

# Freedom of Expression and the Law of the Democratic Process

Colin Feasby

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

## Citation Information

Feasby, Colin. "Freedom of Expression and the Law of the Democratic Process." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 29. (2005).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol29/iss1/13>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

# Freedom of Expression and the Law of the Democratic Process

Colin Feasby\*

## I. INTRODUCTION

*Harper v. Canada* is the third and (probably) final chapter in a 20-year struggle between the National Citizens' Coalition and the federal government over election laws.<sup>1</sup> The contest was ostensibly about the regulation of election expenditures made by third parties — individuals and organizations who are neither candidates nor political parties. Third party expenditure limits, though important to those affected, are at the margins of the campaign finance regime. The fact that the struggle over third party expenditure limits has enjoyed relative prominence compared to other challenges and potential challenges to the constitutionality of the federal campaign finance regime is curious.<sup>2</sup> Like the proxy wars between the United States and the U.S.S.R., however, *Harper* and earlier third party spending cases were really about a larger ideological question; namely, whether an egalitarian or libertarian model of election regulation would prevail in Canada. *Harper* answered the question definitively — Canada's philosophy of election regulation is first and foremost egalitarian.

This paper is not a critique of the Supreme Court of Canada's egalitarian model of elections. The precepts of the Court's egalitarian model

---

\* Osler, Hoskin & Harcourt LLP (Calgary). I thank Mike Dorf, Rick Hasen, Sam Issacharoff, and Greg Tardi for their constructive comments on an earlier version of this paper. Responsibility for all errors and omissions is, of course, my own.

<sup>1</sup> *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 [hereinafter "*Harper (SCC)*"].

<sup>2</sup> The focus of the debate over election regulation in Canada on third party expenditures is especially curious given relatively low levels of third party activity in most Canadian elections and the existence of other contestable regulations that pertain to candidates and political parties. For a discussion of other election regulations that may contravene the Charter, see C. Feasby, "The Supreme Court of Canada's Political Theory and the Constitutionality of the Political Finance Regime" in K.D. Ewing & S. Issacharoff, *Party Funding and Campaign Financing in International Perspective* (Oxford: Hart, 2005) (forthcoming).

will be reviewed, but not contested. Instead, it will be asked whether the Supreme Court's understanding of the egalitarian model led it in *Harper* to be insufficiently rigorous in its scrutiny of third party expenditure limits. Previously I have argued that one of the central assumptions of the egalitarian model is that limits on political expression are inherent in the electoral context. This is what I call the "paradox of political expression." The shortcoming of my earlier work is that once the big picture case for deference in the electoral context was made, the question of the exercise of that deference was underdeveloped.<sup>3</sup> Both of my previous papers made the case for deference to Parliament's choice of democratic values, but concluded that the specific third party limits enacted by the *Canada Elections Act* were nevertheless unconstitutional. What this paper attempts to develop is an explanation for how the Court can circumscribe the application of the egalitarian model by defining the boundaries of the electoral context and can exercise a principled deference and more rigorous judicial review within those boundaries in a way that is consistent with the egalitarian model.

The focus of the following discussion concerns two main aspects of the Court's approach to the judicial review of democratic process questions. First is the question of the breadth of the egalitarian model as a justification for limiting political expression. In doctrinal terms, this question is played out under the rubrics of vagueness and overbreadth. The third party expenditure limits considered in *Harper* arguably extended to all political expression within an election campaign period including so-called issue advocacy. Issue advocacy comes in two forms: (1) "sham issue advocacy" which is really advocacy for or against a particular candidate or political party; and (2) "pure issue advocacy" which is expression concerning an issue of public policy with no reference, veiled or otherwise, to a candidate or political party.<sup>4</sup> The *Harper* trial court found that the third party limits were impermissibly vague or overbroad or both because they applied to expression concerning issues

---

<sup>3</sup> C. Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy Under the *Charter*: The Emerging Egalitarian Model" (1999) 44 McGill L.J. 5 [hereinafter "The Emerging Egalitarian Model"]; and C. Feasby, "Issue Advocacy and Third Parties in the United Kingdom and Canada" (2003) 48 McGill L.J. 11.

<sup>4</sup> See R. Briffault, "Issue Advocacy: Redrawing the Elections/Politics Line" (1999) 77 Tex. L. Rev. 1751; R. Hasen, "The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy" (2000) 48 U.C.L.A. L. Rev. 265.

“associated with political parties or candidates.”<sup>5</sup> Essentially, the trial court found that expression concerning issues *associated* with candidates and political parties could be *political* without necessarily being *electoral* in nature. In other words, the regulation of third party expenditures captures pure issue advocacy. The Supreme Court nevertheless found that the overarching legislative objective — fair elections — justified the broadly framed spending limits. The majority of the Court’s conclusion that the third party spending limits were neither vague nor overbroad betrays a lack of understanding of electoral context and the problems that face actual participants in the electoral process. Moreover, the Court’s failure to take the definitional question seriously indicates that the egalitarian principles that justify the regulation of electoral expression may be stretched beyond the electoral context.

Second, the Court’s deferential approach to judicial review in *Harper* is inconsistent with an appreciation for the rough and tumble of the electoral context. After concluding that third party spending limits are consistent with the egalitarian model and, therefore, pressing and substantial, the majority in *Harper* deferred to Parliament’s assessment of the appropriate level for the third party spending limits. The minority decision is less deferential, but its difference with the majority is underdeveloped. The thrust of the argument against the reflexive deference exhibited in *Harper* is that when participation in the democratic process is limited in a way that protects the *status quo* in some fashion, stricter scrutiny is necessary. The inspiration for this argument is the revival of process theory as a basis for judicial review in the emerging academic discipline of law and the democratic process in the United States and elsewhere.<sup>6</sup> A main premise common to most process theories is that politicians have an interest in shaping electoral rules to protect the *status quo* or even enhance their position *vis à vis* their competition. Substantive and dialogue theories have rightly prevailed over process theories as the orthodoxy in Canadian academic and judicial circles as general accounts of judicial review.<sup>7</sup> The swing of the pendulum to substantive

---

<sup>5</sup> *Harper v. Canada (Attorney General)*, [2001] A.J. No. 808, 295 A.R. 1 (Q.B.) [hereinafter “*Harper (Q.B.)*”].

<sup>6</sup> S. Issacharoff & R. Pildes, “Politics as Markets: Partisan Lockups of the Democratic Process” (1998) 50 *Stan. L. Rev.* 643; R. Pildes, “The Theory of Political Competition” (1999) 85 *Va. L. Rev.* 1605.

<sup>7</sup> For a discussion of the fate of process theory in Canada, see: K. Roach, “American Constitutional Theory for Canadians (And the Rest of the World)” (2002) 52 *U.T.L.J.* 503. On dialogue

and dialogue theories of judicial review, however, has impoverished the Court's approach to cases concerning the democratic process. Process theories, such as that famously espoused by the late John Hart Ely, have important insights to offer that might provide a corrective to the overly deferential approach of the Court in *Harper*.<sup>8</sup> The limited role for process theory that is proposed in this paper has Canadian precedents. Indeed, it will be suggested that this approach is consistent with some of the Supreme Court's recent democratic process cases and was foreshadowed by Dean Patrick Monahan's theory of judicial review under the Charter.<sup>9</sup>

The second part of the paper takes a step back from the main arguments to be advanced and introduces a field of study that is largely neglected in the Canadian legal academy: "Law and the Democratic Process." This emerging sub-discipline of constitutional law provides many of the concepts and much of the context that is missing from *Harper*. Indeed, the appropriateness of an election-specific approach to free speech and the relative merits of process theory and more robust theories of judicial review in democratic process cases are two of the many debates that have animated law and the democratic process scholarship in recent years. Identifying the lack of Canadian academic debate in this area is of particular importance given that Canadian courts appear to be increasingly confronting democratic process problems. The third part of this paper reviews the lower court and Supreme Court of Canada decisions in *Harper*. The analysis of the definitional question that relates to the question of issue advocacy and the Court's justification for its deferential approach are highlighted. The fourth part of this paper situates *Harper* within the larger context of the debate over issue advocacy. The regulation of pure issue advocacy, it is argued, is not supported by the egalitarian model. The concern for defining the electoral realm discussed in part four in the context of issue advocacy is an important complement to the approach to judicial review outlined in the fifth part

---

theory, see P. Hogg & A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75 and K. Roach, *The Supreme Court Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

<sup>8</sup> J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

<sup>9</sup> P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell 1987).

of this paper. The fifth part of this paper questions the Court's deferential stance and suggests that the egalitarian model of elections does not require deference in all circumstances. A principled approach to deference that draws upon aspects of process theory is proposed.

## II. LAW AND THE DEMOCRATIC PROCESS

From an international perspective, Canada is at the leading edge of many of the developments in constitutional law. Canadian courts and legal scholars are pioneers in equality rights, the rights of Aboriginal peoples, and many other areas of constitutional law. One area of constitutional law that has suffered comparative neglect is the intersection between the Charter and the democratic process. Before the publication of Gregory Tardi's two-volume work titled *The Law of Democratic Governing* in late 2004, with a few salient exceptions, Canadian legal scholarship in the last 20 years is barren of any sustained or serious consideration of the legal regulation of the democratic process and related constitutional issues.<sup>10</sup> Interestingly, some of the most significant contributions to the Canadian literature on law and the democratic process are from sources outside the legal academy such as student articles,<sup>11</sup> books by members of the practising bar,<sup>12</sup> efforts of foreign scholars,<sup>13</sup> and political scientists.<sup>14</sup> Canadian political scientists, in

---

<sup>10</sup> G. Tardi, *The Law of Democratic Governing* (Toronto: Carswell, 2004). The most obvious exception to this generalization is J. Patrick Boyer's reference work, *Election Law in Canada: The Law and Procedure of Federal, Provincial and Territorial Elections* (Toronto: Butterworths, 1987). Boyer's *Election Law* and his other publications are principally descriptive and do not contemplate the impact of the Charter in depth.

<sup>11</sup> See, e.g.: N. Devlin, "Opinion Polls and the Protection of Political Speech — A Comment on *Thomson Newspapers Co. v. Canada (Attorney General)*" (1996-1997) Ottawa L. Rev. 412; C. Feasby, "Egalitarian Model" *supra*, note 3; C. Feasby, "Public Opinion Poll Restrictions, Elections, and the Charter" (1997) 55 U.T. Fac. L. Rev. 241; T. Knight, "Unconstitutional Democracy? A Charter Challenge to Canada's Electoral System" (1999) 57 U.T. Fac. L. Rev. 1; T. Knight, "Electoral Justice for Aboriginal People in Canada" (2001) 46 McGill L.J. 1063; J. LaCalamita, "The Equitable Campaign: Party Political Broadcasting Regulation in Canada" (1984) 22 Osgoode Hall L.J. 543.

<sup>12</sup> See, e.g.: Tardi, *The Law of Democratic Governing*, *supra*, note 10; and Boyer, *Election Law in Canada*, *supra*, note 10.

<sup>13</sup> See, e.g.: A.C. Geddis, "Liberté, Egalité, Argent: Third Party Election Spending and the Charter" (2004) 42 Alta. L. Rev. 429; A.C. Geddis, "Democratic Visions and Third-Party Independent Expenditures: A Comparative View" (2001) 9 Tul. L. J. Int'l & Comp. L. 5; K.D. Ewing, *Money, Politics, and Law: A Study of Campaign Finance Reform in Canada* (Oxford: Clarendon Press, 1992).

particular, deserve credit for exploring the intersection of law and the democratic process from the perspective of their academic discipline. Canadian law faculties, however, have accomplished little in this area.<sup>15</sup> This is not surprising because there is not a single tenured or tenure track professor in Canada who identifies law and the democratic process as a primary or even secondary research interest. The lack of interest in law and the democratic process is also reflected in many faculty-taught entry level constitutional law courses where the study of democratic rights and freedom of expression cases that implicate the democratic process occupy a subordinate position to subjects that are more fashionable in the Canadian legal academy. Despite the barren landscape described, there are signs that this tradition of neglect is waning. During

---

<sup>14</sup> On the constitutionality of campaign finance laws, e.g., various articles by J. Hiebert including, "Money and Elections: Can Citizens Participate on Fair Terms Amidst Unrestricted Spending?" (1998) 31:1 Canadian Journal of Political Science 91; various articles by H. Bakvis & J. Smith including, "Third-Party Advertising and Electoral Democracy: The Political Theory of the Alberta Court of Appeal in *Somerville v. Canada (Attorney General)*" (1997) 23:2 Can. Pub. Pol'y 164; L. Young, "Regulating Campaign Finance in Canada: Strengths and Weaknesses" (2004) 3 Elect. L.J. 444. On redistricting and the question of one person, one vote see John C. Courtney's many articles and books including, *Commissioned Ridings: Designing Canada's Electoral Districts* (Montreal & Kingston: McGill-Queen's University Press, 2001). On the constitutional rights of small political parties, for example: H. MacIvor, *The Charter of Rights and Party Politics: The Impact of the Supreme Court of Canada Ruling in Figueroa v. Canada (Attorney General)* (2004) 10 Choices (Montreal: IRPP) and H. MacIvor, "Judicial Review and Electoral Democracy: The Contested Status of Political Parties Under the *Charter*" (2002) 21 Windsor Y.B. Access to Just. 479. Generally on judicial review and the democratic process, see: 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), at 64; H. MacIvor, *Canadian Politics and Government in the Charter Era* (Toronto: Thomson Nelson, 2006) (forthcoming); R. Knopff, "How Democratic is the Charter? And Does it Matter?" (2003) 19 Sup. Ct. L. Rev. 199.

<sup>15</sup> One notable exception is a symposium held jointly by the University of Saskatchewan College of Law and Department of Political Science in 1992 to discuss *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158. See J.C. Courtney, P. MacKinnon, & D.E. Smith, *Drawing Boundaries: Legislatures, Courts, and Electoral Values* (Saskatoon: Fifth House Publishers, 1992) featuring contributions or commentaries from law professors R. Fritz, K. Roach, and K. Swinton. Participants in that symposium have also dealt with the question of redistricting in other articles, see: R. Fritz, "The 1990s Federal Electoral Boundaries Readjustments and the *Charter*" (1998) 61 Sask. L. Rev. 467; R. Fritz, "Challenging Electoral Boundaries Under the *Charter*: Judicial Deference and Burden of Proof" (1999) 5 Rev. Const. Stud. 1; K. Roach, "Reapportionment in British Columbia" (1990) 24 U.B.C. L. Rev. 79. Other law review articles written by Canadian law professors over the last 20 years include: B. Schwartz, "Proportional Representation for Canada?" (2001) 28 Man. L.J. 133; R. Haigh, "Between Here and There Is Better Than Anything Over There: The Morass of *Sauvé v. Canada (Chief Electoral Officer)*" (2003) 20 Sup. Ct. L. Rev. 353; J. Cameron, "Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on *Re Vancouver Sun and Harper v. Canada*" (2005) 17 N.J.C.L. 71.

the past year, three Canadian law schools, two for the first time, offered upper year courses that featured the democratic process as the central focus or as a major topic.<sup>16</sup> However, it is significant that all three courses were taught by non-faculty members.

The dearth of attention to the democratic process among Canadian legal scholars may be attributable to the relative inattention of the Supreme Court of Canada to the same subject. While the Supreme Court of Canada has considered many political questions since the advent of the *Charter*, it considered surprisingly few cases concerning the democratic process during the first 15 years of the *Charter*.<sup>17</sup> More

---

<sup>16</sup> University of Alberta, Law 599: "Law and the Democratic Process" (Fall, 2004) (Instructor: Colin Feasby). University of Ottawa, CML 4104E: "Studies in Public Law: The Law of Canadian Democracy" (Winter, 2005) (Instructor: Aaron Freeman). Note that the University of Ottawa course concerns a number of the practical aspects of the practice of politics such as lobbyist regulation and the role of the ethics counsellor that are not necessarily constitutional in nature. McGill University, CMPL 518: "Policies, Politics, and the Legislative Process" (Instructor: Gregory Tardi). The McGill University course concerns "political law" which Greg Tardi defines as broadly to include all of the practices and procedures of Parliament as well as those subjects that are said to comprise law and the democratic process in this paper. The Alberta, Ottawa, and McGill courses should be distinguished from those such as Michael Mandel's "Legal Politics" course at Osgoode Hall which concerns how law deals with "political issues" rather than the "political process" although the two are intertwined to some extent. Kent Roach's course "The Role of Courts in a Democracy" at the University of Toronto also touches on some democratic process issues, but is concerned more with the broader question of the legitimacy of courts and judicial review in a democratic society.

<sup>17</sup> Notable exceptions to this generalization are *Reference re Provincial Electoral Boundaries (Sask.)*, *supra*, note 15; *Haig v. Canada (Attorney General)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995; and *Harvey v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 82, [1996] 2 S.C.R. 876. The Supreme Court has denied leave on the following cases which appear to meet the criteria of "public importance" and uncertainty in the law: *Re Allman v. Northwest Territories (Commissioner)*, [1984] 1 S.C.R. v (challenging residency requirements for voting in a referendum); *Campbell v. Canada*, [1988] 6 W.W.R. lxviii (concerning allocation of seats in the House of Commons among the provinces and with a strong dissent at the British Columbia Court of Appeal); *Pacific Press v. British Columbia (Attorney General)*, [1998] S.C.C.A. No. 628 (striking down B.C. *Elections Act* third party election expense restrictions contrary to *Libman* and striking down mandatory disclosure of polling data contrary to *obiter* in *Thomson Newspapers*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877; *Charlottetown (City) v. Prince Edward Island*, [1999] S.C.C.A. No. 64 (interpreting *Saskatchewan Electoral Boundaries* as setting out a +/- 25 per cent rule contrary to the interpretation of the Alberta Court of Appeal in *Reference re: Electoral Division Statutes Amendment Act, 1993*, [1994] A.J. No. 768 (C.A.)); and *Fitzgerald (Next friend of) v. Alberta*, [2004] S.C.C.A. No. 349 (challenging age restrictions on the right to vote). The following cases were either not appealed to the Supreme Court or leave applications were discontinued: *Lac la Biche (Town) v. Alberta*, [1994] S.C.C.A. No. 500 (concerning principles other than population applicable to redistributing); *Barrette v. Canada*, [1994] Q.J. No. 219, 113 D.L.R. (4th) 623 (C.A.) (challenging the threshold for reimbursement of election expenditures in federal elections); *Reference re: Electoral Division Statutes Amendment Act, 1993*, [1994] A.J. No. 768 (C.A.) (concerning burden of justifying population deviations); *Reform Party of Canada v. Canada (Attorney General)*, [1995]



recent cases suggest that the Supreme Court's reluctance to tackle democratic process cases in the early Charter era may be receding. Beginning with *Libman*<sup>18</sup> in 1997 and continuing with the *Secession Reference*<sup>19</sup> and *Thomson Newspapers*<sup>20</sup> in 1998, *Corbière*<sup>21</sup> in 1999, *Figueroa*<sup>22</sup> in 2002, *Sauvé*<sup>23</sup> in 2003, and now *Harper* in 2004 the Supreme Court is showing an increasing propensity for wading into the political thicket.<sup>24</sup> Moreover, an unscientific survey of case law from lower courts over the past year indicates that the democratic process is contested in Canadian courts more than ever before.<sup>25</sup> The Supreme Court's emerging jurisprudence of the democratic process and the growth in litigation over the democratic process merit a commensurate increase in scholarly attention.

---

A.J. No. 793, 10 W.W.R. 764 (C.A.) (challenging the reservation and allocation of broadcast time for political broadcasts and with a strong dissent in the Alberta Court of Appeal); *Somerville v. Canada (Attorney General)*, [1996] A.J. No. 515, 184 A.R. 241 (C.A.).

<sup>18</sup> *Libman v. Canada (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569.

<sup>19</sup> *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1997] 2 S.C.R. 217.

<sup>20</sup> *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877.

<sup>21</sup> *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203.

<sup>22</sup> *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912.

<sup>23</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2003] 3 S.C.R. 519.

<sup>24</sup> The "political thicket" is the evocative description used by Frankfurter J. to describe laws governing the democratic process: *Colgrove v. Green*, 328 U.S. 549 at 556 (1946). Justice Frankfurter was of the view that the Court should not involve itself in political questions such as the apportionment question before the Court in *Colgrove*.

<sup>25</sup> Lower court cases concerning the democratic process within the last 12 months include: *Lukaszuk v. Kibermanis*, [2005] A.J. No. 167 (C.A.) (contested election and meaning of voter intention); *R. v. Bryan*, [2004] B.C.J. No. 451 (C.A.) (leave to appeal successful Charter challenge of publication ban on election results prior to close of polls in British Columbia); *Baier v. Alberta*, [2004] A.J. No. 1003 (Q.B.) (Charter s. 2(b) challenge to restrictions on school board employees standing for election to school board); *Fitzgerald v. Alberta*, [2004] A.J. No. 570 (C.A.) (Charter s. 3 challenge concerning the right of persons under 18 to vote); *Danielson v. Calgary City*, [2004] A.J. No. 1404 (Q.B.) (alleged electoral fraud in municipal election); *Barron v. Warkentin*, [2004] A.J. No. 919 (Q.B.) (jurisdiction of court to interfere with regulation of constituency nomination contest); *Raïche v. Canada (Attorney General)*, [2004] F.C.J. No. 839 (T.D.) (minority rights in redistricting process); *Grewal v. Conservative Party of Canada*, [2004] O.J. No. 2299 (S.C.) (constituency nomination dispute — disqualification of candidate for criminal record); *Ahenakew v. MacKay*, [2004] O.J. No. 2318 (C.A.) (regulation and merger of political parties); *Sinclair v. Conservative Party of Canada*, [2004] F.C.J. No. 1966 (T.D.) (judicial review of Chief Electoral Officer's decision on merger of political parties); *Barkley v. Anderson*, [2004] A.J. No. 1307 (C.A.) (dispute over voter lists in nomination contest); *Bellerose v. Patenaude*, [2004] A.J. No. 1063 (Q.B.) (contested election in a Métis Settlement); *Monaghan v. Joyce*, [2004] N.J. No. 76 (Nfld. S.C.T.D.) (application to void an election).

The dearth of study of the legal regulation of the democratic process in Canada is in stark contrast to developments in other constitutional democracies where the study of the role of the courts in policing the democratic process is a burgeoning academic industry. The United States is at the vanguard of the study of law and the democratic process. This is not surprising given the history of prominent U.S. cases concerning the democratic process beginning with the one person, one vote cases in the 1960s and extending through *Bush v. Gore* and the more recent battles over the California recall election and the 2004 elections. Symposia in leading law reviews on the democratic process are common,<sup>26</sup> many major law schools offer at least one upper year course on the subject,<sup>27</sup> there are two commercial case books available,<sup>28</sup> and recently a specialist legal journal — the *Election Law Journal* — was founded.<sup>29</sup> The study of law and the democratic process is not an academic ghetto confined to specialists. Quite the opposite, in fact. Giants of the U.S. legal academy including Bruce Ackerman, Ronald Dworkin, Owen Fiss, Frank Michelman, Richard Posner, Frederick Schauer, and Cass Sunstein have all given democratic process questions serious consideration over the past decade both before and after the seminal event of *Bush v. Gore*.<sup>30</sup> The growth in the study of law and the democratic

---

<sup>26</sup> See, e.g., “Symposium: Regulating the Electoral Process” (1993) 71 Tex. L. Rev. 1409; “Law and the Political Process” (1998) 50 Stan. L. Rev. 605; “Symposium: The Law and Economics of Election Law” (1999) 85 Va. L. Rev. 1533; “Election Law as its Own Field of Study” (1999) 32 Loy. L.A. L. Rev. 1095; “Symposium: Law and Political Parties” (2000) 100 Colum. L. Rev. 593; “Symposium: *Baker v. Carr*: A Commemorative Symposium” (2002) N.C. L. Rev. 1103; “Symposium: Federal Courts and Electoral Politics” (2002) 82 Boston U. L. Rev. 608; “Symposium: The Supreme Court and Election Law” (2004) 31 J. of Legislation 1; “Symposium: Law of Democracy” (2004) 153 U. Penn. L. Rev. 1; “Symposium: Democracy and Elections in North America: What Can We Learn from Our Neighbor?” (2004) 3 Election L. J. 396.

<sup>27</sup> Chicago, Columbia, Harvard, Michigan, NYU, Pennsylvania, Stanford, UCLA, Virginia and Yale. For a complete list of law and the democratic process teachers and their respective universities, see the database posted online at: <[www.electionlaw.org](http://www.electionlaw.org)> (last accessed 17 June 2005).

<sup>28</sup> S. Issacharoff, P. Karlan, & R. Pildes, eds., *The Law of Democracy*, 2d ed. (New York: Foundation Press, 2001); D. Lowenstein & R. Hasen, eds., *Election Law—Cases and Materials*, 3d ed. (Durham: Carolina Academic Press, 2004).

<sup>29</sup> The first issue of the *Election Law Journal* was released in March 2002.

<sup>30</sup> See, e.g., B. Ackerman & I. Ayres, *Voting With Dollars: A New Paradigm for Campaign Finance* (New Haven: Yale University Press, 2002); R. Dworkin, ed., *A Badly Flawed Election: (Debating) Bush v. Gore, The Supreme Court and American Democracy* (New York: The New Press, 2002) (with contributions by L. Guinier, R. Posner, C. Sunstein, L. Tribe, and others); R. Dworkin, “The Curse of American Politics” 43:16 *The New York Review of Books* (17 October 1996) 19; R. Dworkin, “Free Speech and the Dimensions of Democracy in E. Joshua Rosenkranz, ed., *If Buckley Fell: A First Amendment Blueprint for*

process is not a phenomenon peculiar to the United States. Two recent law review symposia have been dedicated to law and the democratic process in Australia.<sup>31</sup> Moreover, there is a growing international community of scholars examining developments in law and the democratic process from a comparative perspective.<sup>32</sup>

The profusion of legal writing on the democratic process has given rise to a growing recognition in the U.S. and elsewhere that the intersection of constitutional law and the democratic process is a distinct sub-discipline of constitutional law with recognizable parameters. In a law review symposium dedicated to the subject of "Election Law as its Own Field of Study," Pamela Karlan asked rhetorically: "What then does it mean to talk about the legal structure of the political process as its own field of study?" According to Karlan:

The law governing politics is a form of applied constitutional law; it involves repeated interactions among statutes and constitutional provisions, courts and legislatures, and state and national governments. Moreover, looking at the statutes, structures, and cases that govern our politics as it is actually conducted may offer a far richer avenue for understanding constitutional law generally than pursuing ever more theoretical and abstract forms of constitutional theory....<sup>33</sup>

---

*Regulating Money in Politics* (New York: Century Foundation Press, 1999) at 63; O. Fiss, *The Irony of Free Speech* (Cambridge, Mass.: Harvard University Press, 1996); F. Michelman, "Conceptions of Democracy in American Constitutional Argument" (1989) 41 Fla. L. Rev. 443; R. Posner, *Law, Pragmatism and Democracy* (Cambridge, Mass.: Harvard University Press, 2003); C. Sunstein, *Democracy and the Problem of Free Speech* (Toronto: Maxwell Macmillan, 1993); C. Sunstein, "Political Equality and Unintended Consequences" (1994) 94 Colum. L. Rev. 1390; F. Schauer, "Judicial Review of the Devices of Democracy" (1994) 94 Colum. L. Rev. 1326; F. Schauer & R. Pildes, "Electoral Exceptionalism and the First Amendment" (1999) 77 Tex. L. Rev. 1803.

<sup>31</sup> "Electoral Law Symposium: An Introduction" (2004) 32 Fed. L. Rev. 1; "Special Issue: Electoral Regulation" (1998) 7(2) Griffith L. Rev. 1. See also, G. Orr, B. Mercurio, & G. Williams, *Realising Democracy: Electoral Law in Australia* (Annadale: Federation Press, 2003).

<sup>32</sup> See, e.g., K.D. Ewing & S. Issacharoff, *Party Funding and Campaign Financing in International Perspective* (Oxford: Hart, 2005) (forthcoming).

<sup>33</sup> P. Karlan, "Election Law as its Own Field of Study: Constitutional Law, the Political Process, and the Bondage of Discipline" (1999) 32 Loy. L.A. L. Rev. 1185, at 1196. On January 31, 2005 Greg Tardi wrote to a long list of mostly Canadian constitutional law scholars and practitioners echoing Karlan in a call for the creation of a community of scholars to study what he calls "political law":

The field of study described by Karlan, is both old and new.<sup>34</sup> Law and the democratic process as a field of study comprises much of the constitutional law that would have been familiar to Dicey and Bagehot.<sup>35</sup> Indeed, the right to vote, the form of the electoral system, and rules applicable to Parliament were central parts of constitutional law as it was known prior to the Canadian Bill of Rights and the Charter. The field of study is only new in the sense that it marries a Diceyan concept of constitutional law — small “c” constitutional law — with contemporary big “C” constitutional law which in Canada is dominated by the Charter. Subjects that fall within the ambit of law and the democratic process are at least: (1) contested elections and referenda; (2) campaign finance (public funding, spending limits, allocation of free broadcasting, *etc.*); (3) redistricting; (4) minority rights in the democratic process; (5) limits on participatory rights; (6) the structure of the electoral system; (7) non-financial limits on expression during elections and referenda; and (8) the role and regulation of candidates, political parties and

---

Political law can be defined as the study of the interaction among public law, public policy and administration, and politics, as well as examination of the influence and impact of legality on the conduct of democratic governing.

There is a genuine need for recognition of political law as an autonomous field of study and practice. Some Canadian law schools devote insufficient attention to evolving public law issues in their core teaching. Universities tend to teach public policy and administration, and politics, as if they were unrelated to each other and especially to public law. The professions dealing with governing are fragmented on the basis of such educational streaming. The literature about government is diffuse. Even informed public discourse tends to underplay the fundamental contribution of legality to democracy.

<sup>34</sup> G. Orr, B. Mercurio, & G. Williams, “Electoral Law Symposium: An Introduction” (2004) 32 Fed. L. Rev. 1, at 3 remarking on the debate between “Election Law” (Hasen and Lowenstein’s preferred term) and the “Law of Democracy” (Issacharoff, Pildes & Karlan’s preferred term): “An intermediate title might be the ‘Law of Politics’. It has the advantage of capturing a field of human activity, rather than a discrete process (elections) or a vague aspiration (democracy).” Greg Tardi, *supra*, note 10 prefers the term “political law.” I am agnostic on the term used to describe the subject area. In this paper and elsewhere I use the label “law and the democratic process.”

<sup>35</sup> W. Bagehot, *The English Constitution* (Oxford: Oxford University Press, 2001); A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (8th ed.) (Toronto: Macmillan, 1923). Dicey wrote at 22-23:

*Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution and exercise of the sovereign power in the state. Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, of the members thereof, exercise their authority. Its rules prescribe the order of succession to the throne, regulate the prerogatives of the chief magistrate, determine the form of the legislature and its mode of election.*

third parties. Each of these subjects raise both small “c” and big “C” constitutional issues.

Even if the suggestion is accepted that law and the democratic process has been neglected by the Canadian legal academy, one might well ask: “So what?” The first and foremost reason why law and the democratic process matters is that for better or worse the Supreme Court of Canada’s Charter analysis is explicitly contextual.<sup>36</sup> Context, in law and democratic process cases, concerns the nature of politics and the relationship between political actors and the legal regime that regulates politics. Individual litigants too often overlook context, so sometimes the courts look to the legal academy for reflection on the larger implications of discrete controversies. Law and the democratic process, as the discipline has evolved in the United States, has been the crucible for a vibrant debate and cross-fertilization between political scientists and constitutional lawyers. This debate and cross-fertilization has both deepened the legal analysis of democratic process issues and made the work of political scientists more accessible to the courts. This is not to suggest that U.S. courts have availed themselves of the ample body of literature that exists in that country or that their decision-making is any better than that of the Supreme Court of Canada; rather, it is to suggest that if a robust Canadian law and the democratic process literature existed, it could assist the Court to appreciate the context of the democratic process. As will be explained later in this paper, the Court’s lack of appreciation for context is one of the shortcomings of the *Harper* decision. One cannot help but wonder if the absence of a vibrant Canadian literature on law and the democratic process is partially responsible for the Supreme Court’s impoverished understanding of context.

Quite apart from understanding the practice of politics in context, the law and democratic process scholarship has confronted anew debates over the relationship between legislatures and the courts and the nature of judicial review. It is no accident that democratic process issues have attracted the attention of many of the leading U.S. legal theorists in recent years. This development is particularly apposite given that the Supreme Court of Canada in its recent democratic process cases has

---

<sup>36</sup> For a criticism of the Supreme Court’s contextual approach see generally, J. Cameron, “The Past, Present, and Future of Expressive Freedom Under the *Charter*” (1997) 35 Osgoode Hall L.J. 1. See also, C. Bredt and A. Dodek, “The Increasing Irrelevance of Section 1 of the *Charter*” (2001) 14 Sup. Ct. L. Rev. 175, at 184-85.

both unabashedly stepped into the realm of political theory and struggled with developing a principled approach to judicial review. Perhaps the most obvious failure of the Court is that it has not developed a principled approach to judicial review in democratic process cases. As this paper will endeavour to explain later, the U.S. debate between an explicitly normative approach and a more structural or process-oriented approach to democratic process cases is relevant to the predicament in which the Supreme Court of Canada finds itself after *Harper*. Indeed, it will be suggested that heightened sensitivity to process questions in both section 2(b) and section 3 cases may bring much needed coherence to the Supreme Court's jurisprudence of the democratic process.

### III. *HARPER V. CANADA*

#### 1. *Canada Elections Act 2000* — **Third Party Election Spending Limits**

Third party spending limits have been a central feature of the Canadian political finance regime since it was first conceived. The main pillars of Canada's political finance legislation, including third party spending limits, were originally suggested in Canada by the Barbeau Committee in 1966 and enacted in 1974.<sup>37</sup> The 1974 third party spending limits prohibited any expenditures during a campaign period that *directly* promoted or opposed a candidate or political party, but provided for a "good faith" exception. The good faith exception provided essentially that a third party that incurred expenses with respect to the promotion of an issue of public policy was protected so long as there was no co-ordination or collusion with a candidate or political party. The good faith exception was tested in a 1978 case where a union member hired a plane to fly around the city of Ottawa towing a banner that said "O.H.C. Employees 767 C.U.P.E. vote, but not Liberal."<sup>38</sup> The failure to secure a conviction showed that the third party spending limits were toothless. Parliament responded in 1983 by removing the good faith exception.<sup>39</sup>

---

<sup>37</sup> Canada, *Report of the Committee on Election Expenses* (Ottawa: Queen's Printer, 1966) (Chair: Alphonse Barbeau); *Election Expenses Act*, S.C. 1974, c. 51.

<sup>38</sup> *R. v. Roach* (1978), 101 D.L.R. (3d) 736, at 737 (Ont. Co. Ct.).

<sup>39</sup> *An Act to amend the Canada Elections Act (No. 3)*, S.C. 1983, c. 164.

The prohibition on third party spending minus the good faith exception was challenged by the National Citizen's Coalition in one of the first Charter section 2(b) cases.<sup>40</sup> The Alberta Court of Queen's Bench struck down the third party spending limits as an unjustifiable limit on freedom of expression shortly before the 1984 federal election. The decision was not appealed and no third party spending limits were enforced in either the 1984 or 1988 elections.

The 1988 election was marked by significant third party spending by proponents and opponents of the Free Trade Agreement between Canada and the United States.<sup>41</sup> In response to public concerns over the political process and political finance, following the 1988 election the Royal Commission on Electoral Reform and Party Financing chaired by Pierre Lortie was appointed. The Lortie Commission recommended in 1992 that third party spending limits be reinstated and that the limits apply to *indirect* as well as direct promotion or opposition of candidates or political parties.<sup>42</sup> The following year Parliament amended the *Canada Elections Act* to provide for a \$1,000 spending limit for third parties but did not broaden the limit to indirect promotion or opposition of candidates or political parties.<sup>43</sup> Shortly after the amendments, the National Citizens' Coalition once again challenged the constitutionality of third party spending limits. In 1996, the Alberta Court of Appeal struck down the third party spending limits in *Somerville v. Canada (Attorney General)* on the basis that the legislative objective was not pressing and substantial.<sup>44</sup> As a result of *Somerville*, the third party spending limits were not enforced during the 1997 election.

The 1997 Supreme Court decision in *Libman* was a turning point. The Court accepted that the purpose of political finance controls was egalitarian and found the legislative objective behind the specific third party spending limits in issue to be pressing and substantial. The Court in *Libman*, however, went further to explicitly disagree with the Alberta Court of Appeal's reasoning in *Somerville* describing the purpose of the

---

<sup>40</sup> *National Citizens' Coalition Inc. v. Canada (Attorney General)* (1984), 11 D.L.R. (4th) 481 (Alta. Q.B.).

<sup>41</sup> Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, Vol. 1 (1991), at 337 [hereinafter "*Final Report*"].

<sup>42</sup> *Id.*, at 340.

<sup>43</sup> *An Act to amend the Canada Elections Act*, S.C. 1993, c. 19, s. 259.

<sup>44</sup> [1996] A.J. No. 515, 184 A.R. 241 (C.A.).

*Canada Elections Act*'s political finance regime as "laudable."<sup>45</sup> Despite finding the purpose of the legislation to be praiseworthy, the Court struck down the specific limits in Quebec's *Referendum Act* on the grounds that they were not minimally impairing.

Following *Libman*, Parliament was emboldened to once again enact third party spending limits. The CEA 2000 provided for two limits: a \$150,000 aggregate national limit and a \$3,000 constituency limit. The \$150,000 national limit pertained to "election advertising," defined as communications that promote or oppose a particular candidate or party, including communications that take "a position on an issue with which a registered party or candidate is *associated*."<sup>46</sup> Parliament in the CEA 2000 essentially adopted the Lortie Commission's recommendation to regulate third party activities that indirectly promote candidates and political parties. The definition of "election advertising," unlike the definitions that preceded it, does not require that communications that promote or oppose a political party or candidate be *direct*. The \$3,000 constituency limit applies to communications that promote or oppose candidates 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*."<sup>47</sup>

## 2. The Alberta Court of Queen's Bench

Shortly after the adoption of the CEA 2000, Stephen Harper, erstwhile president of the National Citizens' Coalition and present leader of the Conservative Party of Canada, commenced an action under section 2(b) and section 3 of the Charter to declare the new third party spending limits and certain related provisions unconstitutional.<sup>48</sup> After the trial, but before a decision was rendered, a federal election was called. Harper successfully moved before the trial judge for an injunction suspending operation of the law.<sup>49</sup> The injunction order was upheld by the Court of

---

<sup>45</sup> *Libman*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 56.

<sup>46</sup> *Canada Elections Act, 2000*, S.C. 2000, c. 9, s. 319 [hereinafter "CEA 2000"].

<sup>47</sup> CEA 2000, s. 350.

<sup>48</sup> A violation of Charter s. 2(d) was also argued. The s. 2(d) arguments relate principally to the anti-circumvention and anti-collusion provisions that support the third-party spending limits. The s. 2(d) issues did not preoccupy any of the three Courts and will not be discussed in this paper.

<sup>49</sup> *Harper v. Canada (Attorney General)*, [2000] A.J. No. 1226, 6 C.P.C. (5th) 362 (Q.B.).



Appeal, but reversed by the Supreme Court of Canada approximately halfway through the election campaign.<sup>50</sup>

The trial decision in *Harper* was released following the 2000 election. Justice Cairns did not find that the third party spending limits violated section 3. Justice Cairns held, without the benefit of the Supreme Court's more expansive views in *Figueroa*, that section 3 is principally concerned with representation, not information. The informational component of the right to vote is ancillary to the right to effective representation and accordingly guarantees the voter only "sufficient information."<sup>51</sup> Justice Cairns' reasons make it clear that he viewed third party spending limits as a freedom of expression problem, not a democratic rights issue.

Justice Cairns held that the third party spending limits violated section 2(b) and was not saved under section 1. In arriving at this conclusion, Cairns J. distinguished the case from *Libman*. Justice Cairns' way around *Libman* was to find that the basis for the Lortie Commission's recommendations, upon which the Supreme Court in *Libman* had relied, was a discredited research study.<sup>52</sup> This same conclusion, together with the government's inability to provide other empirical evidence of harm caused by third party advertising, led Cairns J. to conclude that the expenditure limits did not serve a pressing and substantial objective and were therefore unconstitutional.

For the purposes of this paper, the most important part of Cairns J.'s decision is his approach to two other aspects of section 1 of the Charter; namely, his consideration of the definition of the word "associated" in the context of the section 1 requirement that limits be "prescribed by law" and in the context of his minimal impairment analysis and his evaluation of the monetary limit chosen by Parliament in his minimal impairment analysis. Justice Cairns found that the regulation of expression concerning issues "associated" with parties and candidates was unconstitutionally vague and did not constitute a limit "prescribed by law." Justice Cairns added rhetorically:

---

<sup>50</sup> *Harper v. Canada (Attorney General)*, [2000] A.J. No. 1240, 266 A.R. 262 (C.A.); *Harper v. Canada (Attorney General)*, [2000] S.C.J. No. 58, [2000] 2 S.C.R. 764.

<sup>51</sup> *Harper (Q.B.)*, *supra*, note 5, at para. 133.

<sup>52</sup> *Id.*, at paras. 266-70, 273.

Is a person being given fair notice of the conduct which is being proscribed? With respect to the matter of issues which are “associated” with a party or candidate, I find there is not fair notice. While one or two issues may stand out in every election, parties and candidates generally take a position on a host of issues. All of the major parties will have positions on issues ranging from health care to constitutional reform. A third party could take a position on an issue considering it to be pure issue advertising, only to subsequently find out that Elections Canada considers the issues to be “associated” or even “particularly associated” with a party or candidate ... thus running afoul of the legislation. It is ill-defined.<sup>53</sup>

Put differently, Cairns J. is concerned about the definition extending beyond the underlying legislative objective.

Justice Cairns did not come to a conclusion concerning the appropriateness of the quantum of the spending limits. He explained that he was “not in a position to determine what the appropriate numbers are and some deference should be accorded to Parliament.”<sup>54</sup> At the same time, however, he noted that he was “troubled by the relatively low numbers and the relatively limited amount of speech that can be engaged in by third parties within the limits.”<sup>55</sup> Justice Cairns in any event concluded that the spending limits were not minimally impairing for the same reasons that he concluded that the limits were vague.

### 3. The Alberta Court of Appeal

#### (a) *The Majority Decision of Paperny J.A.*

Justice Paperny, writing for the majority of the Alberta Court of Appeal, concurred with the trial judge that third party spending limits did not offend section 3 of the Charter but that third party spending limits violated section 2(b). The majority also agreed with the trial judge’s conclusion that there was insufficient evidence of harm arising from third party electoral activities to support a finding that the legislative objective was pressing and substantial.<sup>56</sup> Despite her conclusion,

---

<sup>53</sup> *Id.*, at para. 220.

<sup>54</sup> *Id.*, at para. 300.

<sup>55</sup> *Id.*, at para. 300.

<sup>56</sup> *Harper v. Canada (Attorney General)*, [2002] A.J. No. 1542, 14 Alta. L.R. (4th) 4, at para. 161 (C.A.) [hereinafter “*Harper (C.A.)*”].

she undertook a full section 1 analysis. She approached her section 1 analysis on the basis that if she was incorrect with respect to her conclusion on the lack of a pressing and substantial objective, the lack of proof of harm was nevertheless relevant to the standard of review to be applied. Indeed, she concluded that:

This is not a case where great deference is to be accorded to Parliament's objectives. As in *Thomson Newspapers*, when the contextual factors indicate that the government has not established the harm to be prevented is widespread or significant or when the group to be protected is not historically vulnerable or disadvantaged, little deference should be shown.<sup>57</sup>

Justice Paperny's strict standard of review is most evident in her consideration of whether or not the third party spending limits were minimally impairing.

On the section 1 threshold question of vagueness, Paperny J.A. disagreed with Cairns J. as to whether the limit was "prescribed by law." Despite conceding the fact that "'association' cannot be defined *a priori* with precision," Paperny J.A. concluded that "it is possible to determine when third party messages bear sufficient resemblance to political party and candidate policies that they come under the administration of the *Elections Act 2000*."<sup>58</sup> Justice Paperny, following the usual practice of Canadian courts, preferred to consider the definitional question as part of her minimal impairment analysis.<sup>59</sup>

Justice Paperny's minimal impairment analysis focused on two separate problems. First, she considered the quantum of the third party limits. To Paperny J.A., it was clear that in many cases the electoral district limit of \$3,000 "renders even minimally effective third party advertising nugatory. A scheme that so restricts freedom of expression to make it ineffectual is equivalent to an absolute ban."<sup>60</sup> She also concluded that:

---

<sup>57</sup> *Id.*, at para. 135.

<sup>58</sup> *Id.*, at para. 58.

<sup>59</sup> *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606, at 627:

The Court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 *in limine*, and will rather consider the scope of the disposition under the "minimal impairment" test.

<sup>60</sup> *Harper (C.A.)*, *supra*, note 56, at para. 176.

the \$150,000 overall limit, even if perfectly apportioned at \$3,000 among districts, only allows spending in 50 constituencies.... Or by another calculation, \$150,000 divided among 298 constituencies provides for little over \$503 per constituency. The total limit appears to amount to a ban on nationwide advertising.<sup>61</sup>

Foreshadowing the language used in *Figueroa*, Paperny J.A. concluded that such stringent limits were unjustifiable because it precluded citizens from “meaningful expression.”<sup>62</sup>

Justice Paperny’s conclusion that the spending limits were too miserly is unremarkable. What is much more interesting is that she identified the problem of limiting issue advocacy:

The *Elections Act 2000* [third party spending limits] include those who simply want to raise the profile of an issue regardless of political affiliations. By including such expressions in the legislation, the infringement of rights goes beyond what is necessary to control election financing by encroaching upon the freedom of expression of those who seek to voice public concerns which are inconsequential to partisan advocacy. As such, the legislation cannot pass the minimal impairment analysis.<sup>63</sup>

Even more clearly than Cairns J., Paperny J.A. appreciates that the stated underlying legislative objective does not extend to non-partisan expression concerning issues during an election period. Essentially what Paperny J.A. concluded was that even if there was a pressing and substantial objective, it did not justify the regulation of third party pure issue advocacy. As will be discussed below, the Supreme Court in *Harper* entirely missed this point.

(b) *The Dissenting Decision of Berger J.A.*

Justice Berger’s dissenting reasons begin with a discussion of the dialogue theory of judicial review. Dialogue theory has particular resonance in the context of third party spending limits because of the give and take between the courts and Parliament over third party spending

---

<sup>61</sup> *Id.*, at para. 177.

<sup>62</sup> *Id.*, at para. 178.

<sup>63</sup> *Id.*, at para. 184.

limits in the *CEA* and between the courts and provincial legislatures with respect to similar legislation. Justice Berger was careful to note that the Supreme Court in *Sauvé* pointed out that “the dialogue metaphor does not signal a lowering of the s. 1 justification standard.”<sup>64</sup> At the same time, however, he framed the question before the Court in *Harper* to be “whether the response of the Parliament of Canada in enacting the *Canada Elections Act 2000* is properly respectful of the *Charter* values identified by the Supreme Court of Canada in *Libman v. Quebec (Attorney General)*.”<sup>65</sup> Dialogue in this case may not have led directly to Berger J.A. adopting a deferential stance in principle; however, indirectly the idea that inquiry was limited to whether the legislative response was consistent with *Libman* suggests a lower standard of review in practice.

Justice Berger confronted the definitional issue in the context of the threshold question of whether the third party spending limits were “prescribed by law” rather than in his minimal impairment analysis. Justice Berger, unlike the trial judge, Paperny J.A., or the Supreme Court, offered a suggestion as to how a court might deal with the indeterminacy of the word “associated” if actually confronted with an alleged violation of the third party spending limits. Justice Berger suggested that “[t]he relevant inquiry ... will be whether a reasonable person would perceive that third party election advertising takes a position on an issue that is particularly associated with a registered political party or candidate.”<sup>66</sup> The addition of a reasonableness qualification goes some way to resolving the vagueness of the word “associated,” but it does not necessarily reduce the breadth of the definition. Justice Berger, however, did not address the question of definitional overbreadth in his minimal impairment analysis.

Justice Berger also took a different approach from the majority to the balance of his section 1 analysis. To Berger J.A., the question of proof was not important. Instead, he found the legislative objective behind third party limits to be pressing and substantial according to the following logic. First, the justification for the political finance regime in the abstract was consistent with other *Charter* rights. Indeed, the legislative purpose of the *CEA* had been said by the Supreme Court in *Libman*

---

<sup>64</sup> *Id.*, at para. 199, quoting *Sauvé*, *supra*, note 23, at para. 104.

<sup>65</sup> *Id.*, at para. 200.

<sup>66</sup> *Id.*, at para. 227.

to be “laudable.”<sup>67</sup> Second, properly understood, the limits on third party spending were designed to prevent damage to the larger political finance regime by stopping an avenue for circumvention of candidate and political party spending limits. He concluded:

The provisions at issue are part of the overall objective of Parliament to ensure a fair electoral system. The “harm” posed by unregulated third party spending is the damage done to the regime of fairness and equity created and maintained by party and candidate spending limits. Limiting third party spending is essential to preserving the integrity of the existing scheme of electoral finance controls.<sup>68</sup>

Justice Berger went on to conclude that: “[t]he fact that the Lortie Commission concluded that its own limit of \$1,000 for all third party election expenditures would satisfy the minimal impairment test speaks strongly in favour of the minimal impairment validity of the provision adopted by Parliament.”<sup>69</sup>

#### 4. The Supreme Court

##### (a) *The Majority Decision of Bastarache J.*

The majority decision of the Supreme Court of Canada, written by Bastarache J., begins with an affirmation and elaboration of the political theory articulated in *Libman*. The majority of the Court in *Harper* adopted my term “egalitarian model” to describe an approach to the regulation of elections that draws on the political theory of John Rawls and other liberal theorists who have participated in the U.S. campaign finance reform debates over the past 40 years.<sup>70</sup> The egalitarian model, Bastarache J., explains “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.”<sup>71</sup> Justice Bastarache went on to explain that the State may implement the

---

<sup>67</sup> *Libman*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 56.

<sup>68</sup> *Harper (C.A.)*, *supra*, note 56, at para. 261.

<sup>69</sup> *Id.*, at para. 270.

<sup>70</sup> Feasby, “The Emerging Egalitarian Model,” *supra*, note 3, at 9-17.

<sup>71</sup> *Harper (S.C.C.)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827, at para. 62.

egalitarian model by funding candidates and political parties and by restricting “voices which dominate the political discourse so that others may be heard as well.”<sup>72</sup> The *Harper* majority makes it clear that the principles set out in *Libman* and contested by the Alberta courts are now the orthodox position in Canada.

With the esoteric question of political theory behind him, Bastarache J. tackled the more terrestrial issue of whether the impugned sections of the *CEA 2000* contravened sections 2(b) and 3 of the Charter. Justice Bastarache began with section 3. Section 3, as the Court recently articulated in *Figueroa*, guarantees citizens the right to “meaningful participation” in the electoral process.<sup>73</sup> A violation of section 3 will be found only when a citizen’s right to meaningful participation has been compromised. In the context of spending limits, Bastarache J. stated the problem as follows:

Spending limits ... must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters. Spending limits which are overly restrictive may undermine the informational component of the right to vote. To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.<sup>74</sup>

In *Figueroa*, the Court found that the inability of small political parties to issue tax receipts to donors and the inability of small party candidates to be identified by party affiliation on ballots infringed citizens’ right to meaningful participation in the electoral process.<sup>75</sup> The restrictions in *Figueroa* were clearly unfair to small political parties and their candidates, but they stopped far short of precluding participation in the political process. Despite *Figueroa*’s seemingly low threshold for finding that citizens’ right to meaningful participation had been compromised, Bastarache J. concluded that the impugned third party spending limits did not violate section 3. After noting that the trial judge found that third parties were precluded from mounting an “effective

---

<sup>72</sup> *Id.*, at para. 62.

<sup>73</sup> *Figueroa*, [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912, at para. 26.

<sup>74</sup> *Harper (S.C.C.)*, *supra*, note 1, at para. 73.

<sup>75</sup> *Figueroa*, *supra*, note 73, at paras. 54 and 58.

persuasive campaign,” he dismissively concluded that, “[m]eaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome.”<sup>76</sup>

The Court’s analysis in relation to the alleged violation of the right to freedom of expression took place entirely in the context of section 1. Perhaps what is most notable about the *Harper* majority is that section 1 analysis is the deferential approach. Justice Bastarache, citing *Thomson Newspapers*, looked to contextual factors to determine the appropriate degree of deference.<sup>77</sup> The contextual factors considered were: (i) the nature of the harm and the inability to measure it; (ii) vulnerability of the group; (iii) subjective fears and apprehension of harm; and (iv) the nature of the infringed activity — political expression. The last contextual factor appears to have had the most impact on Bastarache J.; it is here where he contemplated the egalitarian model. According to Bastarache J.:

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.... Given the right of Parliament to choose Canada’s electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference.... In the end, *the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament.*<sup>78</sup>

Justice Bastarache appears to have predicated his deference to Parliament not on a conception of dialogue, but in large part on an innate sense that Parliament is in a better position than the Court to regulate the political process and, in this case, political expression.

The majority identified three pressing and substantial objectives served by the third party expenditure limits: (i) to promote equality in the political discourse; (ii) to protect the integrity of the financing regime applicable to candidates and parties; and (iii) to maintain confidence in the electoral process. Justice Bastarache’s three objectives capture the customary arguments made in favour of third party expendi-

---

<sup>76</sup> *Harper (S.C.C.)*, *supra*, note 71, at para. 74.

<sup>77</sup> *Id.*, at para. 76.

<sup>78</sup> *Id.*, at para. 87 (emphasis added).



ture limits. To some degree these objectives are different aspects of the same objective. The second objective — protecting the integrity of the political finance regime — only matters because the political finance regime fosters the first objective — promoting equality in the political discourse. The third objective — maintaining confidence in the political process — is only relevant if there is a general consensus that promotion of equality in the political discourse is normatively desirable. These overlapping objectives are all, to one extent or another, derivative of the case for the egalitarian model — the same model upon which Bastarache J. predicated his deferential approach to section 1.

The majority's minimal impairment analysis began with an obligatory recitation of the prescription in *RJR-MacDonald* that a law must be "carefully tailored" but that "[i]f the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement."<sup>79</sup> With this in mind, the majority identified two contextual factors to support the view that the third party spending limits were set at an appropriate level. First, Bastarache J. noted that there are few obstacles to individuals joining political parties or creating political parties. Presumably, this point was highlighted to suggest that despite the third party spending limits there remain channels through which political views may be expressed during an election. Second, he noted that "lack of means, not legislative restrictions" was the primary obstacle for most individuals even under the third party expenditure limits.<sup>80</sup> While Bastarache J. resisted the suggestion of the minority that he was arguing that "since the breach of s. 2(b) only affects a few people, it is therefore justifiable," such a conclusion is hard to escape. Justice Bastarache took a similar approach to the definitional question, to the extent that he dealt with it at all. He noted that the definition of "election advertising" does not apply to a number of forms of communications such as editorials, debates, speeches, interviews, columns, letters, commentary, the news, and non-commercial use of the Internet. These exclusions, according to Bastarache J., are "highly effective means of conveying information."<sup>81</sup> Justice Bastarache went on to conclude that

---

<sup>79</sup> *Id.*, at para. 110 quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160.

<sup>80</sup> *Id.*, at para. 113.

<sup>81</sup> *Id.*, at para. 115.

not only were the limits “minimally impairing” but that they “allow for meaningful participation in the electoral process and encourage informed voting. The limits promote a free and democratic society.”<sup>82</sup>

(b) *The Minority Decision of McLachlin C.J.C. and Major J.*

The minority judgment, written by McLachlin C.J.C. and Major J., differs from the majority reasons both in substance and in tone. Like Bastarache J., the minority judgment accepts *Libman* as having settled the question of the legitimacy of the legislative objective. In this respect, McLachlin C.J.C. and Major J. are deferential to Parliament. Unlike Bastarache J., however, the minority did not find that Parliament was owed any particular deference in the electoral arena with respect to the means by which it chose to address its objectives. Harkening back to *Libman*, McLachlin C.J.C. and Major J. observed that “Here, too, Parliament’s good faith is advanced, said to be evidenced by the ongoing dialogue with the courts as to where the limits should be set. But as in *Libman*, good faith cannot remedy an impairment of the right to freedom of expression.”<sup>83</sup>

The minority’s lack of deference throughout the proportionality analysis, though most obviously in its consideration of minimal impairment, is founded on two pillars. First, the minority clearly appreciates in a way that the majority did not that third parties may bring perspectives to the electoral debate that candidates and political parties do not. Moreover, quite apart from an individual’s interest in expressing himself, “[p]ermitt[ing] an effective voice for unpopular and minority views — views political parties may not embrace — is essential to deliberative democracy.”<sup>84</sup> In other words, from a structural perspective third parties play a unique and valuable role. Chief Justice McLachlin and Major J. further explained that:

It is no answer to say that the citizen can speak through a registered political party. The citizen may hold views not espoused by a registered party. The citizen has a right to communicate those views. The right to do so is essential to the effective debate upon which our

---

<sup>82</sup> *Id.*, at para. 118.

<sup>83</sup> *Id.*, at para. 37.

<sup>84</sup> *Id.*, at para. 14.

democracy rests, and lies at the core of the freedom of expression guarantee. That does not mean that the right cannot be limited. But it does mean that limits on it must be supported by clear and convincing demonstration that they are necessary, do not go too far, and enhance more than harm the democratic process.<sup>85</sup>

The second pillar supporting the minority's lack of deference, which is also evident in the preceding quotation, is the overriding importance of political expression. Whatever the legitimacy of Parliament's objective, the importance of political expression demands that a critical assessment be made of Parliament's chosen means to achieve the objective. According to the minority, a lack of deference was particularly appropriate given that the problem addressed by the third party spending limits was only hypothetical.<sup>86</sup>

The minority did not consider at length the vagueness or overbreadth of the third party spending limits. Instead, McLachlin C.J.C. and Major J. understood the limits to have the broadest possible application because of the wide array of issues with which candidates and political parties are typically associated.<sup>87</sup> For the minority, the debate over issue advocacy was irrelevant because of its conclusion that there was no evidence that indicated that partisan third party advocacy was a problem. The broad definition of "associated" together with the meagre monetary limits prescribed by the third party spending limits led the minority to conclude that "the problem ... is that the draconian nature of the infringement — to effectively deprive all those who do not or cannot speak through political parties of their voice during an election period — overshoots the perceived danger."<sup>88</sup>

---

<sup>85</sup> *Id.*, at para. 21.

<sup>86</sup> *Id.*, at para. 33.

<sup>87</sup> *Id.*, at para. 3.

<sup>88</sup> *Id.*, at para. 39.

#### IV. JUDICIAL REVIEW AND THE DEMOCRATIC PROCESS

##### 1. The Limits of the Egalitarian Model

###### (a) *The Duality of Third Parties in the Electoral Debate and the Motives for Regulation*

Viewed from a structural perspective, third parties can play both an important role and a dangerous role in the political process. Some third parties are an important catalyst for debate while others may be little more than a device for evading the political finance regime. An ideal regulation of third party spending would facilitate third parties' debate catalyst function and limit the propensity of third parties to destabilize the political finance regime. The duality of third parties in the political process is an essential part of the context that must be understood when considering the constitutionality of third party spending limits. The duality of third parties, however, is inadequately understood by the majority in *Harper*.

The political finance regime's egalitarian objectives can be justified on the grounds it is reasonable to assume that over time that third party advocacy activities will be biased toward the interests of private wealth. Essentially, private wealth enjoys an advantage in agenda setting. Such a threat is not as direct a threat to inequality as political contributions to candidates and political parties. Furthermore, the argument that private wealth can dominate agenda setting through third party expenditures, however logical, is not substantiated by empirical evidence. The most immediate and direct threat posed by third parties to political equality is to the integrity of the political finance regime. Third party activities imperil the political finance regime by threatening to undermine the relative deliberative equality among candidates and political parties. The political finance regime creates a context within which major parties and their candidates and even to some extent minor parties and their candidates are ensured a rough parity of resources through public funding and free broadcasting and are subject to similar expenditure limits. Campaigns by third parties may intentionally or unintentionally parallel political party campaigns in message and objective. In an environment where third party expenditures are not controlled, a third party communications campaign that promotes or opposes a candidate or political party may threaten the integrity of candidate and political party spending limits by creating an incentive for avoidance on the part of the targeted candidate or political party. Such avoidance might take the form

of non-compliance with candidate and political party spending limits or through a responding third party attack. Essentially, the involvement of a third party can upset the *détente* imposed by the *Elections Act* and prompt an arms race between candidates and political parties. Even if avoidance of the political finance regime does not become widespread, the perception of unfairness may result in the repeal of third party spending limits. Either result jeopardizes the larger egalitarian mission of the political finance regime.

Candidates and political parties may, from time to time, have a common interest in not debating a particular issue. Such a common interest may stem from an issue being perceived as a “loser” for all candidates and parties, or perhaps it is an issue that is “too hot to handle,” or it may be that the issue concerns an aspect of the political process itself such as Parliamentary pensions and salaries. Third parties, unlike candidates and political parties, are not inhibited from raising controversial subjects by concern for their electoral fate nor do they have a vested interest in the political process itself. Third parties are, therefore, uniquely positioned to criticize the *status quo* and the shared values of candidates and political parties. For example, third parties can effectively attack government waste and corruption in a way that candidates and political parties cannot or will not. When third parties function in this manner they broaden political discourse and enhance the value of citizens’ democratic rights. Accepting that the regulation of third party electoral activities is egalitarian in purpose does not mean that there are no other legislative motives at play. Candidates and political parties, particularly incumbents, share a common interest in reducing the chances of the unexpected. Safe campaigns serve the interests of candidates and political parties, not citizens. The catalyst function of third parties that is so vital to enhancing political debate is also a potentially destabilizing force in a campaign. The possibility that legislators might be tempted by self-interest to enact third party spending limits that are more stringent than are necessary to serve the egalitarian objectives of the political finance regime cannot be discounted.

(b) *Issue Advocacy*

Third party electoral communications can be divided into two general types: partisan advocacy and issue advocacy. Partisan advocacy, as the term suggests, refers to communications that expressly promote or oppose a candidate or political party. Partisan advocacy is the type of

third party activity that poses a threat to the integrity of the larger political finance regime. Issue advocacy refers to communications concerning issues, not candidates or political parties. Issue advocacy, as it has come to be understood in the United States, can itself be divided into two categories: “pure” issue advocacy and “sham” issue advocacy.<sup>89</sup> In practice, the distinction between pure and sham issue advocacy is not always easy to make.

Pure issue advocacy is electoral communications that do not seek to persuade a listener to vote for or against a particular candidate or political party. An example of pure issue advocacy from the 2000 federal election is “Canada’s Health Care,” an advertisement placed by the Canadian Medical Association in *The Globe and Mail* and which read as follows:

Canada’s Health Care: Planning a Full Recovery

Join with Canada’s physicians to help make [the Canadian Medical Association’s ideas for a better health care system] a reality, by letting your voice be heard during this election. [Here are] some things that you can do:

1. Send your idea of an ideal health care system to us. We’ll post them on our web-site, and send them all to Canada’s political leaders.
2. Tell your local candidates about the health system you want, and ask what they’ll do to make it happen.
3. Write, email, phone hot line shows, go to meetings, and then make your vote count.<sup>90</sup>

No issue advocacy can be wholly neutral. The CMA’s “Canada’s Healthcare” was undoubtedly more consistent with some political par-

---

<sup>89</sup> See Hasen, “The Surprisingly Complex Case,” *supra*, note 4. The U.S. Supreme Court’s decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) gave rise to the distinction between issue advocacy and partisan advocacy. The divide between issue advocacy and partisan advocacy was assumed by many to have constitutional significance. The Court, however, upheld issue advocacy restrictions in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). For comment on the treatment of issue advocacy in *McConnell* see: R. Hasen, “The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy” (2004) 3 Election L.J. 251.

<sup>90</sup> Canadian Medical Association, “Canada’s Health Care: Planning a Full Recovery” *The Globe and Mail* (9 November 2000), at A9.

ties' positions in the 2000 federal election than others. Even so, the advertisement is non-partisan. Issue advocacy fundamentally differs from partisan advocacy in that its primary objective is promotion of political debate, not promotion of or opposition to a candidate or political party.

Sham issue advocacy is, like its name suggests, not really issue advocacy at all. Sham issue advocacy is thinly-veiled partisan advocacy. Advertisements that describe an issue in the context of a candidate or political party's position on the issue and portrays that position in either a positive or negative light are sham issue advocacy. A classic example of sham issue advocacy was placed by the Grand Council for the Crees in *The Globe and Mail* two days prior to the 2000 federal election:

I Encourage Aboriginal Citizens to Vote in the Federal Election.

Jean Chretien's Liberal Platform

1. continue to work with aboriginal peoples to address the economic and social problems they face;
2. promote aboriginal languages;
3. build and strengthen relations with aboriginal peoples;
4. promote aboriginal economic skill development and prosperous aboriginal economies.

Stockwell Day's plans for us we all know.

Gilles Duceppe's agenda for aboriginals in Canada is also well known.

\*\*\*

By voting we may determine decisions that will impact the future of our peoples. Voting is one expression of our right of self-determination.<sup>91</sup>

The explanation of Jean Chretien's program in positive terms and the programs of Stockwell Day and Gilles Duceppe in dismissive terms

---

<sup>91</sup> Grand Council of the Crees, "A Message from Grand Chief Ted Moses" *The Globe and Mail* (25 November 2000), at A10.

clearly indicated that Aboriginal citizens should not only vote, but vote Liberal.

If the dual nature of third parties in the political process and the distinction between pure and issue advocacy are accepted, it may be concluded that in the abstract there is a case for limiting sham issue advocacy, but little or no case for limiting pure issue advocacy. Partisan advocacy and sham issue advocacy pose a threat to the stability of other political finance controls, while issue advocacy primarily enables third parties to be catalysts for expanded political debate. The only argument for regulating pure issue advocacy is pragmatic; essentially, it must be argued that it is impossible to intelligently distinguish between sham issue advocacy and pure issue advocacy.<sup>92</sup> This argument was not considered by the Supreme Court in *Harper*.

(c) *The Paradox of Political Expression in Elections*

Political expression in elections, even before the Charter, was recognized to be perhaps the most essential form of expression. Chief Justice Duff, writing for the majority of the Supreme Court of Canada in the *Alberta Press* case observed:

Under the constitution established by *The British North America Act*, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons..... The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. *This is signally true in respect of the discharge ... by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.*<sup>93</sup>

---

<sup>92</sup> This was the view of the Lortie Commission: see Canada, *Final Report*, *supra*, note 41, at 340.

<sup>93</sup> *Reference re Alberta Legislation*, [1938] S.C.R. 100, at 132-33 (emphasis added).



The idea that political expression is “core expression” is a recurring theme in Charter section 2(b) cases. The clearest articulation of this view is found in Dickson C.J.’s remarks in *Keegstra* where he noted that: “The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy.”<sup>94</sup> The importance of political expression, in most instances, would seem to override competing legislative objectives.

The potential problem of wealth dominating the political agenda exists outside the electoral context. This concern, however, is not sufficient to justify limits on political expression outside an election period. Accordingly, egalitarian concerns alone do not explain the reason for a deferential approach to the regulation of electoral expression. A necessary complement to egalitarian principles is the idea that political expression is too important *not* to be regulated in some respects during elections. This is the paradox of political expression in elections. Political expression in election campaigns is so closely connected to the exercise of democratic rights that concern about improper influence on debate is heightened. Electoral expression is fundamentally different than normal political discourse in that it takes place within a defined time period, is subject to myriad rules, and is ancillary to an expressive act — voting — that is both highly regulated and constitutionally protected. Elections are an artificial context created for a specific purpose and dependent on State action.<sup>95</sup> Edwin Baker expressed this argument in the following terms:

elections are part of a formal, legally structured realm of the governmental apparatus. Campaign speech is a central part of this electoral realm. For this reason, campaign speech must be distinguished from the much broader category of political speech or speech about public issues.<sup>96</sup>

Frederick Schauer and Richard Pildes term this argument “electoral exceptionalism”:

---

<sup>94</sup> *R. v. Keegstra*, [1990] S.C.J. No. 697, [1990] 3 S.C.R. 697, at 763-64.

<sup>95</sup> Feasby, “Public Opinion Poll Restrictions, Elections, and the *Charter*” *supra*, note 11, at 260.

<sup>96</sup> C.E. Baker, “Campaign Expenditures and Free Speech” (1998) 33 *Harv. C.R.-C.L. L. Rev.* 1, at 3.

According to electoral exceptionalism, elections should be constitutionally understood as (relatively) bounded domains of communicative activity. Because of the defined scope of this activity, it would be possible to prescribe or apply First Amendment principles to electoral processes that do not necessarily apply through the full reach of the First Amendment. If electoral exceptionalism prevails, courts evaluating restrictions on speech that is part of the process of nominating and electing candidates would employ a different standard from what we might otherwise characterize as the normal, or baseline, degree of First Amendment scrutiny.<sup>97</sup>

The great danger of the electoral exceptionalism argument is that it may be applied too broadly. If electoral exceptionalism is indeed central to the Court's reasoning in *Harper* and it is accepted that political expression is as important as the Court explained in the *Alberta Press* case and in *Keegstra*, then the Court should be careful to limit its application to electoral expression. Political expression outside the electoral context cannot be limited on the grounds that the limit somehow improves electoral debate. To cabin the electoral exceptionalism argument the Court must draw a line between political expression generally and electoral expression. It may be impossible to draw a bright line, but every effort must be made to limit electoral exceptionalism to its proper context.

(d) *The Margins of the Electoral Context and the Failure of the Court in Harper*

The Court in *Harper* explicitly accepted the egalitarian model and seemingly accepted the basic premise of the electoral exceptionalism argument. The Court concluded its explanation why deference to Parliament was appropriate by stating that: "In the end, the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament."<sup>98</sup> While this is not an explicit endorsement of electoral exceptionalism, it certainly appears to be an acceptance of the view that elections are an artificial

---

<sup>97</sup> F. Schauer & R. Pildes, "Electoral Exceptionalism and the First Amendment" (1999) 77 *Tex. L. Rev.* 1803, at 1805.

<sup>98</sup> *Harper* (S.C.C.), [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827, at para. 87.

end-driven context within which limits on what would otherwise be core expression are necessary and expected.

Accepting for the moment that deference is warranted in the electoral context, the most obvious problems with the third party expenditure limit in the *CEA 2000* are definitional. There are two doctrinal rubrics under which the definitional problems with *CEA 2000* third party spending limits can be considered: vagueness and overbreadth. Vagueness and definitional overbreadth are closely related concepts. A vague law is a threat to the rule of law because it creates the risk of arbitrary and capricious enforcement.<sup>99</sup> A law must be sufficiently clear that it gives citizens fair warning so that they may govern their conduct so as to comply with the law. Definitional overbreadth presents a similar danger in that a law that is overbroad is susceptible to enforcement according to unstated and arbitrary principles. The classic example is a law prohibiting loitering that is enforced against teenage males at night, but not against parishioners mingling outside Church on a Sunday morning.<sup>100</sup> In the Charter context, vagueness is considered as a threshold question under section 1 where the Court asks the question whether a provision is a “limit prescribed by law.” Overbreadth is typically considered a question of minimal impairment under the section 1 proportionality analysis. For the purposes of this paper and consideration of the limits of the electoral exceptionalism argument, the relevant concern is not vagueness, but definitional overbreadth. In particular, the question is to what extent the breadth of the third party spending limits exceed the underlying legislative objective.

Canadian courts have been reluctant to find laws vague. Instead, courts are inclined to give laws their most plausible meaning, which is often the broadest meaning possible, and to consider whether the law is overbroad in the context of the minimal impairment analysis. The Court in *Harper* followed this approach as it confronted the definitional problems with the third party spending limits. The Court held: “[w]hether the definition is impermissibly broad is a matter for legal debate and is more

---

<sup>99</sup> *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at 1157.

<sup>100</sup> R. Post, “Reconceptualizing Vagueness: Legal Rules and Social Orders” (1994) 82 Cal. L. Rev. 491, at 497.

properly considered at the minimal impairment stage of the justification analysis.”<sup>101</sup>

By postponing consideration of difficult definitional questions to the minimal impairment stage of its analysis, the Court risks avoiding a reckoning with the true meaning of a statutory provision. Indeed, the majority in *Harper* never returns to the definitional question in its minimal impairment analysis.<sup>102</sup> The Court’s discussion of minimal impairment is almost entirely concerned with whether the financial limits were set at the appropriate levels. No consideration is given to the question of the definitional breadth of the third party spending limits. The question of whether non-electoral political expression is captured is not considered nor is the question of whether the law exceeded the underlying legislative objective addressed.

When contemplating the breadth of the third party restrictions in the *CEA 2000*, the Court should have, at a minimum, considered the context within which third parties operate. The most obvious contextual issue is: How broad is the limit in practice? In other words, is there any unregulated space during an election campaign and, if so, how much? The majority did not explicitly consider the breadth of the provision in the context of determining whether the third party spending limits were prescribed by law; however, certain comments suggest that the majority considered the limit to apply to something less than all political expression during an election period. In particular, the majority noted that “[w]hile no specific criteria exist, it is possible to determine whether an issue is associated with a candidate or political party and, therefore, to delineate an area of risk. For example, it is possible to discern whether an issue is associated with a candidate or political party from their platform.”<sup>103</sup>

The majority’s implicit view that the third party spending limit extended to something less than all political expression during an election campaign, was rejected by the minority. The minority, unlike the majority, turns its mind to how elections really work:

Section 350(2)(d) is particularly restrictive. It prohibits individuals from spending more than the allowed amounts on any issue with

---

<sup>101</sup> *Harper (S.C.C.)*, *supra*, note 98, at para. 90.

<sup>102</sup> *Id.*, at paras. 110-18.

<sup>103</sup> *Id.*, at para. 90.

which a candidate is “particularly associated.” *The candidates in an election are typically associated with a wide range of views on a wide range of issues.* The evidence shows that the effect of the limits is to prevent citizens from effectively communicating their views on issues during an election campaign.<sup>104</sup>

The minority probably understates the breadth of the third party spending limits in practice. Indeed, it is hard to imagine a political issue during an election that is not “associated” or even “particularly associated” with a political party or candidate. If the minority’s understanding of the definition of the third party spending limitation is accepted, it is impossible to conclude anything other than that the definition exceeds the scope of the underlying legislative objective. The definitional breadth of the third party spending limits is every bit as much of a constitutional problem as the modest financial limits.

There are two other contextual considerations that illustrate the overbroad and capricious nature of the third party spending restriction and that escaped the Court’s notice. First, elections may arise unexpectedly and wrong foot third parties with regularly scheduled advertising campaigns. Third parties, as the Court noted,<sup>105</sup> may advertise without restriction prior to the commencement of an electoral period. One of the central features of our Parliamentary system, however, is that there are no set election dates. Consider for a moment the predicament of a hypothetical third party that invested funds in excess of the permitted amounts to develop an advertising campaign and purchased significant television broadcasting time several months in advance. After the third party’s investment in developing the campaign with an advertising agency and purchase of television time, but before the campaign runs on television an election is called for the period in which the third party advertising campaign was planned. A third party in such a situation has two choices: (1) break the law and run its campaign; or (2) delay or cancel its campaign and suffer a financial loss. Neither of these alternatives are fair to an individual or organization complying with the law prior to the issue of the election writ.

Second, consider the predicament of a third party that plans an advertising campaign during an election period in excess of the prescribed

---

<sup>104</sup> *Id.*, at para. 3 (emphasis added).

<sup>105</sup> *Id.*, at para. 112.

financial limits on an issue that is not associated with a political party or particularly associated with any candidate. The hypothetical third party invests its resources in preparing the advertising campaign and purchasing broadcast time or advertising space in a publication. However, in the midst of the campaign and before the third party is able to run its advertisements, a political party announces that it adopts the third party's issue as its own thus becoming "associated" with the issue. Just as in the case of the third party surprised by an election, a third party whose issue is usurped by a political party in mid-campaign is potentially in violation of the third party expenditure limits. This hypothetical example is not a remote possibility. Indeed, the emergence of issues over a campaign period is part of the ordinary function of democratic debate. Issues are not frozen in place at the commencement of a campaign or even in the platform documents of the various political parties.

## 2. Political Process Theory

### (a) *Process Theory and Political Markets*

One of the great debates in constitutional theory in the 20th century was over the question of whether judicial review was democratic. Is it legitimate for an appointed Court to invalidate laws passed by a democratically elected legislature? Alexander Bickel famously termed this quandary the "counter-majoritarian difficulty."<sup>106</sup> The short answer to this problem in the Canadian context is that Canada is not a pure democracy; it is a constitutional democracy. The Supreme Court made this abundantly clear in the *Secession Reference* where it outlined four principles — democracy, federalism, respect for minority rights, and constitutionalism and the rule of law — that together define Canada's political being.<sup>107</sup> Even if we accept that the big question posed by Bickel and others has been answered by the Court, the practical question of the relationship between Parliament and the Court remains. To what extent can the Court interfere with Parliament's choices? And to what extent should the Court respect Parliament's choices?

---

<sup>106</sup> A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobs-Merrill, 1962), at 16.

<sup>107</sup> *Secession Reference*, [1998] S.C.J. No. 61, [1997] 2 S.C.R. 217, at para. 49.

One approach to reconciling judicial review with democracy that has largely been overlooked in Canada is process theory. Process theories, such as that of John Hart Ely, hold that the U.S. *Constitution* (and for the sake of argument we will assume that this statement applies equally to the *Constitution of Canada*) is fundamentally democratic. All process theories hold, in essence, that a Constitution should be principally a guarantee of procedural fairness and that the Court's role is to enforce that guarantee. If Courts enforce a guarantee of procedural fairness, it is often argued, substantively fair results will inevitably follow. By enforcing a process guarantee instead of deciding cases based on substantive values, the Court respects the democratic will of the legislature to make normative choices.

Ely's process theory was inspired by the fourth footnote in *United States v. Carolene Products Co.*<sup>108</sup> The footnote itself is not clearly expressed and is subject to interpretation. A general consensus, however, has emerged through extensive academic debate that the footnote provides essentially that there should be little deference shown in review of three types of legislation: (1) laws that infringe textually enumerated constitutional rights; (2) legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation; and (3) laws that discriminate on the basis of race, religion, or national origin.<sup>109</sup>

The famous footnote has been credited by some as articulating the post-New Deal approach to judicial review. Owen Fiss, for example, called the footnote "the great and modern charter for ordering the rela-

---

<sup>108</sup> 304 U.S. 144, at 152-53 n4 (1938).

<sup>109</sup> M. Dorf & S. Issacharoff, "Can Process Theory Constrain Courts?" (2001) 72 U. Colo. L. Rev. 923, at 926. The footnote itself reads as follows:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth ...

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation...

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious ... or national ... or racial minorities ...; whether prejudice discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of these political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

tion between judges and other agencies of government.”<sup>110</sup> The footnote’s fame is in no small part due to Ely making it the centrepiece of his process theory.

Ely called his approach to judicial review a “representation-reinforcing theory.”<sup>111</sup> What Ely meant by this was that the Court should concern “itself only with questions of participation, and not with the substantive merits of the political choice under attack.”<sup>112</sup> While “participation” is a vague notion, Ely made it clear that he envisioned the Court as functioning in the political sphere much like the Competition Tribunal in the economic domain combating monopolistic behaviour. As Ely explained:

[t]he approach to constitutional adjudication recommended here is akin to what might be called an “antitrust” as opposed to a “regulatory” orientation to economic affairs — rather than dictate substantive results it intervenes only when the “market,” in our case the political market, is systemically malfunctioning. (A referee analogy is also not far off: the referee is to intervene only when one team is gaining unfair advantage, not because the “wrong” team has scored.)... Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.<sup>113</sup>

Participation, to Ely, is enhanced by preventing the “ins” from manipulating the political system in their favour. He went on to explain that a court is much better placed than a legislature to determine when there is a malfunction in the political market. Ely remarked, “[o]bviously our elected representatives are the last persons we should trust with identification of either of these situations.”<sup>114</sup>

---

<sup>110</sup> O. Fiss, “Foreword: The Forms of Justice” (1979) 93 Harv. L. Rev. 1.

<sup>111</sup> Ely, *Democracy and Distrust*, *supra*, note 8, at 181.

<sup>112</sup> *Id.*, at 181.

<sup>113</sup> *Id.*, at 102-103.

<sup>114</sup> *Id.*, at 103.



Ely's work grappled with the Warren Court's minority rights jurisprudence and, particularly, those decisions concerning minority rights in the political process. Ely's process theory, for all its promise, did not elaborate in any detail how courts should approach political process questions generally. His "work remained relatively undeveloped regarding the application of process theory to the core functioning of the political process, an inquiry that has advanced significantly since the emergence of the study of political governance as a distinct inquiry in constitutional law."<sup>115</sup> Indeed, as noted in the second part of this paper, one of the notable developments in the study of law and the democratic process has been the revival of process theory.

The most notable extension of Ely's process theory to emerge from the body of law and the democratic process scholarship is the "political markets" approach advocated by Samuel Issacharoff and Richard Pildes.<sup>116</sup> Issacharoff and Pildes adopted a competition-based model, but did not use Ely's anti-trust analogy. Instead, they preferred to conceive of elected representatives as analogous to corporate managers. The problem of management entrenchment in corporate law through the use of "poison pills," "break fees," and super-majority requirements, they argued, is no different than political representatives entrenching themselves through gerrymanders, political finance laws, or other regulations of the political process. To support this view, Issacharoff and Pildes drew upon public choice scholarship that concluded that the "legislative process [is] an arena for fundamentally self-serving behavior."<sup>117</sup> While such a dim view of human nature is undoubtedly incorrect in many individual cases, as a generalization it delineates a genuine structural risk.

Corporate law deals with the risk of self-serving behaviour and entrenchment by managers in two ways. First, the law imposes fiduciary obligations on directors and officers. Second, the law favours conditions that support open contests for control. According to Issacharoff and Pildes, this latter means of shaping the behaviour of corporate managers is the most instructive for the study of law and the democratic process. They explained their approach in the following terms:

---

<sup>115</sup> Dorf & Issacharoff, "Can Process Theory Constrain Courts?" *supra*, note 109, at 928.

<sup>116</sup> S. Issacharoff & R. Pildes, "Politics as Markets" *supra*, note 6.

<sup>117</sup> *Id.*, at 650.

[P]olitics shares with all markets a vulnerability to anticompetitive behavior. In political markets, anticompetitive entities alter the rules of engagement to protect established powers from the risk of successful challenge. This market analogy may be pushed one step further if we view elected officials and dominant parties as a managerial class, imperfectly accountable through periodic review to a diffuse body of equity holders known as the electorate.

Like the managerial class well-known to the laws of corporate governance, these political managers readily identify their stewardship with the interests of the corporate body they lead. Like their corporate counterparts, they act in the name of the entity to protect themselves against outside challenges to their personal authority. Again, like their corporate counterparts, political managers use procedural devices, created in their incumbent capacity, to lock up their control.<sup>118</sup>

Issacharoff and Pildes concluded that a structural approach to judicial review — ensuring that political markets are competitive — is preferable to an individual rights approach to judicial review. This conclusion has been controversial,<sup>119</sup> but is not essential for the position advanced in this paper. Instead, it is enough to take from the political markets approach that judicial review must be guided, at least in part, by a sensitivity to the threat posed by self-serving behaviour by legislators. By making a link to two unrelated disciplines, public choice scholarship and corporate law, political markets provide a more detailed and compelling account than Ely why politicians should be distrusted. Even if it is not accepted that structural considerations should prevail over individual rights analysis, political markets indicate that a more searching standard of judicial review may be appropriate when such a risk is identified.

*(b) The Egalitarian Model and “Process Theory Lite”*

The most obvious question that can be asked in the Canadian context is: How can process theory be reconciled with the explicitly normative analysis favoured by the Supreme Court of Canada? And, in the

---

<sup>118</sup> *Id.*, at 646-47.

<sup>119</sup> See, e.g., R. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (New York: NYU Press, 2003), at 4-6.

particular context of the democratic process, how can process theory co-exist with the egalitarian model? These questions are not unique to the Canadian context. For the purpose of this paper, the proposition advanced is that a form of process theory is germane to the review of the laws that govern the democratic process. No broader claim for the relevance of process theory is made. Even at that, the argument here is that process theory is consistent with the egalitarian model and at least some of the Supreme Court of Canada's recent democratic process case law.

The most trenchant criticism of process theory is that judgments about fair processes are inherently substantive even though they may pretend not to be.<sup>120</sup> In other words, process theory is covertly substantive. The effect of this criticism is not to deny the utility of process theory in democratic process cases; rather, it begs the question of what normative theory of democracy informs judgments about fair processes. The way forward, however, is not to see substantive and process theories as being inherently opposed.<sup>121</sup> Michael Dorf argues that Ely recognized that his theory of judicial review, notwithstanding its emphasis on process, was rooted in an underlying substantive theory of democracy — the liberal democracy that he lived in.<sup>122</sup> While process theory is not normally associated with robust theories of democracy, there is no inherent reason why that is so. The recognition that a substantive theory of democracy must inevitably inform process theory enables it to be reconciled in some form with the Supreme Court of Canada's democratic process jurisprudence dominated as it is by the egalitarian model.

Perhaps the best example of the marriage of process theory and a robust theory of democracy is found in Patrick Monahan's *Politics and the Constitution*. Monahan, like Ely, disclaims a substantive approach to constitutional interpretation. Monahan argues that "[t]he resolution of *Charter* issues is not to be found in the philosophies of John Rawls, Robert Nozick or Ronald Dworkin." Following in Ely's footsteps, Monahan finds democracy to be the most persuasive interpretive guide to the interpretation of the Charter. He even suggests, that process theory is

---

<sup>120</sup> L. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 Yale L.J. 1063.

<sup>121</sup> See, R. Pildes, "The Theory of Political Competition" (1999) 85 Va. L. Rev. 1605, at 1625 noting the "interplay" of process and substance. See also, K. Roach, "American Constitutional Theory" *supra*, note 7, at 505.

<sup>122</sup> Michael C. Dorf, "The Coherency of *Democracy and Distrust*" (2005) 114 Yale L.J. 1237, at 1251-61.

more suited to the Charter than it is to the U.S. *Constitution* because of its explicit emphasis on democracy and relative lack of provisions guaranteeing substantive values.<sup>123</sup> Monahan's understanding of democracy, however, appears more robust than Ely's. He writes:

Democracy implies more than simply popular rule. It means, in addition, a broadening of the opportunities for, and the scope of, collective deliberation and debate in a political community; it means identifying and reducing the barriers to effective and equal participation in the process by all citizens; it means ensuring that there are no arbitrary and permanent boundaries around the scope of political debate.<sup>124</sup>

To some extent, Monahan's concept of democracy may be influenced by his second interpretive principle, communitarianism. The robustness of Monahan's conception of democracy is evident in his discussion of the Alberta Court's consideration of third party spending restrictions in *National Citizens Coalition v. Canada*. "How might a democratic theory along the lines I propose deal with the issue of election campaign finance?"<sup>125</sup> Monahan asks rhetorically. His answer is telling:

If we begin with the proposition that freedom is not simply the absence of restraint, it becomes possible to conceive of the regulation of campaign finance as ameliorating freedom rather than limiting it. The point of the legislation is to restrict the ability of certain wealthy groups or interests to dominate election campaigns through the expenditure of money. The legislation is designed to ensure that no one political perspective is permitted to drown out the competing messages in the electoral marketplace. This justification becomes convincing once you push beyond questions of formal access and negative freedom and focus instead on issues of equality of access and positive freedom.<sup>126</sup>

The foregoing passage echoes the Rawlsian democratic theory upon which the egalitarian model draws.<sup>127</sup> The compatibility between those

---

<sup>123</sup> Monahan, *Politics and the Constitution*, *supra*, note 9, at 99.

<sup>124</sup> *Id.*, at 98.

<sup>125</sup> *Id.*, at 133.

<sup>126</sup> *Id.*, at 134.

<sup>127</sup> I have argued that the egalitarian model is fundamentally Rawlsian in its conception: see Feasby, "The Emerging Egalitarian Model" *supra*, note 3, at 9-12. Indeed, the Lortie Commission

aspects of Rawls' theory of justice that touch upon the democratic process and Ely's process theory is not as strange as it might seem at first glance.<sup>128</sup> Rawls' argument for the control of the influence of wealth in the democratic process (and similar arguments made by many other liberal scholars) is in some respects process-based and inspired by the same anti-trust concepts that informed Ely's view. Ely's view is that the political process must be kept open so that there is a competition for political power. This competition, he surmises, provides the means by which more substantive objectives, the realization of minority rights for example, might be achieved. Rawls goes farther. Rawls argues that economic disparities will inevitably be manifested in a disparity of political power. This is particularly problematic because the Ins can manipulate the system to further enhance their political and economic power at the expense of the Outs. Rawls writes: "Political power rapidly accumulates and becomes unequal; and making use of the coercive apparatus of the state and its law, those who gain the advantage can often assure themselves of a favored position."<sup>129</sup>

Monahan's democratic theory, like Ely's, shares some characteristics with that of Rawls. Moreover, his analysis of the *National Citizens Coalition* case suggests that his conception of democracy is more robust than Ely's, perhaps even consistent with the Supreme Court of Canada's egalitarian model. Even if Monahan's democratic theory can be seen to be consistent with the egalitarian model, it is not clear if he would advocate deference in the review of Parliament's matching of means and ends. He pointed out that "[o]ne need not use a sledgehammer to kill a fly,"<sup>130</sup> but at the same time expressed concern about the ability of courts to make complex factual and normative judgments in the context

---

quoted the following passage from Rawls' *Theory of Justice* in its *Final Report*, *supra*, note 41, at 326:

The liberties protected by the principle of participation [in the democratic process] lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation. In due time they are likely to acquire a preponderant weight in settling social questions, at least in regard to those things that support their favored circumstances.

<sup>128</sup> See J. Cohen, "For a Democratic Society" in S. Freeman ed., *The Cambridge Companion to Rawls* (2003), at 119-20; and Michael C. Dorf, "'The Coherentism of Democracy and Distrust'" *supra*, note 122, at 1251-61.

<sup>129</sup> J. Rawls, *A Theory of Justice* (Rev.) (Cambridge, Mass.: Belknap Press, 1999), at 199.

<sup>130</sup> Monahan, *Politics and the Constitution*, *supra*, note 9, at 134.

of section 1 proportionality analysis.<sup>131</sup> For a more fully developed approach to judicial review in democratic process cases we must look farther afield.

One possible source of a fully formed approach of judicial review in democratic process cases that incorporates aspects of process theory is found in Richard Hasen's recent book, *The Supreme Court and Election Law*.<sup>132</sup> Hasen, a critic of pure process theory and political markets, has articulated an alternative approach to judicial review in democratic process cases in the United States. The approach espoused by Hasen is limited to equality questions; however, this limit is not as constricting as it might seem because most democratic process cases can be reduced to questions of political equality. According to Hasen, political equality rights can be divided into two kinds: core equality rights and contested equality rights. Core equality rights are the minimal requirements of a democratic government such as a right to an equal vote. Hasen argues that core rights are those upon which there is a social consensus or near consensus. Contested rights in the U.S. context considered by Hasen include campaign finance controls and other election regulations where there is no current social consensus. The dependence of Hasen's classifications on social values makes his theory portable in the sense that if it is applied in a different context, for example, in Canada, the same values need not be classified as core and contested. The obvious problem with Hasen's core/contested dichotomy is whether or not in practice a distinction can be drawn between the two categories.<sup>133</sup>

Hasen argues that only core political equality rights should be constitutionalized. By this he means that core political equality rights are those that may be protected by the Court if the legislature fails to do so. In the event the Court finds that the right in question is a core political equality right, there should be no deference to the State. If the Court finds that the asserted right is a contested political equality right, the Court should defer to the State's judgment in a way that does not preclude a legislature subsequently stepping in to protect the contested political equality right. In this way, the Court allows for an evolution in the social consensus and the possibility that the contested political

---

<sup>131</sup> *Id.*, at 135-36.

<sup>132</sup> Hasen, *The Supreme Court and Election Law*, *supra*, note 119.

<sup>133</sup> G. Charles, "Law, Politics, and Judicial Review: A Comment on Hasen" (2004) 31 J. Legislation 17, at 18.

equality right will become a core political equality right. When considering a legislative act that purports to further a contested political equality right, Hasen suggests, the Court should engage in “careful balancing of interests.” Hasen goes on to explain:

In the case of a legislative body’s voluntary imposition of a *contested* vision of political equality, the Court should be *deferential to (but not a rubber stamp of) the value judgments about the balance between equality and other interests* made by the legislative body while at the same time be *skeptical about the means by which the legislative body purports to enforce the contested equality right*.<sup>134</sup>

The scepticism of legislative means prescribed by Hasen is predicated on the potential abuses that may arise from self-serving behaviour of elected representatives. In particular, he warns:

... the Court must be especially careful of measures that legislatures enact in the name of political equality. The potential for self-interested legislation lurks behind all election laws and the courts must skeptically inquire whether the means of achieving equality closely fit the ends of the law. This skepticism serves as a substitute for a probe of legislative “motive” in passing these election laws.<sup>135</sup>

So while Hasen’s approach to judicial review of democratic process cases is set up as an alternative to process theory and political markets, one of the main tenets of process theory — distrust of political representatives — plays an important role in the approach he recommends. As will be explained in the next section, an approach akin to Hasen’s approach to contested political equality rights is consistent with the Supreme Court of Canada’s recent jurisprudence of the democratic process, though notably not with its approach to *Harper*.

---

<sup>134</sup> Hasen, *The Supreme Court and Election Law*, *supra*, note 119, at 102 (emphasis in original).

<sup>135</sup> *Id.*, at 103.

### 3. Process Theory Lite and the Supreme Court of Canada's Recent Democratic Process Cases

#### (a) *Deference to Democratic Values, Not Legislative Means*

The early democratic process cases under the Charter where substantial reasons were given — *Saskatchewan Electoral Boundaries*, *Haig*, and *Harvey* — are notably deferential. *Saskatchewan Electoral Boundaries* and *Haig* are not deferential in the context of section 1, but rather in acquiescing to Parliament's limited definition of the right in question.<sup>136</sup> Justice McLachlin, as she then was, in defining the nature of the right to vote in *Saskatchewan Electoral Boundaries* countenanced deviations from average electoral district populations of plus or minus 25 per cent as a matter of course and allowed that even greater deviations could be justified under section 1. In doing so, she neglected to note the self-serving motives behind the Saskatchewan legislation and the partisan implications of her decision.<sup>137</sup> The Court in *Haig* found that the right to vote in a referendum was not protected by the section 3 right to vote and, in the specific context of the referenda in question, neither section 2(b) nor section 15(1) provided any protection. The plurality decision in *Harvey* found that a restriction on an individual convicted of an election offence from serving in the legislature contravened section 3, but was justified. LaForest J. wrote:

A degree of deference is especially appropriate in this case where the impugned legislative provisions are aimed at transgressing members of the New Brunswick Legislative Assembly. Surely the members of that body are in the best position to choose between available options when

---

<sup>136</sup> Deference to Parliament in the definition of democratic rights protected by s. 3 is particularly problematic. The originalist-historicist reasoning that characterizes the majority judgment in *Saskatchewan Electoral Boundaries*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158 and its predecessor *Dixon v. British Columbia (Attorney General)*, [1989] B.C.J. No. 583, 59 D.L.R. (4th) 247 (S.C.) (per McLachlin J. as she then was) is not only an anomalous interpretive approach, it is completely contrary to the approach set out in this paper. Process theory, even in the diluted form presented in this paper, holds that the history of the right to vote is not to be trusted. The variations from equal voting power identified by the Court as providing insight into the meaning of the right are, likely in part, the product of self-interested Parliamentarians. See also *Haig*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995; *Harvey*, [1996] S.C.J. No. 82, [1996] 2 S.C.R. 876.

<sup>137</sup> M. Carter, "Reconsidering the Charter and Electoral Boundaries" (1999) 22 *Dalhousie L.J.* 53, at 88.



it comes to deterring other members from breaching the trust that exists between them, the electorate, and the House as a whole.<sup>138</sup>

The Court appeared to maintain a deferential approach in *Libman* in considering third party expenditure limits in the context of provincial referendum legislation. The Court termed the legislative objective — limiting the influence of wealth in the political process — “laudable.”<sup>139</sup> Despite the deferential stance toward Parliament’s assessment of the objective of the legislation, the specific limits were found to be too restrictive. The Court employed a similar approach in *Thomson Newspapers* where the constitutionality of a ban on publication of opinion polls was in issue, though with a less deferential tone.<sup>140</sup> Two main purposes were offered by the government in support of the publication ban: (1) the necessity of a rest period prior to an election where no opinion polls could be published so that voters could deliberate; and (2) the risk of a misleading poll that could not be corrected prior to election day. Justice Bastarache, writing for the majority of the Court, refused to accept the first objective but found the second objective plausible despite a lack of evidence. Even though he found that misleading polls were potentially harmful to voters, he refused to defer to Parliament’s choice of means to address the problem. Justice Bastarache was particularly concerned that Parliament could have substantially addressed the perceived harm by requiring publication of methodological data together with all polls to enable voters to critically assess the information. He concluded, “[t]he failure to address or explain the reason for not adopting a significantly less intrusive measure which appears as effective as that actually adopted weighs heavily against the justifiability of this provision.”<sup>141</sup>

Even more recently in the context of a section 3 challenge to limits on the rights of prisoners to vote in *Sauvé* the Court observed that, “[t]he 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>142</sup> The Court nevertheless accepted Parliament’s stated objective as pressing and substantial (though with a healthy degree of

---

<sup>138</sup> *Harvey*, *supra*, note 136, at para. 47.

<sup>139</sup> *Libman*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 56.

<sup>140</sup> A. Geddis, “Liberté, Egalité, Argent” *supra*, note 13, at 446-48.

<sup>141</sup> *Thomson Newspapers*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 119.

<sup>142</sup> *Sauvé*, [2002] S.C.J. No. 66, [2003] 3 S.C.R. 519, at para. 9.

scepticism) and proceeded to find the means chosen by Parliament to be unacceptable. The Court's most recent section 3 case, *Figueroa*,<sup>143</sup> follows the same pattern. The legislative provisions in issue in *Figueroa* limited the rights of small political parties to issue tax receipts and the candidates of small political parties to be identified by their party affiliation on the ballot. Just as in *Sauvé*, Iacobucci J. writing for the majority viewed the legislature's proffered objectives with scepticism, but allowed that the objectives could in some circumstances be pressing and substantial. Justice Iacobucci went on to find that the legislative provisions did not pass the proportionality aspects of the section 1 analysis.

The Court's approach to section 1 in *Libman*, *Thomson Newspapers*, *Sauvé*, and *Figueroa* can be characterized as deferential to Parliament's assessment of democratic values, but sceptical of Parliament's choice of means to achieve its objectives. The minority decision in *Harper*, reviewed earlier in this paper, follows the same approach. What is lacking from each of these cases is a principled basis for deferring to Parliament in one aspect of the section 1 analysis but not another. The most obvious explanation for the Court's deference in the first part of the section 1 analysis in these cases is that the Court believes that Parliament is the appropriate body to assess the values that inform the structure of the Canadian democratic process. The Court's deference to Parliament in this regard is made easy by the fact that the political philosophy that forms the intellectual underpinnings of the democratic system is generally consistent with the Court's democratic theory.

The Court's lack of deference in the proportionality aspect of the section 1 analysis is harder to explain. Certainly one can discern specific reasons for a sceptical approach in each case, but what is needed is a larger explanation. The best explanation, however, is one that cannot be found in the Court's words. The reason why the Court should be sceptical of Parliament's choice of means is the inherent conflict of interest in Members of Parliament setting the rules of the political game. This is the fundamental insight of process theory and political markets. To recognize this fact and integrate it into an approach to judicial review in democratic process cases is not to capitulate to a narrowly procedural form of judicial review. Like the approach proposed by Hasen to contested equality rights in the U.S., process theory can inform the second

---

<sup>143</sup> *Figueroa*, [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912.

stage of section 1 analysis. The Court may, indeed in many cases it should, defer to Parliament's assessment of democratic values in the first stage of section 1 analysis before critically assessing the chosen means of achieving those objectives. Recognizing Parliament's role in determining democratic norms does not lessen the danger posed by self-interested *status quo* preserving legislation.

The Court has shown a decided preference to turn a blind eye to the self-interested motives of provincial legislatures and Parliament in democratic process cases. Even in *Figueroa* where the impugned provisions were designed to hamper the electoral fortunes of small political parties, the *bona fides* of Parliament was not questioned. The reason for the Court's reticence may be a lack of evidence, good manners, or naïveté. Despite the Court's curious inattention to Parliament's conflict of interest, Iacobucci J.'s reasons in *Figueroa* provide a powerful tool to combat self-serving legislation enacted in the name of democratic values. Justice Iacobucci held that "legislation that exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public is inconsistent with s. 3."<sup>144</sup> This rule, if it may be called that, is consistent with the basic premise of process theory; namely, that legislation should not impinge upon participatory rights in a way that helps to keep the Ins in and the Outs out. Justice Iacobucci's interpretation of section 3 in *Figueroa* is relevant to the approach to judicial review in democratic process cases proposed in this paper because it demonstrates that on some level at least, the values that infuse process theory are consistent with the Court's conception of democracy.

(b) *Harper v. Canada: Deference Run Amok?*

*Harper* is notably more deferential than other recent Supreme Court decisions concerning the democratic process. One reason that can be offered for the deference in *Harper*, though not identified by the Court, is that third party spending limits do not affect competition between candidates and political parties. Indeed, one of the premises of third party spending limits is that they protect the competitive balance between electoral participants. As a result, there is a legitimate question as

---

<sup>144</sup> *Figueroa*, *supra*, note 143, at para. 54.

to whether third party spending limits merit as careful scrutiny as more direct and obvious incumbent protection measures.<sup>145</sup> The critical approach to the proportionality aspects of section 1 analysis outlined in the previous sections of this paper is intended to combat self-interested legislation in the electoral realm. Limits on third party spending, however, are not as obviously self-serving as gerrymandering or even other political finance controls. Limits on third party spending serve a legitimate end; namely, supporting an egalitarian political finance regime. At the same time, however, third party spending limits may also shield candidates and political parties from criticism. Whether or not Parliament was acting in a self-interested fashion when implementing third party spending limits, strict scrutiny is warranted because electoral laws are uniquely vulnerable to abuse and legislative motive can never be truly ascertained. As Hasen suggests, scepticism is “a substitute for a probe of legislative ‘motive’” in the electoral realm.<sup>146</sup>

Scepticism is decidedly absent from the majority decision in *Harper*. Justice Bastarache held that the rules that apply to elections reflect “a political choice, the details of which are better left to Parliament.”<sup>147</sup> He offers no reason why the Court should defer to Parliament’s “political choice” regarding the details of the electoral process other than Parliament’s “right to choose Canada’s electoral model.”<sup>148</sup> Although not stated, this idea harkens back to the majority judgment in *Figuroa* where Iacobucci J. stated that “the *Charter* is entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised.”<sup>149</sup> Justice Iacobucci went on to explain in response to criticism from the *Figuroa* minority that in finding that promotion of majority governments was not a pressing and substantial objective he did “not mean to suggest that Parliament must choose an electoral system that the Court believes will result in “good” or “better” governance. The *Charter* aside, the choice among electoral processes is, as LeBel J.

---

<sup>145</sup> The question of the appropriate scrutiny to apply to regulations affecting third parties also divided the U.S. Supreme Court in *McConnell*, 540 U.S. 93 (2003). For a criticism of the majority of the U.S. Supreme Court’s inattention to the problems of self-interest, see R. Hasen, “*Buckley* is Dead, Long Live *Buckley*: The New Campaign Finance Incoherence of *McConnell v. Federal Election Commission*” (2004) 153 U. Penn. L. Rev. 31.

<sup>146</sup> Hasen, *The Supreme Court and Election Law*, *supra*, note 119, at 103.

<sup>147</sup> *Harper* (S.C.C.), [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827, at para. 87.

<sup>148</sup> *Id.*, at para. 87.

<sup>149</sup> *Figuroa*, *supra*, note 143, at para. 37.

states, a political one — and not one in which the Court should involve itself.<sup>150</sup> The context in which Iacobucci J.'s remarks were made in *Figueroa* suggests that he was concerned about the implication that his reasons had for the first-past-the-post system, not laws governing the democratic process generally.<sup>151</sup> Justice Bastarache in *Harper*, however, seems to understand laws governing the democratic process to be, if not beyond judicial review, certainly worthy of great deference.

The question to be answered by the Court in future democratic process cases is whether there is some principled basis for the extreme deference in *Harper*. If the Court's deferential stance is an aberration, as I suspect that it is, then the Court is still left with the problem of articulating a reasoned approach to democratic process cases that will provide a measure of consistency from case to case. The approach to judicial review in democratic process cases outlined in this paper is consistent with the Supreme Court's recent democratic process cases other than *Harper* and offers a coherent explanation for both deference to Parliament's assessment of democratic norms and critical evaluation of Parliament's means chosen to implement its democratic vision.

## V. CONCLUSION

Dialogue is the most fashionable account of the relationship between the Court and Parliament. The idea of a never ending conversation, however unsatisfying, is probably an accurate description of the interplay of the Court and Parliament over time. Dialogue, however, is a descriptive theory of judicial review, not a prescriptive one. The fact that the Court and Parliament engage in a dialogue does not provide any guidance as to which institution's views should prevail in any given circumstance. This paper has not attempted to supplant dialogue as the means of understanding judicial review in the context of challenges to laws governing the democratic process. Instead, this paper has attempted to articulate an approach to democratic process cases that gives structure to the dialogue between the Court and Parliament.

---

<sup>150</sup> *Id.*, at para. 81.

<sup>151</sup> Justice Iacobucci's efforts to limit the implications of his decision in *Figueroa* may be futile. See, G. Mitchell, "Developments in Constitutional Law: The 2002-2003 Term – A Tale of Two Courts" (2003) 22 Sup. Ct. L. Rev. 83, at 108. See also, C. Feasby, "Seems our entire electoral system may be unconstitutional" *The Globe and Mail* (3 July 2003), at A11.

To begin with, the Court should in most instances defer to Parliament's assessment of democratic values. As a democratic institution, Parliament is better placed than the Court to ascertain the norms that should inform the democratic process. Both *Libman* and *Harper* follow this prescription and endorse the egalitarian model of election regulation in concept. The Court, however, must be cautious to confine its deference to the electoral realm. Deference to the choice of political philosophy that informs election regulation does not extend to the regulation of activity outside the electoral domain. The Court in *Harper* failed to cabin its deference and was uncritical of Parliament's regulation of pure issue advocacy. Finally, the Court must recognize that the regulation of the democratic process is vulnerable to abuse. The Court is uniquely suited, and Parliament is particularly ill equipped, to police self-interested behaviour on the part of Parliament. The best way for the Court to fulfill its role in this regard is to critically assess the means chosen by Parliament to effect its objective in the section 1 proportionality analysis.

Dialogue is also an apt description of the relationship between the Court and the legal academy. The Court is dependent in some respects on the constructive criticism that it receives from the legal academy. The Canadian legal academy has engaged the Court in dialogue on many important subjects; however, comparatively little has been said about the law of the democratic process. *Harper* is a decision that raises important questions about the nature of political speech, the political philosophy that informs the regulation of the democratic process, and the relationship between the Court and Parliament. There is much to be said about all of these subjects. Moreover, the problems with the *Harper* decision indicate that the Supreme Court could benefit from some dialogue. As two critics of the infamous *Bush v. Gore* case wrote, "the academy must do its part to hold the Court accountable through reasoned criticism."<sup>152</sup>

---

<sup>152</sup> Dorf & Issacharoff, "Can Process Theory Constrain Courts?" *supra*, note 109, at 951.

