

# Fair Opportunity to Participate: The *Charter* and the Regulation of Electoral Speech

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## Abstract

*In his 1999 article, *Libman v. Quebec (A.G.) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model*, Colin Feasby suggests that the Supreme Court of Canada endorsed an egalitarian approach to democratic participation and the regulation of electoral speech. More specifically, Feasby argues that the Court has adopted a model that draws from the philosophy of John Rawls; in particular, his supposedly egalitarian idea of the fair value of the equal political liberties. In this article, I critically examine this egalitarian thesis in the context of the Court's more recent 2004 decisions in *Harper v. Canada (Attorney General)*. While I agree that the Court has adopted an approach similar to the philosophy of John Rawls, I nevertheless reject the conclusion that this is an egalitarian model of democratic participation. Instead, I argue that both Rawls and the Court may be more clearly understood as endorsing a liberal fair opportunity model of elections. This liberal model rejects the egalitarian ideal that all citizens are to enjoy equality of influence in political decision making. The focus, instead, is on the liberal ideal of procedural fairness, and ensuring that all citizens have an equal opportunity or chance to influence political outcomes.*

## Introduction

In his 1999 article, *Libman v. Quebec (A.G.) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model*, Colin Feasby suggests that the Supreme Court of Canada endorsed an egalitarian approach to democratic participation and the regulation of electoral speech. More specifically, Feasby argues that the Court has adopted a model that draws from the philosophy of John Rawls; in particular, his supposedly egalitarian idea of the fair value of the equal political liberties.

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In this article, I critically examine this egalitarian thesis in the context of the Court's more recent 2004 decisions in *Harper v. Canada (Attorney General)*. While I agree that the Court has adopted an approach similar to the philosophy of John Rawls, I nevertheless reject the conclusion that this is an egalitarian model of democratic participation. Instead, I argue that both Rawls and the Court may be more clearly understood as endorsing a liberal fair opportunity model of elections. This liberal model rejects the egalitarian ideal that all citizens are to enjoy equality of influence in political decision making. The focus, instead, is on the liberal ideal of procedural fairness, and ensuring that all citizens have an equal opportunity or chance to influence political outcomes.

Rawls and the Court, however, differ from other liberal approaches in that they endorse a broader conception of equality of opportunity. This fair opportunity approach rejects the claim that equality of opportunity may be secured simply by providing citizens with equal political liberties; that is, equal freedom from legal restrictions in their political conduct. The fair opportunity view, instead, holds that social and economic inequalities between electoral participants must also be addressed in order to ensure the fair value of the equal political liberties. The objective, however, is not to ensure equality of political influence, but simply fair opportunity to influence, regardless of one's social or economic class of origin.

In drawing out this conclusion, I begin by examining the egalitarian thesis, as proposed by Feasby. I then revisit the idea of an egalitarian model of democratic participation, drawing from theories of democracy grounded in the Marxist idea of the classless society. With this theoretical framework in mind, attention is then turned to the Rawlsian approach to democratic participation, as well as the Court's decisions in *Harper v. Canada*.

## **Overview of the Egalitarian Thesis**

In his article, Feasby concludes that the Supreme Court is adopting an egalitarian model of elections in its approach. In drawing out the contours of this model, Feasby focuses on Rawls' theory of political participation as found in *A Theory of Justice and Political Liberalism*. As Feasby states, "the egalitarian model has been expressed in different forms, but the most influential expression of the principles of this model can be found in the work of John Rawls" (1999: 9).

To begin, Feasby asserts that Rawls grounds his egalitarian view of political participation on a basic conception of justice, or fairness, as equality. As he states, Rawls' theory of fairness is "predicated on a hypothetical idea of original equality" (1999: 9). For Feasby, this Rawlsian idea of original equality is more than simply a description of persons in the original position. It is, instead, a fundamental normative idea, which is meant to inform assessments of fair social and political institutions. According to Feasby, Rawls' principle of equality "should specify the kinds of social cooperation that can be entered into and the forms of government that can be established" (1999: 9).

With this normative egalitarian principle in mind, Feasby goes on to discuss Rawls' conception of democratic participation; in particular, his idea of the fair value of the equal political liberties. Feasby argues that Rawls endorses a view of democracy in which all persons are to enjoy equality in their political participation. As he states:

From this basic idea [of fairness as equality] he [Rawls] extrapolates that individuals should have an equal opportunity to exercise their liberty to

participate in the political life of the State. This is exemplified in the idea of “one person-one vote” and the creation of relatively equal electoral districts in terms of population. Equal opportunity in this sense is not a mere absence of controls so that all individuals have the opportunity to express themselves as much as they want; it takes into account of each individual’s ability to influence and participate in the political process...(1999: 9-10)

Democratic processes, such as elections, are thus to be fair in that all citizens are to enjoy equality in their political participation. This equality, moreover, requires more than the “mere absence of controls so that all individuals have the opportunity to express themselves as much as they want.” Instead, it “takes into account of individual’s ability to influence and participate in the political process.” This requires mitigating against the influence of social and economic inequalities, such as differences in wealth, in order to ensure that all enjoy equality in their democratic participation.

Using this Rawlsian theoretical approach, Feasby goes on to argue that Supreme Court adopted an egalitarian model in *Libman*. This case arose out of the events surrounding the 1992 Quebec provincial referendum on the Charlottetown Accord and, more specifically, provincial legislation governing participation in the referendum campaign. The *Quebec Referendum Act* provided for a number of restrictions regarding the incurring of referendum expenses. First, it provided for the establishment of national committees, whose purpose it was to campaign for a particular referendum option. Furthermore, the *Act* provided that only an official agent of a national committee, or one of his or her representatives, was permitted to incur regulated expenses during the campaign. These “regulated expenses” included the cost of any goods and services that promoted or opposed, directly or indirectly, an option submitted to a referendum. Third, such expenses could only be paid out of the referendum fund, which was available only to national committees. Finally, the *Act* imposed limits on the amounts each national committee, and their affiliated groups, could spend in their referendum campaigns.

While the Court found the legislation to be unconstitutional, Feasby nevertheless argues that they adopted an egalitarian model of elections in their decision. In particular, Feasby emphasizes the Court’s characterization of the purpose of the impugned legislation. Feasby argues that the Court endorsed an egalitarian purpose, which is evident from the following quote in their decision:

[T]he objective of the Act is, first, egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources. What is sought is in a sense of equality of participation and influence between the proponents of each option. Second, from the voters’ point of view, the system is designed to permit an informed choice to be made by ensuring that some positions are not buried by others. Finally, as a related point, the system is designed to preserve the confidence of the electorate in a democratic process that it knows will not be dominated by the power of money (1999: 31).

The important points here seem to be the Court’s assertion that affluent members of society must be prevented from “exerting a disproportionate influence” and that what is sought is a sense of “equality of participation and influence.” In addition, Feasby further suggests that the Court

adopted an egalitarian definition of the concept of electoral fairness. He argues that the Court “firmly anchored the principle of electoral fairness in the *Charter* guarantee of equality” (1999: 31). Moreover, that the Court held, “in very Rawlsian terms,” that the value of electoral fairness is related to the “very values the *Canadian Charter* seeks to protect, in particular the political equality of citizens that is at the heart of a free and democratic society” (1999: 31). Finally, that the notion of political equality endorsed by the Court referred to “the right of each voter to have roughly equal influence on the electoral process irrespective each individual’s wealth” (1999: 31).

In sum, then, the egalitarian thesis, as outlined by Feasby, is grounded on a Rawlsian approach to democratic participation. It holds that an egalitarian model of elections is derived from the normative claim that citizens are to enjoy equality in their political participation. This, in turn, requires the state to mitigate against social and economic inequalities, such as differences in wealth, between election participants in order to ensure that all citizens may enjoy the equal value of their political liberties. This egalitarian model, it is further argued, has been adopted by the Court in *Libman*, which is evident in the Court’s characterization of the objectives of the impugned legislation and its basic conception of electoral fairness.

## **Egalitarian Model of Democracy Revisited**

In what follows, I reject this egalitarian thesis. While I agree that the Court has endorsed an approach to democratic participation and the regulation of electoral speech that is similar to the philosophy of Rawls, I disagree that this model may be called egalitarian.

In drawing out this conclusion, it is first necessary to outline what I mean by an egalitarian model of democratic participation. By the term “egalitarianism,” I mean those theories, often grounded in the Marxist ideal of a classless society, which consider equality to be central to the ideas of justice and democratic participation. An example of such a view can be found in T.B. Bottomore’s *Elites and Society*, which advocates the following sense of democracy:

...all the adult members of society ought to have, so far as is possible, an equal influence upon those decisions which affect important aspects of the life of society, and in the sense that inequalities of wealth, of social rank, or of education and access to knowledge, should not be so considerable as to result in the permanent subordination of some individuals and groups to others in any of the various spheres of social life... (2009: 101)

Fundamental is the idea that democracy should function to provide citizens with equality of political influence. Citizens have an interest in democratic participation as a process by which they may equally influence political decision making and, in turn, the structure of key political, social, and economic institutions in society. Under this view, it should not be that some individuals or groups have a greater say, impact, or role in political decision making. Instead, all citizens should, as Bottomore states, have an “equal influence upon those decisions which affect important aspects of the life of society.”

Central here is the principle of equality of outcome. Under the egalitarian view, a properly functioning democracy is one in which there is an absence of hierarchies of political status, power, and influence. These political goods should be distributed equally amongst citizens,

ensuring that all may have an equal say, role or impact on political decisions. This egalitarian view of democratic equality is grounded not only on the recognition that hierarchies of political power are artificial social constructs, but that they tend to function as mechanisms of oppression and exploitation in society in general. As Bottomore states, the “major inequalities of society are in the main social products, created and maintained by the institutions of property and inheritance, of political and military power, and supported by particular beliefs and doctrines” (2009: 102).

To this point I have discussed egalitarianism in a highly idealized or utopian manner, asserting that it seeks to promote equality of political influence absolutely. Some egalitarian theorists, such as Bottomore, however, recognize that there are serious practical constraints in pursuing this ideal. This qualified version of egalitarianism recognizes that absolute equality of political influence, while an admirable goal, may be impossible or impractical, considering the realities of modern democratic societies. Nevertheless, for Bottomore, this practical constraint does not imply a rejection of egalitarianism. As he states:

If neither inequality nor equality is a natural phenomenon, which has simply to be accepted, the advocacy of one or the other does not consist in the presentation of a scientific argument based wholly upon matters of fact, but in the formulation of a moral and social ideal. We can *opt* for equality, and although in doing so we have to pay attention to matters of fact which bear upon the practicality of the ideal and upon the means appropriate for attaining it, the ultimate justification for our option is not itself any matter of fact but a reasoned claim that the pursuit of equality is likely to create a more admirable society (2009: 102-103). [Emphasis in original]

The complete removal of social, political and economic hierarchies may thus be impractical. Nevertheless, for Bottomore, this does not imply the rejection of egalitarianism as a social or moral ideal. One may hold that a society that moves towards egalitarianism, but does not necessarily achieve it completely, remains admirable and a worthwhile goal. The practical constraint simply means that one must pay attention to “matters of fact” when seeking to attain an egalitarian society.

In sum, by the term “egalitarianism,” I mean those theories of democratic participation that seek to promote equality of political influence between citizens, as much as is possible. Central to this model is the rejection of hierarchies in political power as artificial social constructs and as mechanisms for the reinforcement of relations of inequality and oppression in the broader societal context. As such, this model seeks to promote equality of outcomes in citizens’ democratic participation, which involves an equal distribution of political power and influence. In its qualified variant, such a model recognizes practical limits to ensuring this equality of political influence. For the egalitarian, however, this simply implies that equality of outcome in power and influence should be pursued as far as is possible.

## **Rawlsian Approach to Democratic Participation**

This raises the question: is the Rawlsian approach to democratic participation egalitarian? In other words, is Rawls advocating an approach to democratic institutions, such as elections, in which citizens are to enjoy equality of political influence and power as much as is possible? At

points in his discussion, Feasby seems to suggest that this is the case. As discussed above, he asserts that Rawls grounds his theory of fairness, and in turn democracy, on a normative claim to equality. Moreover, at times, Feasby he asserts that both Rawls and the Court are seeking to ensure that the wealthy do not exert a disproportionate influence on electoral processes, and that there is a sense of equality in citizens' participation and influence.

In examining Rawls' theory further, however, this egalitarian characterization is problematic. While I agree that Rawls does emphasize the need to address social and economic inequalities in citizens' democratic participation, I nevertheless disagree that this concern is an egalitarian one. Rawls is not seeking to ensure *equal political influence* between citizens, as much as is possible. Instead, he is simply seeking to secure *equal opportunity to influence* for citizens. In other words, the objective is not to eliminate hierarchies of political power and influence, but simply to ensure that these hierarchies exist under conditions of procedural fairness, in which all have a fair chance to attain offices of political power and positions of influence.

In drawing out and contrasting Rawls' approach to democratic participation, I rely on two texts: *A Theory of Justice* and *Justice as Fairness: A Restatement*. There, Rawls introduces a number of principles relating to citizens' participation in democratic institutions, primarily within the context of his first principle of justice. This first principle holds that "each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all" (2001: 42). Moreover, by "liberties," Rawls simply means freedom from external interferences by others in one's conduct; particularly freedom from legal restrictions (1971: 202-203).

The first principle of justice thus entitles each person to a fully adequate scheme of rights to freedom from legal restrictions in their conduct. With his first principle, however, Rawls is not asserting that persons are to be entitled to enjoy "liberty generally." Instead, he is simply asserting that persons are entitled to a "scheme of liberties," understood as a bundle of basic freedoms to engage in important sorts of conduct. Rawls goes on to define this bundle of basic liberties as roughly including "political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law" (1971: 61).

An important implication of the first principle of justice is thus the recognition that citizens are entitled to enjoy an adequate and equal scheme of political liberties. This includes the right to vote, to run for public office, and freedom of speech and assembly in the context of political institutions and processes. Moreover, these freedoms are to be understood in terms of the absence of external interferences; in particular, the absence of legal restrictions. Citizens, in their democratic participation, are to be adequately and equally free from legal restrictions when exercising their vote, running for public office, expressing their political views, or forming and joining political associations.

Rawls goes on further to introduce the idea of the fair value of the equal political liberties as a qualification of this first principle of justice. This qualification holds that citizens are entitled not only to an adequate and equal scheme of political liberties, but also to the fair value or worth of those liberties, taking into account inequalities in social and economic background institutions. Moreover, this qualification applies only to citizens' political liberties, such as the right to vote,

run for political office, and freedom of expression, association and conscience. It is not extended to the other liberties found in the set of basic liberties outlined by Rawls.

Why is this qualification introduced in the context of political liberties? Rawls gives the following justification:

The idea of their fair value [of the equal political liberties] is introduced in an attempt to answer this question: how shall we meet the familiar objection, often made by radical democrats and socialists (and by Marx), that the equal liberties in a modern democratic state are in practice merely formal? While it may appear, the objection continues, that citizens' basic rights and liberties are effectively equal – all have the right to vote, to run for political office and to engage in party politics, and so on – social and economic inequalities in background institutions are ordinarily so large that those with greater wealth and position usually control political life and enact legislation and social policies that advance their interests.

To discuss this question, distinguish between the basic liberties and the worth of these liberties as follows: these liberties are the same for all citizens (are specified the same way) and the question of how to compensate for a lesser liberty does not arise. But the worth, that is, the usefulness of these liberties, which is estimated by the index of primary goods, is not the same for all. The difference principle, in maximizing the index available to the least advantaged, maximizes the worth to them of the equal liberties enjoyed by all. Yet some have more income and wealth than others, and so more all-purpose material means for realizing their ends (2001: 148-149).

Central for Rawls is the concern that differences between persons in social position and wealth, if sufficiently large, will entail substantive inequalities in the worth of the political liberties. Even though all citizens may enjoy an adequate scheme of political liberties, understood as freedom from legal restrictions in their political conduct, social and economic inequalities in background institutions may be such that “those with greater wealth and position usually control political life.” Those with lesser financial resources may find that a political liberty carries very little worth, as they do not have the wealth necessary to actually engage in the activity. Moreover, if systematic, this may result in segments of society being excluded from participating in political institutions, leaving the political system to be dominated by those that do have financial resources to fully exercise their political liberties.

In order to prevent such situations, Rawls argues that citizens are entitled to the fair value or worth of their political liberties. In drawing this principle out further, Rawls states:

... This guarantee means that the worth of the political liberties to all citizens, whatever their economic or social position, must be sufficiently equal in the senses that all have a fair opportunity to hold public office and to affect the outcome of elections, and the like. This idea of the fair opportunity parallels that of the fair equality of opportunity in the second principle (2001: 149).

Central to Rawls' conception of the fair value of the equal political liberties is the idea that all are to have a “fair opportunity” in their political participation, regardless of their economic or

social status. In drawing this principle out further, it is important to examine the notion of fair opportunity under the second principle, which Rawls asserts parallels the idea of the fair value of the equal political liberties. Fair equality of opportunity holds that citizens should enjoy a fair chance to attain public offices and social positions. This fair chance entails more than simply the same formal opportunity; that is, equality in freedom from legal restrictions. It also involves ensuring that economic or social class is not a barrier to attaining public offices and social positions. As Rawls states, "those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of social class of origin" (2001: 44).

The principle of the fair value of the equal political liberties is meant to mirror this basic idea. Those with similar native talents, and willingness to use those talents, should have the same prospects for success in political institutions, be it running for political office or influencing political outcomes, regardless of their social or economic class of origin. In other words, success in political institutions should not be determined solely by one's economic or social class, with the wealthy and privileged having an unfair advantage in influencing political outcomes. Hence, for Rawls, this fair opportunity in democratic participation requires not only ensuring an adequate scheme of political liberties for all citizens, but also addressing economic and social inequalities so that all may have a fair chance in political processes.

With this general sketch, attention can be turned to the implications of Rawls' theory. Is this idea of the fair value of equal political liberties egalitarian? As discussed above, the egalitarian approach to political participation is grounded on the ideal that all citizens, as much as is possible, should enjoy equality of influence in political decision making; there should be equality of outcome in terms of the distribution of political power and influence. In examining Rawls' approach, however, it is clear that he is rejecting this egalitarian claim. Rawls accepts that there will and should be inequalities in outcomes between citizens in terms of their political power and influence. It may be, for example, that some citizens have native talents, or a greater willingness to use their talents in political life, which should result in them exercising greater influence on political decision making. The issue for Rawls is not the elimination of political hierarchies, but ensuring that they exist under conditions of procedural fairness.

With this in mind, the focus for Rawls is simply ensuring equality of opportunity. Citizens are entitled to a similar opportunity or chance for success in their democratic activities. Thus, a democratic society may be unequal in the sense that political decision making falls to a limited number of elected representatives, or that some individuals and groups exert a disproportionate influence on political decision making. For Rawls, the concern is ensuring that these hierarchies of political power are fair in that all citizens have an equal opportunity or chance to attain important positions of political power and influence.

The rejection of egalitarianism and emphasis on equality of opportunity is a common trait in liberal theories of democracy. This, however, does not mean that Rawls' theory is indistinguishable from other liberal approaches. Central to his idea of the fair value of the equal political liberties is a particular conception of procedural fairness and equality of opportunity, which is broader than many other liberal approaches. In drawing out this distinction further, it is useful to contrast Rawls' theory to another prevalent liberal model, such as a free market model of democracy. By a free market approach to democracy, I have in mind theories of democratic participation, such as those discussed by C.B. Macpherson in his book the *Life and Times of*



*Liberal Democracy*, which are based on economic theories of the free market. A liberal free market approach conceptualizes equality of opportunity simply in terms of equal political liberties or equal freedoms from state interferences. It is to be the free political market, understood as citizens competing for political power under conditions of equal liberty or freedom from state interferences, which is to decide political outcomes.

Rawls differs from this liberal free market approach in that he recognizes that equal political liberties are often insufficient to ensure fair opportunity for all citizens in their democratic participation. Differences in wealth or social status between citizens may be so great that some individuals or groups are able to dominate political institutions and decision making, while others enjoy little or no chance to influence political outcomes, even though all possess the same political liberties. As such, Rawls advocates a broader conception of equality of opportunity, which requires not only that all citizens possess an adequate and equal scheme of political liberties, but that social and economic inequalities between participants are not so great that these political liberties are rendered substantially unequal or worthless to segments of society.

Under the Rawlsian approach, then, the state may legitimately limit basic liberties in order to prevent wealth and privilege from becoming the deciding factor in political success. While not going into detail concerning specific reforms, Rawls does provide some general ideas, such as “the assurance of a more even access to public media; and certain regulations of freedom of speech and of the press (but not restrictions affecting the content of speech)” (2001: 149). Such reforms should help to “enable legislators and political parties to be independent of large concentrations of private economic and social power in a private-property democracy...” (2001: 149)

This, however, does not imply that Rawls is egalitarian. Rawls is not suggesting that the state may interfere in democratic processes, and limit citizens’ basic liberties, in order to ensure that all citizens have an equal influence on political decision making. State action, instead, is justifiable only in so far as it is necessary to procedural fairness, understood as all citizens having a fair chance to influence political outcomes, regardless of their social or economic class of origin.

### ***Harper v. Canada and Limits on Election Advertising***

With the above discussion in mind, the following question is raised: what approach to democracy, if any, does the Court adopt in *Harper*? Before examining the Court’s decisions in detail, it is first necessary to provide some background on the case.

*Harper v. Canada (Attorney General)* centred on several changes to the *Canada Elections Act* made by the federal government in 2000. Central to these reforms were greater restrictions on the activities of so-called “third parties” during election periods. Under the *Act*, third parties refer to any person or group other than registered election candidates or political parties. This includes private individuals, as well as groups such as business, labour, religious, environmental organizations, and so forth.

The *Act* placed a number of limits on the political expression of citizens in this context. First, it imposed a ceiling on the amount of money that citizens could spend on election advertising:

\$3,000 in any given electoral district and \$150,000 in total nationally (adjusted annually for inflation). Under the *Act*, advertising expenses were defined as any expense “incurred to promote or oppose the election of one or more candidates in a given electoral district by (a) naming them; (b) showing their likeness; (c) identifying them by their respective political affiliations; or (d) taking a position on an issue with which they are particularly associated” (*Harper v. Canada*: para 53). For greater certainty, the *Act* goes on to explicitly exclude a number of expressive activities from this definition (*Harper v. Canada*: para 57). These included the communication of an editorial, a debate, a speech, an interview, a letter, a commentary or news; the distribution and promotion of a book; transmission of documents by a person or a group to their members, employees or shareholders; and the communication of personal views via the Internet. These limits applied did not apply to citizens prior to the official election period, nor to any expression that which promoted an issue that that is not associated with a registered candidate or political party.

The *Act* also provided for a blackout period on polling day, in which all third party advertising is prohibited. It further included several rules for the administration of these restrictions. All third parties desiring to advertise during an election must register with the Chief Electoral Officer, appoint a financial officer and auditor, and provide full disclosure of their advertising spending. Third parties must identify themselves in all of their election advertising; and are prohibited from splitting or colluding in order to circumvent the spending restrictions. The prohibition on splitting, for example, is intended to prevent a group from divided itself into two in order to double the amount it could spend on advertising during an election.

In 2001, Stephen Harper, then president of the National Citizens’ Coalition, sought a declaration by the Alberta Court of the Queen’s Bench that the third party advertising scheme under the *Act* was of no force and effect on the grounds that it violated the right to freedom of expression, freedom of association, and the right to vote under sections 2(b), 2(d), and 3 of the *Canadian Charter of Rights and Freedoms* respectively. The trial judge agreed, concluding that the spending limit violated freedom of expression, while the prohibition on splitting and colluding violated freedom of association, and that neither was justified under Section 1 of the *Charter*. The Alberta Court of Appeal upheld that decision.

The Attorney General of Canada appealed the decision to the Supreme Court of Canada, which rendered its decisions in 2004. A majority of the Court, which included justices Iacobucci, Bastarache, Arbour, LeBel, Deschamps and Fish, allowed the Attorney General’s appeal, finding that, while the *Act* violated freedom of expression, the violation was justified under section. 1 of the *Charter*. A minority, which included justices McLachlin, Major and Binnie, dissented in part, concluding that the violation of freedom of expression was not justified under section. 1 of the *Charter*.

### ***Harper and Fair Opportunity to Participation***

What model of democratic participation is being adopted by the Court in *Harper*? The conclusion drawn here is that the Court operated within a fair opportunity model democracy, similar to the approach found in *Rawls*. As discussed above, however, this approach is not egalitarian. It does not seek to ensure that all citizens, as much as is possible, enjoy equality of influence in political decision making. The focus is, instead, on procedural fairness, and ensuring

that all citizens enjoy a fair chance in their democratic participation, regardless of their social or economic class of origin.

In drawing out this conclusion, it is useful to begin with the majority's general discussion of electoral fairness. As the majority states:

The Court's conception of electoral fairness as reflected in the foregoing principles is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation... Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power. The state can equalize participation in the electoral process in two ways... First, the State can provide a voice to those who might otherwise not be heard. The Act does so by reimbursing candidates and political parties and by providing broadcast time to political parties. Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions seek to create a level playing field for those who wish to engage in the electoral discourse... (*Harper v. Canada*: para 62)

At first glance, one might argue that this is a clear endorsement of an egalitarian view of democratic participation. The majority is explicitly recognizing an egalitarian model of electoral fairness, which seeks to promote equal participation by preventing the wealthy from controlling the electoral process to the detriments of those with less economic power. In this context, the state may attempt to equalize political participation by providing public assistance to those with lesser financial resources, as well as by limiting the political liberties of wealthy participants.

Upon further examination, however, this egalitarian interpretation is problematic. In discussing their conception of electoral fairness further, the majority immediately uses the liberal language of procedural fairness and equality of opportunity. They assert that the model is premised on the notion that citizens should have "an equal opportunity to participate in the electoral process" and that there should be a "level playing field for those who wish to engage in the electoral discourse." This suggests that the basic concern is not promoting the egalitarian ideal of equality of political influence; that is, ensuring that citizens enjoy equality of outcome in political influence and power, as much as possible. The concern, instead, is simply to ensure that hierarchies of political power are procedurally fair and that all have an equal opportunity to attain positions of political influence.

This use of the liberal language of equality of opportunity is pervasive throughout both the majority and minority decisions. For example, in discussing the purpose of the right to freedom of political expression, the majority quotes Justice Dickson in *R. v. Keegstra*, stating that this right is crucial "not only because it permits the best policies to be chosen from a wide array of proffered options, but additionally because it helps to ensure that *participation in the political process is open to all persons*" (*Harper v. Canada*: para 84). Interestingly, the majority stresses

the importance of freedom of political expression not on egalitarian grounds, as being crucial to citizens enjoying equal influence in political decision making, but on the liberal grounds of ensuring an “open” democratic process in which all have an opportunity to participate. The minority, in discussing the objectives of the impugned legislation, also stresses equality of opportunity. Quoting the Court in *Libman*, they state that elections are fair and equitably only if citizens are reasonably informed of all the possible choices, and if parties and candidates are given “a reasonable opportunity to present their positions so that the election discourse is not dominated by those with access to greater financial resources” (*Harper v. Canada*: para 24).

The Court’s adoption of a liberal, as opposed to egalitarian, approach to elections is further evident in its characterization of the harm associated with unlimited spending on election advertising. The majority describes the harm in the following manner:

For voters to be able to hear all points of view, the information disseminated by third parties, candidates and political parties cannot be unlimited. In the absence of spending limits, it is possible for the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse. The respondent’s factum illustrates that political advertising is a costly endeavour. If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out... Where those having access to the most resources monopolize the election discourse, their opponents will be deprived of a reasonable opportunity to speak and be heard. This unequal dissemination of points of view undermines the voter’s ability to be adequately informed of all views... (*Harper v. Canada*: para 72)

At certain points in this quote, the majority might be interpreted as grounding the harm in egalitarian terms, particularly in regard to their assertion that unlimited spending would entail an “unequal dissemination of points of views.” Central here is the characterization of the harm in terms of equality of outcomes in citizens’ participation in the political discourse surrounding an election. Unlimited spending on election advertising is harmful because it entails that some views will be communicated to a greater degree, be it quantitatively or qualitatively, than others. Such a harm could be implied under an egalitarian model of democratic participation, if one assumes that the dissemination of points of views is correlated to political power and influence. Under this egalitarian interpretation, then, the majority is holding that unlimited spending is harmful in that it allows wealthy speakers to communicate their political views to a greater extent and, in turn, exert an unequal influence on political decision making.

A liberal model of democratic participation, however, would reject such a characterization of the harm. For a liberal, the objective is not to ensure that citizens enjoy equality of outcomes in their political expression; that is, that all may equally influence election outcomes through the equal dissemination of views. The objective, instead, is to simply ensure that all have an equal opportunity to express their political views. Unlimited spending on election advertising would thus be considered harmful only in so far as it denies or degrades equality of opportunity in citizens’ expression.

In examining the above quote further, the majority clearly switches into this liberal characterization of the harm. As they state, unlimited spending permits wealthy speakers to

“flood the electoral discourse with their message” and to “monopolize the election discourse.” Moreover, such a situation is harmful in that the “voices of some will be drowned out” and that those with lesser financial resources “will be deprived of a reasonable opportunity to speak and be heard.” Here the concern is not one of equality of outcome, but of equality of opportunity. Unlimited spending is harmful because it permits wealthy speakers to express their points of view in such a manner that others are denied the chance or opportunity to participate in the political discourse.

While the majority does not go on to describe this liberal harm in greater detail, one might suppose a number of possible cases. Wealthy speakers could, for example, use their financial resources to purchase all available time and space in mediums of mass communication, or drive up the cost of access to these mediums to such a level that it is beyond the means of many speakers. Such a situation could be considered analogous to one speaker denying another speaker access to the stage or microphone when addressing an audience. Another example would be wealthy speakers engaging in election advertising to such an extent that it consumes the attention of the electorate, and relegates the expression of others to the periphery of the political discourse. In this case, one might draw an analogy to one speaker denying another speaker an opportunity to express their views by constantly interrupting or shouting over them.

Hence, putting aside the ambiguity stemming from the statement that there should be an equal dissemination of political views, the majority seems to be asserting the harm in terms of denying or degrading equality of opportunity in democratic participation. This approach, moreover, is evident in parts of the minority’s decision. Discussing the impugned legislation, for example, the minority asserts that one of the objectives is to prevent harm to informed citizenship by ensuring that “some positions are not drowned out by others” (*Harper v. Canada*: para 23). Again, the concern seems to be centred on the liberal harm of the wealthy denying or degrading equality of opportunity for others in the political discourse.

In sum, then, the Court relies on a liberal, as opposed to egalitarian, model of democracy in its decisions in *Harper*. This is evident in their emphasis of equality of opportunity both in their conception of electoral fairness, as well as their characterization of the harm associated with unlimited spending on election advertising. For the Court, the objective is not to ensure that citizens, as much as is possible, enjoy equality of influence in political decision making. The concern is, instead, with ensuring that all citizens have an equal chance or opportunity for political influence through their political expression.

In doing so, however, the Court is endorsing a particular conception of equality of opportunity, which is consistent with the Rawlsian notion of fair opportunity in democratic participation. The Court does not conceive of equality of opportunity simply in terms of equal political liberties for citizens. The concern here is not that some individuals or groups will be denied an opportunity to express their political views because of legal restrictions. The issue, instead, centres on the worth of the *Charter* right to freedom of expression within the context of economic inequalities between citizens. Wealthy speakers may communicate their political views in such a manner that those with lesser resources are denied an opportunity to participate in the political discourse, even though all enjoy the same expressive liberties.

Hence, like Rawls, the Court recognizes that the state may legitimately intervene in citizens’ political participation in order to address economic inequalities between citizens and promote

equality. The state may place limits on citizens' basic liberties, such as restrictions on the amount of money they may spend on their election expression. The state may also provide public support to those with lesser financial resources in order to promote their expressive activities. The objective of these interventions, however, is not egalitarian. It is, instead, grounded on the liberal ideal of procedural fairness and equality of opportunity in citizens' democratic participation.

## Conclusion

Colin Feasby suggests that the Court in *Libman* endorsed an egalitarian model of democratic participation and the regulation of electoral speech. Feasby bases his conclusion on a similarity between the Court and the supposed egalitarian philosophy of John Rawls. In this article, I critically examined this egalitarian thesis in the context of Court's more recent decisions in *Harper v. Canada (Attorney General)*. While I agree that the Court has adopted an approach similar to the philosophy of John Rawls, I nevertheless reject the conclusion that this is an egalitarian model of democratic participation.

Instead, I argue that both Rawls and the Court may be more clearly understood as endorsing a liberal fair opportunity model of elections. This liberal model rejects the egalitarian ideal that all citizens are to enjoy equality of influence in political decision making. The focus, instead, is on the liberal ideal of procedural fairness, and ensuring that all citizens have an equal opportunity or chance to influence political outcomes. Rawls and the Court, however, differ from other liberal approaches in their conception of equality of opportunity. They reject the idea that equality of opportunity may be secured simply by ensuring equal political liberties for all citizens, understood as equal freedom from legal restrictions. The fair opportunity approach, by contrast, holds that social and economic inequalities between electoral participants must also be addressed, so that one's economic or social class does not determine their political success. The objective, however, is not egalitarian, but liberal in nature.

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