 63.

340 *Ibid* at para 66.

341 *Ibid* at para 121.



deliberation during the election period.<sup>342</sup> The dissenting justices noted that the spending limits were so low that citizens could not advertise through the national media.<sup>343</sup> At most, citizens could place ads in local papers, print some flyers, and distribute these flyers by hand.<sup>344</sup> As a result of these spending limits on advertising, citizens could not ‘effectively communicate with their fellow citizens on election issues during an election campaign.’<sup>345</sup> In addition, the spending limits imposed on citizens were significantly lower than those imposed on candidates and parties; indeed, citizens were permitted to spend only 1.3 per cent of the national advertising spending limits for political parties.<sup>346</sup> McLachlin CJ observed that the ‘practical effect is that effective communication during the writ period is confined to registered political parties and their candidates.’<sup>347</sup> For all intents and purposes, the only individuals and groups that could engage in political discussion during an election period were candidates and political parties. She concluded that this ‘denial of effective communication to citizens violates free expression where it warrants the greatest protection – the sphere of political discourse.’<sup>348</sup>

One criticism that is often made about campaign finance regulation is that elected officials, in the guise of democratizing politics, may, in fact, be protecting their offices from potential challengers. As a general rule, campaign finance regulations tend to benefit incumbents, thereby entrenching those already in power.<sup>349</sup> Rules that make fund-raising more difficult are detrimental to challengers and therefore beneficial for incumbents.<sup>350</sup> A very low contribution limit makes it difficult for a challenger to collect enough funds.<sup>351</sup> By contrast, incumbents have a larger base of support, and they also enjoy such advantages as name recognition, press coverage, free mailings to their constituents, and a free

<sup>342</sup> Ibid at para 35, McLachlin CJ and Major J, dissenting. See Dawood, ‘Campaign Finance Reform,’ supra note 11 at 286–7 for a discussion of the dissenting opinion.

<sup>343</sup> Ibid at para 4, McLachlin CJ and Major J, dissenting.

<sup>344</sup> Ibid at para 7, McLachlin CJ and Major J, dissenting.

<sup>345</sup> Ibid at para 2, McLachlin CJ and Major J, dissenting.

<sup>346</sup> Ibid at para 35, McLachlin CJ and Major J, dissenting.

<sup>347</sup> Ibid at para 2, McLachlin CJ and Major J, dissenting.

<sup>348</sup> Ibid.

<sup>349</sup> See Lillian R BeVier, ‘Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform’ (1985) 73 Cal L Rev 1045 at 1080; Bradley A Smith, ‘Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform’ (1996) 105 Yale LJ 1049 at 1077; Frank J Sorauf, *Money in American Elections* (Boston: Scott Foresman, 1988) at 162.

<sup>350</sup> See BeVier, *ibid* at 1080.

<sup>351</sup> See Stephen E Gottlieb, ‘The Dilemma of Election Campaign Finance Reform’ (1989) 18 Hofstra L Rev 213 at 220–1.

staff.<sup>352</sup> A challenger would need to have significant financial resources at her disposal to overcome all the advantages enjoyed by an incumbent.

Given these incumbent-protecting effects, commentators in the Canadian law of democracy field have raised structural concerns about campaign finance regulation.<sup>353</sup> Manfredi and Rush, for instance, argue that the spending restrictions in *Harper* ‘insulated incumbent political powers (parties or individuals) from political competition.’<sup>354</sup> They observe that ‘[u]nder the guise of promoting equality within civil society (by constraining the influence of the more wealthy or powerful), the spending restrictions constrain the capacity of all political actors to challenge entrenched incumbents.’<sup>355</sup> In addition, Manfredi and Rush argue that the problem of incumbency protection ‘was not lost on Chief Justice McLachlin.’<sup>356</sup> They contend that McLachlin CJ thought that the low spending limits ‘exacerbated the relative inequalities between incumbent political powers and the rest of civil society and thereby muted the capacity of the electorate as a whole to challenge the government.’<sup>357</sup> Because the restrictions prevented citizens from ‘mounting effective challenges to the government, [they] . . . enhanced the entrenchment of incumbent powers.’<sup>358</sup> In addition, Manfredi and Rush argue that McLachlin CJ ‘saw two threats to the meaningful exercise of the franchise.’<sup>359</sup> The first was that the government was limiting ‘the diversity of opinion.’<sup>360</sup> The second was that ‘the government, under the cover of promoting equality and restricting individual rights, was actually insulating itself from political competition.’<sup>361</sup> Manfredi and Rush interpret McLachlin CJ’s opinion in *Harper* (and in earlier cases such as *Figueroa* and *Libman*) as evincing a ‘growing scepticism of legislative motive.’<sup>362</sup> They connect this scepticism to a broader concern about political competition.<sup>363</sup>

It is important to emphasize, however, that McLachlin CJ and Major J did not openly adopt the political markets or structural approach in their dissenting opinion in *Harper*. Indeed, they did not even mention

<sup>352</sup> *Ibid* at 224.

<sup>353</sup> See *supra* note 335.

<sup>354</sup> Manfredi & Rush, *Judging Democracy*, *supra* note 11 at 108. For a similar argument about the incumbent entrenching effects of the measures at issue in *Harper*, see Dawood, ‘Campaign Finance Reform,’ *supra* note 11 at 287.

<sup>355</sup> Manfredi & Rush, *ibid* at 108.

<sup>356</sup> *Ibid*.

<sup>357</sup> *Ibid* at 109.

<sup>358</sup> *Ibid*.

<sup>359</sup> *Ibid*.

<sup>360</sup> *Ibid*.

<sup>361</sup> *Ibid*.

<sup>362</sup> *Ibid* at 116.

<sup>363</sup> *Ibid*.

incumbency protection, insulation from political competition, or a scepticism about legislative motive. What is notable about their opinion is their silence on these topics. Their silence on these issues stands in some contrast to Justice Scalia's dissenting opinion in *McConnell v Federal Election Commission*.<sup>364</sup> In *McConnell*, which was decided six months before *Harper*, a majority of the US Supreme Court upheld the major provisions of the Bipartisan Campaign Reform Act of 2002. In his dissenting opinion, Justice Scalia openly discussed the concern that campaign finance regulations insulate incumbents from political competition. He observed that the 'first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.'<sup>365</sup> Justice Scalia described campaign finance regulations as amounting to an incumbent protection plan.<sup>366</sup> By regulating corporate speech, officeholders have insulated themselves 'from the most effective speech that the major participants in the economy and major incorporated interest groups can generate.'<sup>367</sup>

Unlike Justice Scalia, Chief Justice McLachlin and Justice Major did not explicitly discuss the problem of partisan self-dealing. Instead, they focused their attention on the freedom of expression. They noted that the advertising limits 'represent a serious incursion on free expression in the political realm.'<sup>368</sup> There is no doubt that McLachlin CJ and Major J were concerned that, as a result of the restrictions, the 'only sustained messages voters see and hear during the course of an election campaign are from political parties.'<sup>369</sup> Given their strong criticisms of the spending limits, it is striking that they did not openly raise concerns about partisan self-dealing, diminished political competition, incumbent protection, or suspect legislative motives. The dissent's apparent unwillingness to explore these topics is notable, first, because the dissent was very critical of the spending limits, and second, because it is widely acknowledged that campaign finance laws do raise the problem of partisan self-entrenchment.

This curious silence within both the majority and dissenting opinions in the *Harper* decision suggests a reluctance on the part of the Court to address the possibility that Canada's major political parties may have engaged in self-dealing by preventing third parties from spending funds

<sup>364</sup> *Supra* note 227. Parts of this decision were superseded by the US Supreme Court's recent decision in *Citizens United v Federal Election Commission*, 558 US 50 (2010).

<sup>365</sup> *McConnell*, *supra* note 221 at 263; see Dawood, 'Campaign Finance Reform,' *supra* note 11 at 274, 286 for a discussion of the *McConnell* case and Justice Scalia's dissent.

<sup>366</sup> *Ibid* at 249.

<sup>367</sup> *Ibid* at 258.

<sup>368</sup> *Harper*, *supra* note 3 at para 9.

<sup>369</sup> *Ibid* at para 19.

on election advertising. Even if the Court had ultimately decided that the structural concern was negligible, it should, nonetheless, possess the capacity to enquire into the possibility that the legislation was overly protective of the interests of legislators and political parties at the expense of the citizenry.

#### v *The judicial oversight of democracy*

The judicial oversight of democracy presents a dilemma. On the one hand, if we leave the democratic process to the legislature, there is a risk that the process will malfunction as a result of the self-interested action of political insiders.<sup>370</sup> On the other hand, if courts intervene to monitor the democratic process, there are two potential problems. First, there is the problem of judicial overreaching that arises when courts usurp the role of democratically elected representatives.<sup>371</sup> Second, there is the difficulty that courts are not institutionally capable of making the kind of complex decisions that are required for the creation of election laws.<sup>372</sup> This part considers how a structural rights approach provides a way to navigate these competing considerations. It uses the examples of electoral redistricting and political finance to show how the right to a fair and legitimate democratic process could be applied in practice. This part also considers the structural rights approach in light of the theories on dialogue and deference.

#### A *DIALOGUE AND THE LAW OF DEMOCRACY*

According to dialogue theory, as described by Peter Hogg and Allison Bushell, judicial review is ‘part of a “dialogue” between the judges and legislatures.’<sup>373</sup> The basic idea behind dialogue theory is that the risk of

<sup>370</sup> Ely, *supra* note 25 at 103, arguing that the role of the courts is to prevent stoppages, such as the denial of the vote, in the democratic process.

<sup>371</sup> Sunstein, *One Case at a Time*, *supra* note 22 at 26. Cass Sunstein argues for judicial minimalism, in part to ensure that ‘certain important decisions are made by democratically accountable actors’; *ibid* at 5. He argues, however, that a maximalist solution is acceptable when it ‘will promote democratic goals either by creating the preconditions for democracy or by imposing good incentives on officials, incentives to which they are likely to be responsive’; *ibid* at 57.

<sup>372</sup> See *supra* note 24.

<sup>373</sup> Peter W Hogg & Allison Bushell, ‘The Charter Dialogue between Courts and Legislatures’ (1997) 35 *Osgoode Hall LJ* 75 at 79 [Hogg & Bushell]. For a further discussion of the debate between judicial activism and judicial dialogue, see Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Markham, ON: LexisNexis Butterworths, 2004) [Huscroft & Brodie].

judicial supremacy is lessened when a judicial decision can be modified or reversed by the legislature.<sup>374</sup> In a later article, the authors clarified that dialogue theory does not provide a justification for judicial review.<sup>375</sup> Instead, the dialogue metaphor is helpful because it captures an institutional dynamic in which the legislature was able to respond to the decisions of the Supreme Court.<sup>376</sup> There is a wide-ranging literature – both supportive and critical – on dialogue theory.<sup>377</sup> Some scholars argue that it is undemocratic to give judges the final say in Charter issues,<sup>378</sup> while others contend that judicial review is a necessary institution in a democratic framework.<sup>379</sup>

Kent Roach argues that judicial review is not inherently undemocratic.<sup>380</sup> Instead, he contends that the task at hand is to determine how democratic institutions should interact with one another. He proposes a theory of ‘democratic dialogue’ under which democratic institutions are viewed as having distinct but complementary roles. Courts should

374 Hogg & Bushell, *ibid* at 79.

375 Peter W Hogg, Allison A Bushell Thornton, & Wade K Wright, ‘Charter Dialogue Revisited – Or “Much Ado about Metaphors”’ (2007) 45 *Osgoode Hall LJ* 1 at 27–8 [Hogg, Thornton, & Wright].

376 *Ibid* at 4. See also Peter W Hogg, ‘Discovering Dialogue’ in Huscroft & Brodie, *supra* note 373 at 3–4, noting that dialogue theory did not offer a solution to the counter-majoritarian difficulty.

377 For an excellent discussion of the major critiques of dialogue theory, from both the right and the left, see Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 70–80 [Roach, *Supreme Court*]. See also Hogg, Thornton, & Wright, *supra* note 375 at 27–51, providing a detailed description of the major lines of criticism of and response to dialogue theory.

378 See Rainer Knopff, ‘How Democratic Is the Charter? And Does It Matter?’ (2003) 19 *Sup Ct L Rev* (2d) 199 at 212; Andrew Petter, ‘Taking Dialogue Theory Much Too Seriously (Or Perhaps Charter Dialogue Isn’t Such a Good Thing After All)’ (2007) 45 *Osgoode Hall LJ* 147 at 149. FL Morton and Rainer Knopff argue that the Charter revolution is fundamentally undemocratic because it privileges a ‘court party’ and accords disproportionate power to minorities who pursue policy outcomes via Charter litigation; FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000) at 149. Christopher Manfredi contends that judicial review gives rise to judicial supremacy. Christopher P Manfredi, ‘The Life of a Metaphor: Dialogue in the Supreme Court, 1998–2003’ in Huscroft & Brodie, *supra* note 373, 105. Andrew Petter argues that dialogue theory does not provide a justification for judicial review, and furthermore, that it is ‘devoid of normative content.’ Petter, *ibid* at 149, 166. Luc Tremblay contends that ‘the kind of dialogue that would be needed to confer legitimating force on the institution and practice of judicial review does not and cannot exist’; Luc B Tremblay, ‘The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures’ (2005) 3 *International Journal of Constitutional Law* 617 at 619.

379 Rosalie Silberman Abella, ‘The Judicial Role in a Democratic State’ (2001) 26 *Queen’s LJ* 573 at 579.

380 Roach, *Supreme Court*, *supra* note 377 at 218–20.

perform certain tasks that legislatures are ill-suited to perform, such as ‘good faith interpretation of the constitutional text, fair hearings of claims about rights and injustice and the protection of minorities and fundamental values that are vulnerable to hostility or neglect in the legislative process.’<sup>381</sup> These institutions are mutually improved through the mechanism of dialogue:

A constructive and democratic dialogue between courts and legislatures under a modern bill of rights such as the Charter can improve the performance of both institutions. The independent judiciary can be robust and fearless in its protection of rights and freedoms, knowing that it need not have the final word.<sup>382</sup>

He notes that, for Justice Iacobucci, judicial review is part of a principled dialogue to the extent that it is ‘conducted in a fair and open manner that respects the distinct roles and abilities of courts, legislatures, and the executive.’<sup>383</sup> Roach concludes that the Charter has ‘created a fertile and democratic middle ground between the extremes of legislative and judicial supremacy.’<sup>384</sup>

The structural rights approach proposed in this article has affinities with Kent Roach’s theory of democratic dialogue.<sup>385</sup> Roach contends that courts are institutionally suited to certain functions, such as the protection of rights. Likewise, the role of the Court under the structural rights approach is to recognize and enforce the right to a fair and legitimate democratic process. To see how the right to a fair and legitimate democratic process could be used to address partisan self-dealing, consider the *Saskatchewan Reference* case. As described in Part IV, there was evidence that the governing party had engaged in partisan self-dealing by enacting the EBCA. The Court, however, in both the majority and dissenting opinions, appeared reluctant to directly confront the issue of partisan gerrymandering.

The Court may be more willing to remedy the partisan manipulation of the democratic process if its role could be relatively non-intrusive in the regulation of the redistricting process. By ‘non-intrusive,’ I do not mean that the Court is deferential to Parliament; instead, I mean that the Court is not in the position of having to devise a bright-line rule – such as the one-person one-vote principle – that would regulate the

<sup>381</sup> Roach, ‘Dialogic Judicial Review and Its Critics,’ in Huscroft & Brodie, *supra* note 373 at 52.

<sup>382</sup> Roach, *Supreme Court*, *supra* note 377 at 295.

<sup>383</sup> Kent Roach, ‘A Dialogue about Principle and a Principled Dialogue: Justice Iacobucci’s Substantive Approach to Dialogue’ (2007) 57 *UTLJ* 449 at 450–1.

<sup>384</sup> Roach, *Supreme Court*, *supra* note 377 at 292.

<sup>385</sup> See text accompanying notes 380–1.

specific details of the political process. Given the difficulty in crafting a bright-line rule that would identify impermissible partisan advantage, the Court may think it is prudent to avoid altogether the problem of partisan rule-making.

Instead of devising a bright-line rule, the Court could announce a broader standard, such as a right to a fair and legitimate democratic process.<sup>386</sup> By recognizing a right to a fair and legitimate democratic process, the Court would signal to Parliament that the partisan manipulation of electoral laws is constitutionally intolerable.<sup>387</sup> The Court could state that both the process by which the legislation was adopted and the substance of the legislation itself must meet a standard of fairness and legitimacy. The Court's endorsement of the right to a fair and legitimate democratic process might dissuade a legislature from enacting an EBCA-type piece of legislation or some other self-serving measure in the first instance. If elected officials knew that they would be held accountable by the Court, they would likely self-correct the most worrisome instances of self-dealing in election laws.

In the event of a Charter challenge to an EBCA-type piece of legislation, the right to a fair and legitimate democratic process would provide the Court with a metric by which the actions of the legislators could be judged. Parliament would have to demonstrate that it had abided by the broad parameters signalled by the Court. Legislators would be obligated to ensure that the right to a fair and legitimate democratic process was not infringed by either the substance of the legislation or the process through which it was adopted. Parliament would still have the role of balancing various values and interests, but it would be bound by standards of fairness and integrity (not only with respect to the treatment of voters but also with respect to its own self-interest). The Court could decide to strike down the EBCA on the grounds that the right to a fair and

<sup>386</sup> One possible objection to this idea is that the right to a fair and legitimate democratic process is too vague to provide legislators with sufficient guidance. A number of commentators on US election law, however, have noted the surprising success of the US Supreme Court's vague standards in the *Shaw v Reno* line of cases – a standard that permitted some but not too much use of race in redistricting; *Shaw v Reno*, 509 US 650 (1993) [*Shaw v Reno*]. Richard Pildes argues that the vague and amorphous doctrine in *Shaw v Reno* was internalized by state legislators, with the result that the predicted chaos and litigation failed to materialize. Pildes contends that 'vague law' can transform into 'settled practice'; see Pildes, 'Foreword,' supra note 5 at 67–9. Richard Hasen argues for 'judicially unmanageable standards' on the view that vague standards are both effective and preferable in those cases involving contested equality rights. Hasen, *Supreme Court*, supra note 9 at 48–9, 65–7.

<sup>387</sup> Guy Charles argues that *Shaw v Reno*, *ibid*, can be viewed as a 'signaling' case because it informed legislators that there were limits to redistricting that the Court would enforce. Charles, 'Democracy and Distortion,' supra note 14 at 674.

legitimate democratic process (and hence, section 3) was violated. But even if the Court decided that the partisan self-dealing at issue was not sufficiently worrisome as to warrant striking down the statute, the Court would, nonetheless, send a signal to Parliament that both the substance of election laws and the process through which they are devised must be fair and legitimate.

A similar kind of analysis could be applied to the political finance arena. Consider, for example, a recent political finance law – the Accountability Act – that the Harper government adopted in 2006 in response to the sponsorship scandal.<sup>388</sup> The Accountability Act significantly lowered the contribution limits for individuals. In addition, the Act banned all contributions by corporations, unions, and organizations.<sup>389</sup> The regulations have received a fair amount of criticism.<sup>390</sup> A major difficulty with the Act is that, despite its apparent neutrality, it has significant partisan implications. Feasby argues that the new regulations ‘can be expected to only have a significant negative impact on the Liberal Party’ thereby tilting ‘the electoral playing field against the government’s main rival for power.’<sup>391</sup> He observes that it is a classic example of self-serving legislation, and should therefore be struck down as unconstitutional.<sup>392</sup> Feasby provides detailed evidence that the ban on corporate and union contributions is partisan in nature.<sup>393</sup>

The example of the Accountability Act reinforces the idea that the Court would be well-served if it had a way to respond to the problem of partisan self-dealing in election laws. The Court’s current methodology does not invite this kind of analysis. One of the main difficulties with the current section 1 *Oakes* test is that there is no built-in mechanism for the

<sup>388</sup> *Federal Accountability Act*, SC 2006, c 9.

<sup>389</sup> Elections Canada, Media Release, ‘Chief Electoral Officer Announces Election Financing Changes Brought In by *Federal Accountability Act*’ (2 January 2007) online: Elections Canada <<http://www.elections.ca/content.aspx?section=med&document=jan0207&dir=pre&lang=e>>.

<sup>390</sup> MacIvor argues, for instance, that the Act enhances the appearance of accountability without actually redressing the flaws in the political finance regime. If anything, the rules will increase the amount of illegal funding, in part because these rules will not be effectively enforced; Heather MacIvor, ‘A Missed Opportunity: Political Finance and the Federal Accountability Act’ (2008) 1 *Journal of Parliamentary and Political Law* 105 at 105–7. Christopher Stoney and Catherine Waters likewise conclude that the reforms will have a minimal impact on preventing undue influence; Christopher Stoney & Catherine Waters, ‘The Federal Accountability Act: The Impact of Changes in Party Finances on the Democratic Functions of Political Parties’ (2008) 1 *Journal of Parliamentary and Political Law* 155 at 157 [Stoney & Waters].

<sup>391</sup> Feasby, ‘Constitutional Questions,’ *supra* note 1 at 517, 528–9; see also Stoney & Waters, *ibid* at 174, noting the partisan implications of the Act.

<sup>392</sup> Feasby, ‘Constitutional Questions,’ *ibid* at 555.

<sup>393</sup> *Ibid* at 527–31.



Court to raise the issue of partisan rule-making. Although the *Oakes* test is designed to identify false and nefarious objectives in the rational connection stage of the test,<sup>394</sup> I suggest that in practice the Court is unlikely to consider the partisan objectives at issue in the impugned law. This is because government legislation in the election law arena may simultaneously advance the public interest *and* partisan interests. The regulation of campaign finance is a prime example of the fact that election laws can achieve public goods like equality and the reduction of corruption, while at the same time entrenching incumbents in office.<sup>395</sup> The government would identify the achievement of equality as its objective, and this objective would probably be the focus of the Court's analysis. The government is unlikely, however, to identify partisan self-entrenchment as an objective, with the result that it will not necessarily attract any judicial attention.

It is also unlikely that the problem of partisan self-dealing would be raised in the first three stages of the proportionality analysis as a deleterious effect of the impugned law. The Court recently clarified, in *Hutterian Brethren*, that the rational connection and minimal impairment stages are exclusively concerned with considering the government's objective and are not the place for balancing the beneficial and deleterious effects of the law.<sup>396</sup> The Court stated that the 'first three stages of the proportionality analysis – pressing good, rational connection, and minimal impairment . . . are anchored in an assessment of the law's purpose.'<sup>397</sup> The government, though, is unlikely to identify the reduction of partisan self-entrenchment as an objective, which means that the issue is less likely to arise in the first three stages.

Under *Hutterian Brethren*, the fourth stage is now the only part of the test in which the Court can weigh the ameliorative and deleterious factors.<sup>398</sup> As the Court put it, '[o]nly the fourth branch takes full account

<sup>394</sup> My thanks to Lorraine Weinrib for this point.

<sup>395</sup> In earlier work, I suggested that legislative action exists on a spectrum. One end of the continuum represents legislative action that is solely driven by partisan interest, while the other end of the continuum represents legislative action that is solely devoted to the public interest. Election laws fall somewhere along the continuum, and it is the task of courts to be alert to the partisan component of these laws; see Dawood, 'Anti-domination Model,' *supra* note 18 at 1446.

<sup>396</sup> *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*] at paras 48, 54–60, 63–5. For a discussion, see Marshall Haughey, 'The Camera and the Colony: A Comment on *Alberta v Hutterian Brethren of Wilson Colony*' (2011) 74 Sask L Rev 59 at para 36; Sara Weinrib, 'The Emergence of the Third Step of the *Oakes* Test in *Alberta v Hutterian Brethren of Wilson Colony*' (2010) 68 UT Fac L Rev 77.

<sup>397</sup> *Hutterian Brethren*, *ibid* at para 76.

<sup>398</sup> *Ibid*.

of the “severity of the deleterious effects of a measure on individuals or groups.”<sup>399</sup> Structural issues would, therefore, have to be considered in the fourth stage. It is not evident, however, that even a sceptical review by the Court would necessarily result in a consideration of this issue. By recognizing a right to a fair and legitimate democratic process, the Court would have a reason to examine the rule-making process and to ask Parliament for an explanation. It would also mean that the Court would have to subject Parliament’s legislation to greater scrutiny rather than accept Parliament’s positions without question.

In sum, the structural rights approach proposed here envisions a relatively modest judicial role in policing the political process. By recognizing a right to a fair and legitimate democratic process, the Court would not have to intrude too deeply into the political sphere. It could avoid having to devise a bright-line standard that would regulate the details of the political process. Instead, the Court could use the mechanism of rights to signal a general standard about the kinds of considerations by which Parliament must abide. The Court has already been involved in identifying the key values of democracy notwithstanding its insistence that it is the sole function of Parliament to do so. The Court has recognized various rights – such as the right to effective representation and the right to meaningful participation – that give interpretive content to the right to vote. In the same way, the Court could signal the broad standards of electoral integrity and fairness that would need to be met by Parliament. By setting these general standards, the Court could supervise the democratic process without intervening too deeply in its functioning. The right to a fair and legitimate democratic system is sufficiently broad that it could be applied to a range of issues and a range of perspectives, including those of voters, interest groups, candidates, and political parties – in essence, any time that partisan self-dealing arises in one of its many manifestations.

#### B DEFERENCE AND THE LAW OF DEMOCRACY

In order for the Court to effectively respond to partisan self-dealing in election laws, it must not automatically defer to the legislature. In recent law of democracy cases, however, the Court has spoken out strongly in favour of deference to the legislature. Writing for the majority in *Bryan*, Bastarache J stated that ‘courts ought to take a natural attitude of deference toward Parliament when dealing with election laws.’<sup>400</sup> In *Harper*, the Court asserted that, since Parliament has the right to ‘choose Canada’s

<sup>399</sup> *Ibid.*

<sup>400</sup> *Bryan*, supra note 3 at para 9.

electoral model,' it is incumbent on the Court to defer to Parliament.<sup>401</sup> The Court also stated that the workings of the electoral system are a 'political choice, the details of which are better left to Parliament.'<sup>402</sup>

I argue that this posture of deference is misguided because the legislature should not automatically have the last word in a dispute involving the ground rules of democracy. The Court has greater competence and legitimacy than does the legislature to evaluate the propensity of elected officials to engage in self-dealing. Many commentators support the same position. Bredt and Kremer argue, for instance, that the Supreme Court should not defer to legislatures when they attempt to limit democratic rights.<sup>403</sup> In addition, they claim that the Court should apply a consistent level of deference in these cases.<sup>404</sup> In a similar vein, Feasby argues for a more rigorous judicial review coupled with a principled deference.<sup>405</sup> As Feasby notes, the 'Court is uniquely suited, and Parliament is particularly ill-equipped, to police self-interested behaviour on the part of Parliament.'<sup>406</sup>

The Court majority's lack of deference in *Sauvé II* is a better approach. As McLachlin CJ observed in *Sauvé II*, the 'right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination.'<sup>407</sup> She asserted that the 'core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion.'<sup>408</sup> With respect to deference, she stated that '[d]eference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights.'<sup>409</sup> McLachlin CJ noted that 'it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the Charter that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.'<sup>410</sup> Partisan self-dealing in election laws threatens the integrity of the democratic system, and for this reason, the Court must not defer to the legislature.

There are three additional issues that warrant a brief discussion: first, the classification of a case for the purposes of deference; second, the

401 *Harper*, supra note 3 at para 87.

402 *Ibid.*

403 Bredt & Kremer, supra note 278 at 26.

404 *Ibid.*; Charney & Green, supra note 333 at 268.

405 Feasby, 'Democratic Process,' supra note 11 at 238.

406 *Ibid.* at 288.

407 *Sauvé II*, supra note 3 at para 9.

408 *Ibid.* at para 13.

409 *Ibid.*

410 *Ibid.* at para 15.

demands of evidence for the section 1 analysis; and third, the judicial treatment of second look cases. With respect to the first issue, the level of deference accorded by the Court depends, in part, on the way in which a case is classified.<sup>411</sup> In *Harper*, the Court majority argued that deference was appropriate given Parliament's role as a mediator among competing groups.<sup>412</sup> The Court stated that, under 'the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters.'<sup>413</sup>

I claim that the characterization of Parliament as the 'mediator among competing groups' is only partially accurate in the election law context. The issue of deference is complex, in large part because the law of democracy itself cannot be neatly captured by categories. I argue that the law of democracy involves fundamental democratic rights (which preclude deference) that involve issues of balancing competing interests (which warrant deference) but that raise the problem of partisan self-dealing (which precludes deference). To the extent that Parliament's role as mediator among competing groups is a factor in the analysis, so too should Parliament's propensity to pass self-serving election laws be a factor in the analysis. Once the risk of partisan self-dealing is factored in, rigorous judicial review is preferable to deferential review with respect to the laws of democracy. In addition, as Lorraine Weinrib has suggested, one could also criticize the view that it is permissible for the Court to defer to Parliament because of its role as mediator among competing social interests. Weinrib argues that the Charter was intended to restructure institutional roles so that the exercise of all state power would be disciplined by the framework of rights.<sup>414</sup>

<sup>411</sup> Hogg, Thornton, & Wright, *supra* note 375 at 50. In *Irwin Toy*, Dickson CJ made a distinction between those cases in which Parliament is striking a balance between the claims of competing groups, and those cases in which the government should be viewed as the singular antagonist of the individual claiming a rights infringement; *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at 993–4. In *RJR-MacDonald*, McLachlin J observed that it is at times difficult to distinguish between legislation in which the government is the singular antagonist of the individual and legislation in which it is a mediator between different groups; *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 135. This categorical approach, however, has since given way to a contextual one in which the original categories are used as factors in the analysis; see Sujit Choudhry, 'So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 SCLR (2d) 501 at 521 [Choudhry, 'Real Legacy'].

<sup>412</sup> *Harper*, *supra* note 3 at para 87.

<sup>413</sup> *Ibid.*

<sup>414</sup> See Lorraine E Weinrib, 'Canada's Charter of Rights: Paradigm Lost?' (2002) 6 Rev Const Stud 119.

An increasingly difficult challenge in the election law arena is that issues of deference are playing out with respect to the requirements imposed on the government's evidentiary record.<sup>415</sup> As Bredt and Margot Finlay observe, the divide in the Court was particularly pronounced in recent law of democracy cases.<sup>416</sup> In *Harper*, Bastarache J followed a reasoned apprehension of harm standard, under which the legislature can be guided by reason, logic and common sense in the absence of social science evidence.<sup>417</sup> Given the difficulties in measuring the harm, the majority found that 'a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient.'<sup>418</sup> By contrast, McLachlin CJ argued in dissent that the ' dangers posed are wholly hypothetical' because no evidence was presented to show that the wealthy will 'hijack' the democratic process.<sup>419</sup>

Jamie Cameron argues that under its 'reasoned apprehension of harm' standard, the Court is permitting restrictions on rights even in the absence of proven harm.<sup>420</sup> The Court's approach also means that the government can shield partisan self-dealing from scrutiny by describing the legislation as promoting equality. In those cases that involve a likelihood of partisan self-dealing, such as *Harper*, the Court should be more sceptical of the evidentiary record. Although conclusive evidence is hard to come by, the Court could ask Parliament to show that the spending limits are not self-serving and that they are reasonable given the various tradeoffs that are at stake. The solution is not to forbid all regulation of third party spending or to accept without question any limitation on third party spending. Parliament should be required to show that it has struck a balance between protecting the freedom of speech, preventing the monopolization of the political process by the wealthy, and preventing partisan self-entrenchment.

Another challenge with respect to deference in the law of democracy context is that the democratic rights protected under section 3 of the

415 Choudhry, 'Real Legacy' supra note 411 at 504.

416 Christopher D Bredt & Margot Finlay, '*R v Bryan*: The Supreme Court and the Electoral Process' (2008) 42 SCLR (2d) 63 at 85 [Bredt & Finlay].

417 *Harper*, supra note 3 at para 77. The Court stated that a contextual approach is appropriate, and it listed four factors: (1) the nature of the harm and the inability to measure it; (2) the vulnerability of the group protected; (3) subjective fears and apprehension of harm; and (4) the nature of the infringed activity; *Harper*, supra note 3 at paras 76–88.

418 Ibid at para 88.

419 Ibid at para 34, McLachlin CJ and Major J, dissenting.

420 Jamie Cameron, 'Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on *Vancouver Sun* and *Harper v Canada*' (2005) 17 National Journal of Constitutional Law 71 at 96–7; Bredt & Finlay, supra note 416 at 85.

Charter are not subject to section 33's legislative override power.<sup>421</sup> To the extent that the Court's decision elicits a legislative response, it would be in the form of new legislation. The new legislation enacted by Parliament is sometimes subject to a Charter challenge. A recurring debate in the literature is how the Court should treat so-called 'second look' cases. The Supreme Court has been wrestling with second look cases because they 'bring into stark relief issues relating to the proper boundary between elected legislatures and unelected judges.'<sup>422</sup>

Hogg, Thornton, and Wade Wright argue that dialogue theory does not pre-determine the level of deference that should be accorded to the legislature.<sup>423</sup> They note that in a 'first look' case, courts should not take into account the potential legislative response when ruling on the constitutionality of legislation.<sup>424</sup> In addition, they contend that courts should not treat second look cases differently than first look cases.<sup>425</sup> Kent Roach likewise argues that courts should not be predisposed to uphold or strike down second look cases; instead, the 'judicial focus should be on whether the legislation is justified.'<sup>426</sup> By contrast, Rosalind Dixon argues that the Supreme Court should defer to legislative sequels in second look cases, provided that such deference is reasonable.<sup>427</sup> Under an 'ex post deference-based approach,' courts would uphold a legislative sequel only in the event that it was consistent with a narrow interpretation of the first look decision.<sup>428</sup> Judicial review would be weaker because the Court would defer to Parliament on its interpretation of the Charter in second look cases.<sup>429</sup>

Given the problem of partisan self-interest, however, I suggest that the Court should not defer to Parliament in those second look cases that involve the laws of the democratic process. In *Sauvé II*, McLachlin CJ rejected the idea that the Court should display more deference in a second look case.<sup>430</sup> She argued that 'Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the

421 Hogg, Thornton, & Wright, *supra* note 375 at 6.

422 *Ibid* at 25.

423 *Ibid* at 47.

424 *Ibid*.

425 *Ibid* at 47–8.

426 Kent Roach, 'Sharpening the Dialogue Debate: The Next Decade of Scholarship' (2007) 45 *Osgoode Hall LJ* 169 at 175.

427 Rosalind Dixon, 'The Supreme Court of Canada, Charter Dialogue, and Deference' (2009) 47 *Osgoode Hall LJ* 235 at 240.

428 *Ibid* at 252.

429 *Ibid* at 240.

430 *Sauvé II*, *supra* note 3 at para 17.

Constitution.<sup>431</sup> The Court should be more vigilant, not less, when democratic rights are at stake.

## VI Conclusion

In his landmark work, *Democracy and Distrust*, John Hart Ely observed that elected representatives cannot be trusted to remedy malfunctions in the democratic process.<sup>432</sup> According to Ely, the process is undeserving of trust when ‘the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.’<sup>433</sup> There are powerful incentives for political actors to manipulate the rules of the game in order to forward their partisan ambitions at the expense of the public interest. The problem of partisan self-dealing in election law presents a significant challenge for the Canadian law of democracy.

This article has proposed a new structural approach which uses the language and logic of individual rights to respond to the structural threats posed by partisan self-dealing. I argue that the Supreme Court should recognize the right to a fair and legitimate democratic process as a purpose of the right to vote. In addition, I claim that the right to a fair and legitimate process is best understood as a structural right. Structural rights are individual rights that take into account the broader institutional framework within which rights are defined, held, and exercised. By recognizing the right to a fair and legitimate democratic process, the Court can use the mechanism of rights enforcement to redress the structural harm of partisan self-entrenchment.

The Supreme Court of Canada plays a vital role in ensuring the fairness of the democratic process. A structural rights approach enables the Court to respond to partisan self-dealing without requiring too extensive an intervention in the democratic process. Instead of imposing system-wide structural solutions, the Court would be engaging in its traditional function of enforcing democratic rights. Whenever the integrity of the legislative decision-making process is compromised, the structural rights approach provides courts with adjudicative tools that allow for limited but targeted intervention. It is essential for the Supreme Court to explicitly consider – and forestall – the problem to which Ely alerted us.

<sup>431</sup> Ibid.

<sup>432</sup> Ely, *supra* note 25 at 103.

<sup>433</sup> Ibid.

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