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Abstract

This article addresses the Supreme Court of Canada's theory of democracy and the right to vote. After setting forth the Court's general approach to democracy, I develop a new conceptual framework for the Court's approach to democratic rights. First, I argue that the Court has adopted a "bundle of democratic rights" approach to the right to vote. By this I mean that the Court has interpreted the right to vote as consisting of multiple democratic rights, each of which is concerned with a particular facet of democratic governance. Second, I claim that the democratic rights recognized by the Court are best understood as structural rights. Structural rights theory offers a new way to account for the individual and institutional dimensions of democratic rights. I argue that the Court's recognition of multiple democratic rights, and its attention to the structural dimension of these rights, has enabled it to regulate the democratic process with respect to a wide array of complex issues, including representation, electoral redistricting, the role of money in elections, individual participation, political equality, and the regulation of political parties.

Keywords

Democracy; Suffrage; Canada. Canadian Charter of Rights and Freedoms; Canada

Democracy and the Right to Vote: Rethinking Democratic Rights under the *Charter*

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This article addresses the Supreme Court of Canada's theory of democracy and the right to vote. After setting forth the Court's general approach to democracy, I develop a new conceptual framework for the Court's approach to democratic rights. First, I argue that the Court has adopted a "bundle of democratic rights" approach to the right to vote. By this I mean that the Court has interpreted the right to vote as consisting of multiple democratic rights, each of which is concerned with a particular facet of democratic governance. Second, I claim that the democratic rights recognized by the Court are best understood as structural rights. Structural rights theory offers a new way to account for the individual and institutional dimensions of democratic rights. I argue that the Court's recognition of multiple democratic rights, and its attention to the structural dimension of these rights, has enabled it to regulate the democratic process with respect to a wide array of complex issues, including representation, electoral redistricting, the role of money in elections, individual participation, political equality, and the regulation of political parties.

Cet article aborde la théorie de la Cour suprême du Canada relativement à la démocratie et au droit de vote. Après avoir énoncé dans ses grandes lignes l'approche de la Cour en matière de démocratie, je montre que la Cour a adopté envers le droit de vote une approche fondée sur un ensemble de droits démocratiques. J'entends par là que la Cour interprète le droit de vote comme reposant sur de multiples droits démocratiques, dont chacun s'applique à un aspect particulier de la gouvernance démocratique. Deuxièmement, je fais valoir que les

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droits démocratiques reconnus par la Cour se comprennent mieux comme droits structurants. La théorie des droits structurants offre une nouvelle façon de tenir compte des dimensions individuelle et institutionnelle des droits démocratiques. Je prétends que la reconnaissance par la Cour de droits démocratiques multiples, et son attention à la dimension structurante de ces droits, lui permet de réglementer le processus démocratique en fonction d'une vaste gamme de questions complexes telles la représentation, le redécoupage électoral, le rôle de l'argent dans les élections, la participation individuelle, l'égalité politique et la réglementation des partis politiques.

IN RECENT YEARS, conflicts over the ground rules of the democratic process have garnered considerable attention. For instance, the Robocalls scandal, which erupted after voters received fraudulent and misleading calls during the 2011 federal election, was not only the subject of a recent court challenge[1] but also triggered proposals to reform the *Canada Elections Act*.[2] The Supreme Court of Canada (the Court) recently considered whether a contested election in the Etobicoke Centre riding should be annulled.[3] Citizens and political parties alike have also debated

1. See *McEwing v Canada (Attorney General)*, 2013 FC 525, 228 ACWS (3d) 584. Mosley J. of the Federal Court held that while electoral fraud did occur, it did not affect the outcome of the elections in the six ridings at issue. See also Laura Payson, "Federal Court won't remove MPs over election robocalls" *CBC News* (23 May 2013), online: <http://www.cbc.ca/news/politics/story/2013/05/23/pol-federal-court-robocall-allegations.html>.
2. Bruce Cheadle, "Robo-call court ruling 'should bolster' reform: former Elections Canada chief," *The Globe and Mail* (27 May 2013), online: <http://www.theglobeandmail.com/news/politics/robo-call-court-ruling-should-bolster-reform-former-elections-canada-chief/article12182777/>.
3. *Opitz v Wrzesnewskyj*, 2012 SCC 55, [2012] 3 SCR 76 [*Opitz*]. For an analysis of the *Opitz* decision, see Yasmin Dawood, "Democracy and Dissent: Reconsidering the Judicial Review of the Political Sphere" (2013) 63 Sup Ct L Rev (2d) 59 at 67-71.

the merits of electoral reform,[4] subsidies for political parties,[5] and the prorogation of Parliament[6] to name but a few issues that have been the subject of significant national debate. This renewed interest in democracy and the right to vote is taking place not only in Canada but in many jurisdictions around the world.[7]

This article considers the Court's theory of democracy and the right to vote. As a start, I claim that the Court has played an important role in defining Canadian democracy. The Court has identified the principle of democracy as a "fundamental value in our constitutional law and political culture,"[8] and many of its decisions have implications for democratic rights and the functioning of the governmental system. More directly, the Court has issued several decisions about the democratic process itself. These decisions, which are referred to as the "law of democracy,"[9]

4. See Peter Aucoin & Lori Turnbull, "The Democratic Deficit: Paul Martin and Parliamentary Reform" (2003) 46:4 Can Pub Adm 427; Ailsa Henderson, "Consequences of Electoral Reform: Lessons for Canada" (2006) 32:1 Can Pub Pol'y 41; Russell Isinger, "Paradigms Lost: German Federal and Electoral Solutions to Canada's Constitutional Problems" (1995) 6:2 Const Forum 61; Henry Milner, ed, *Steps Toward Making Every Vote Count: Electoral System Reform in Canada and its Provinces* (Peterborough: Broadview Press, 2004); Denis Pilon, *The Politics of Voting: Reforming Canada's Electoral System* (Toronto: Emond Montgomery, 2007); Bryan Schwartz, "Proportional Representation for Canada?" (2001) 28:2 Man LJ 133; Mark E Warren & Hilary Pearse, eds, *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (New York: Cambridge University Press, 2008); R Kent Weaver, "Improving Representation in the Canadian House of Commons" (1997) 30:3 Can J Pol Sci 473; Trevor Knight, "Unconstitutional Democracy? A Charter Challenge to Canada's Electoral System" (1999) 57:1 UT Fac L Rev 1.
5. See "Chrétien urges Harper not to kill party subsidy" *CBC News* (9 May 2011), online: CBC News <http://www.cbc.ca/news/canada/story/2011/05/09/pol-chretien-party-subsidies.html>; Jeffrey Simpson, "Party financing: End the public subsidy, but raise the individual limit," *The Globe and Mail* (8 August 2010) A15.
6. Peter W Hogg, "Prorogation and the Power of the Governor General" (2009) 27 NJCL 193; Warren J Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis" (2009) 27 NJCL 217; Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009); Marc D Walters, "The Law Behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2011) 5 J Parl't & Pol L 131.
7. Samuel Issacharoff, "Fragile Democracies" (2007) 120:6 Harv L Rev 1405; Samuel Issacharoff, "Constitutionalizing Democracy in Fractured Societies" (2004) 82:7 Tex L Rev 1861.
8. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 61, 161 DLR (4th) 385 [*Secession Reference*].
9. Samuel Issacharoff, Pamela Karlan & Richard Pildes, *The Law of Democracy: Legal Structure of the Political Process*, 3d ed (Westbury, NY: Foundation Press, 2007) at 1-3. The "law of democracy" is referred to by other labels including election law and political law. See Gregory Tardi, *The Law of Democratic Governing* (Toronto: Carswell, 2004) vol 1-2; J Patrick Boyer,

have addressed a number of topics, including electoral redistricting, campaign finance, rules regulating political parties, the disenfranchisement of prisoners, opinion polls, and contested elections.[10] Many of these cases have arisen under section 3 of the *Canadian Charter of Rights and Freedoms*, which provides that every citizen has the right to vote in federal and provincial elections.[11] Other cases have arisen under sections 2(b) and 2(d) of the *Charter*, which protect the freedoms of expression and association, respectively, and section 15, which guarantees equality.[12] The Court's law of democracy jurisprudence not only includes cases involving election law, it also includes cases that are concerned with the democratic process and democratic rights.

In its law of democracy cases, the Court has developed a complex set of theories about democracy, the right to vote, and democratic rights more generally. There are two important features of the Court's approach. First, I claim that the Court has adopted a "bundle of democratic rights" approach to its law of democracy cases.[13] By this I mean that the Court has recognized multiple democratic rights,

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Election Law in Canada: The Law and Procedure of Federal, Provincial and Territorial Elections (Toronto: Butterworths, 1987); Craig Forcese & Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law, 2005).

10. *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158, 81 DLR (4th) 16 [*Saskatchewan Reference*] (concerning the drawing of electoral boundaries); *Sauvé v Canada (Attorney General)*, [1993] 2 SCR 438, 64 CRR (2d) 1 [*Sauvé I*] (inmate voting rights); *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, 105 DLR (4th) 577 [*Haig*] (residency requirements during referenda); *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876, 178 NBR (2d) 161 [*Harvey*] (membership in provincial legislatures); *Libman v Quebec*, [1997] 3 SCR 569, 151 DLR (4th) 385 [*Libman*] (referendum spending limits); *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877, 38 OR (3d) 735 [*Thomson Newspapers*] (public opinion polls); *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé II*] (inmate voting rights); *Figueroa v Canada (Attorney General)*, 2003 SCC 37, [2003] 1 SCR 912 [*Figueroa*] (benefits for political parties); *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827 [*Harper*] (third party election spending); *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527 [*Bryan*] (distribution of election results); *Opitz, supra* note 3 (contested elections).

11. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

12. Colin Feasby, "Constitutional Questions About Canada's New Political Finance Regime" (2007) 45:3 Osgoode Hall LJ 514 at 539 [Feasby, "Constitutional Questions"]. Feasby defines the law of the political process as encompassing decisions that fall under ss 2, 3, and 15.

13. The "bundle of rights" thesis is used most often to describe property rights. It is based upon Wesley Hohfeld's position that a right *in rem* consists of a number of rights among individuals. See JE Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43:3 UCLA L Rev 711 at 712.

each of which is concerned with a particular facet of democratic governance and participation. The Court has treated the right to vote as a *plural* right; that is, properly understood, the right to vote is an umbrella concept that consists of several democratic rights. Specifically, I claim that the Court has recognized the following four democratic rights in its election law jurisprudence: (1) the right to effective representation; (2) the right to meaningful participation; (3) the right to equal participation; and (4) the right to a free and informed vote.

The Court has described the first two rights—the right to effective representation and the right to meaningful participation—with specific reference to section 3's protection of the right to vote. But the Court has also developed a theory of democratic rights that extends beyond the textual language of section 3. The Court has recognized two additional democratic rights—the right to equal participation and the right to a free and informed vote. The Court's recognition of these two rights is relevant for the Court's general understanding of the right to vote, even though these rights do not attach specifically to section 3. Instead, these rights appear to be derived by the Court from an overarching constitutional commitment to the principle of democracy.

Second, I claim that the Court's decisions have developed a novel approach to democratic rights. Specifically, the Court has paid attention to both the individual and the institutional aspects of democratic rights. I suggest that this is a crucially important feature of the Court's theory of democracy and democratic rights. In previous work, I have used the language of "structural rights" to capture the particular nature of democratic rights.[14] Structural rights are individual rights that take into account the broader institutional framework within which these rights are defined, held, and exercised. Rights do not exist in a vacuum, but are instead exercised within an institutional framework that is constituted by relations of power. Consider, for example, the right to an equal vote. Although the right to an equal vote is held by individuals, it is based implicitly on an assessment of how power ought to be distributed across a political system. The right to an equal vote can be described as a structural right because it is intelligible only with respect to the larger institutional infrastructure within which this right is exercised. Democratic rights have a structural dimension because an individual's exercise of his or her rights takes place within an existing organization of social and political power.

Structural rights theory offers a new way to account for the individual and institutional nature of democratic rights. Although the Court does not employ

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14. Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62:4 UTLJ 499 at 503-04 [Dawood, "Electoral Fairness"].

the language of structural rights, I contend that its theory of democratic rights is notable for its attention to the complex nature of democratic rights. The four democratic rights mentioned above—the right to effective representation, the right to meaningful participation, the right to an equal vote, and the right to a free and informed vote—are best understood as structural rights. Although the Court has described these rights as being held by individuals, it is attuned to the ways in which the exercise of these democratic rights is influenced by the larger social and political infrastructure within which these individuals find themselves.

In addition, I argue that it is possible for courts to regulate the structural dimensions of the democratic system by using an individual rights regime. In particular, I claim that the Court has used the democratic rights described above to regulate the political process as a whole. The Court's approach provides it not only with the ability to protect the activities of voting and standing for office as contemplated by the text of section 3, but also to regulate the structure of democratic institutions and the political system more broadly. The "bundle of democratic rights" approach has given the Court considerable flexibility in responding to a wide range of issues—such as electoral redistricting, campaign finance regulation, political equality, and the regulation of political parties. By recognizing the dual individual-institutional nature of democratic rights, the Court has developed nuanced jurisprudential tools to supervise various aspects of democratic governance—not only the structures, institutions, and processes of democracy, but also the values, ideals, and principles of democracy. By diversifying the concept of the "right to vote" so that it includes a number of democratic rights, the Court is able to intervene with respect to a wide array of political institutions and actors.

These democratic rights, I suggest, are indispensable to the Court's supervision of democracy. Yet as many scholars in the Canadian law of democracy field have noted,[15] there are a number of tensions and inconsistencies among the cases. I claim that many of the internal tensions in the Court's law of democracy decisions have their roots in conflicts among these democratic rights. These rights are not necessarily consistent with one another because they reflect the plural and at times conflicting values of democracy itself. Instead of eliminating these inconsistencies, the Court should, in future cases, explicitly identify the competing democratic rights that are at stake in the cases and justify the conclusion it reaches as to which right to favour.

In sum, the Court's approach to the right to vote has provided it with the ability to intervene with respect to a wide range of issues affecting the electoral process and democratic governance. The Court's diversification of the right to vote,

15. See Part III(C).

and its attention to the individual and institutional nature of democratic rights, has afforded it considerable flexibility when supervising the democratic process. In addition, the Court's approach can be used to address other important issues, such as the partisan self-dealing in the design of election laws.[16] Not only does the Court's approach provide an alternative view of democratic rights, it also serves as a useful paradigm for courts in other jurisdictions that are likewise faced with the challenge of regulating the democratic process.

This article proceeds in three parts. Part I argues that the Court has played an important role in defining Canadian democracy. In addition to discussing the Court's theory of democracy, this Part also sets forth the article's conceptual framework. I claim, first, that the Court has adopted a "bundle of democratic rights" approach to the right to vote, and second, that these democratic rights are best understood as structural rights. Part I also shows how the conceptual framework offers a reconceptualization of the existing jurisprudence, in addition to bringing together competing strands in the scholarly literature on the Canadian law of democracy.

Parts II and III engage in an examination of the Court's law of democracy decisions in order to illustrate the salience of the conceptual framework outlined in Part I. Part II focuses on the first two rights—the right to effective representation and the right to meaningful participation. Part III focuses on the next two rights—the right to equal participation and the right to a free and informed vote. In addition to demonstrating that the right to vote consists of a bundle of rights, Parts II and III also illustrate the structural dimension of these democratic rights. Although these democratic rights are indispensable to the Court's supervision of democracy, Part III shows how conflicts among these rights have created tensions in some of the Court's decisions. This Part then proposes that in future cases the Court should explicitly identify the competing democratic rights that are at stake in the cases and justify the conclusion it reaches as to which right to favour.

I. DEMOCRACY AND THE RIGHT TO VOTE

This Part sets forth the Court's theory of democracy and proposes a new conceptual framework for the Court's approach to democratic rights. It argues that the Court has adopted a "bundle of democratic rights" approach to its law of democracy jurisprudence. In addition, this Part claims that the democratic rights recognized by the Court are best understood as structural rights.

16. For an elaboration of this argument, see Dawood, "Electoral Fairness," *supra* note 14 at 500-61.

A. THE SUPREME COURT'S THEORY OF DEMOCRACY

The Court has played an important role in defining Canadian democracy. In the *Secession Reference*,[17] the Court identified the principle of democracy as one of four principles that "inform and sustain the constitutional text; they are the vital unstated assumptions upon which the text is based."[18] According to the Court, the principle of democracy "has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day."[19] As such, the democracy principle is a "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated."[20] The Court thus interpreted the Constitution as establishing a democratic government even though the democracy principle is not explicitly mentioned in the constitutional text.[21]

Crucially, the Court described democracy as having both "an institutional and an individual aspect."[22] The institutional dimension refers to the fact that federal and provincial representatives are elected by the people.[23] The individual dimension refers to the right to vote in federal and provincial elections—a right that is protected by section 3 of the *Charter*.[24] The dual nature of democracy is evident in the Court's definition of democracy as "the process of representative and responsible government and the right of citizens to participate in the political process as voters and as candidates."[25] As discussed in more detail in Part I(C), the Court's recognition of these two dimensions of democracy—individual and institutional—forms an important aspect of the Court's theory of democratic rights.

Democracy is also associated with substantive goals such as self-government, and with fundamental values such as equality, human dignity, and social justice.[26] In *R v Oakes*,[27] a seminal case that established the Court's approach to *Charter* claims, the Court described the basic values of democracy as follows:

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17. *Secession Reference*, *supra* note 8 at para 61.
18. *Ibid* at para 49. The Court identified four constitutional principles: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights (*ibid* at paras 49, 60-61).
19. *Ibid* at para 62.
20. *Ibid*.
21. *Ibid*.
22. *Ibid* at paras 61, 63.
23. *Ibid* at para 65.
24. *Ibid*.
25. *Ibid* [footnotes omitted].
26. *Ibid*.
27. *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*].

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[28]

In addition, as discussed in the *Secession Reference*, democracy "cannot exist without the rule of law."[29] The law "creates the framework within which the 'sovereign will' is to be ascertained and implemented."[30] Democratic institutions are legitimate to the extent that they "allow for the participation of, and accountability to, the people, through public institutions created under the Constitution."[31]

The Court also emphasized the importance of democratic discussion and deliberation.[32] It stated that "[n]o one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top."[33] The Court observed that a democratic system must consider dissenting voices by "seeking to acknowledge and address those voices in the laws by which all in the community must live."[34] The Court's theory of democracy is notable for its inclusion of a number of principles and values, including legitimacy, participation, deliberation, equality, and dissent. In addition, the Court is attentive to the fundamental role played by the legal framework in both constituting and fostering democratic institutions and values.

B. A BUNDLE OF DEMOCRATIC RIGHTS

The Court has decided several cases that fit under the "law of democracy" banner.[35] These cases have arisen under section 3 (the right to vote), but they have also arisen under sections 2(b) and 2(d) (freedoms of expression and association), and section 15 (equality guarantee) of the *Charter*.[36] The right to vote is explicitly protected by section 3 of the *Charter*, which provides that every citizen has the right to vote for elections for the House of Commons or a provincial legislature and to be qualified for membership in those houses.[37] In its decisions, the Court has emphasized the

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28. *Ibid* at para 67.
29. *Secession Reference*, *supra* note 8 at para 67.
30. *Ibid*.
31. *Ibid*.
32. *Ibid* at para 68.
33. *Ibid*.
34. *Ibid*.
35. See *supra* note 10 for a list of the cases.
36. Feasby, "Constitutional Questions," *supra* note 12 at 539.
37. *Charter*, *supra* note 11, s 3.

importance of section 3, declaring, for instance, that the "right of every citizen to vote … lies at the heart of Canadian democracy."[38] In addition, the Court proclaimed that the "right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination."[39] There are two additional *Charter* provisions that establish democratic rights. Section 4 sets a maximum duration of five years for the life of the House of Commons or a provincial legislature; this period can be extended in the event of a national crisis such as war provided that two-thirds of the members vote for an extension.[40] Section 5 guarantees a sitting of Parliament and the legislatures at least once every year.[41] It is significant that the democratic rights protected under sections 3, 4, and 5 cannot be overridden by exercising the notwithstanding clause in section 33.

There exists an extensive scholarly literature on the Court's law of democracy decisions.[42] While it is beyond the scope of this article to summarize this literature, it is possible to briefly identify some of the perspectives that exist. Some commentators suggest that the Court has adopted a relatively coherent approach to the law of democracy. Colin Feasby argues, for example, that some of the Court's decisions can be explained by its commitment to an "egalitarian model" of the democratic process.[43] Under such an approach, the role of the Court is to foster equality by ensuring that candidates and political parties are competing on a level playing field. In a recent decision, the Court confirmed that Parliament had adopted an egalitarian model of elections.[44]

In contrast, other scholars argue that the Court's approach to these cases is inconsistent. Christopher Bredt and Markus Kremer claim that the Court's interpretation of section 3 does not provide much predictive guidance for the resolution of future cases, and moreover, that the Court's posture of deference to the legislature is noticeably inconsistent from case to case.[45] In addition, Christopher

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38. *Sauvé II*, *supra* note 10 at para 1.
39. *Ibid* at para 9.
40. *Charter*, *supra* note 11, s 4.
41. *Ibid*, s 5.
42. Some of this literature is also discussed below in Parts II and III.
43. Colin Feasby, "*Libman v Quebec (AG)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999) 44:1 McGill LJ 5 [Feasby, "Egalitarian Model"]. In more recent work, Feasby has argued that the egalitarian model explains most, but not all, of the Court's decision making. See Feasby, "Constitutional Questions," *supra* note 12 at 540.
44. *Harper, supra* note 10 at paras 62-63; *Libman, supra* note 10 at para 41.
45. Christopher D Bredt & Markus F Kremer, "Section 3 of the *Charter*: Democratic Rights at the Supreme Court of Canada" (2005) 17 NJCL 19 at 20.

Bredt and Laura Pottie assert that the "egalitarian model is neither a comprehensive answer to the issues posed by electoral regulation, nor has the concept been applied consistently by the courts."[46] They further claim that the "electoral process involves a complex interplay between a number of different participants with differing roles and access to a variety of resources."[47] In addition, there is a significant literature on the so-called political markets (or structural) approach to the law of democracy, which is principally concerned with the ways in which political actors manipulate election laws in order to entrench themselves in power.[48] The law of democracy literature has also focused attention on possible reforms to the electoral process.[49]

This article contributes to the law of democracy literature by developing an analytic framework for the Court's approach to democratic rights. My first claim is that the Court has adopted a "bundle of democratic rights" approach to its law of democracy jurisprudence. The bundle of democratic rights argument offers a reconceptualization of the existing jurisprudence, one that brings together the competing strands found in the cases. Specifically, I argue that the Court has identified a number of democratic rights that govern its law of democracy decisions. After a detailed examination of the law of democracy decisions (in Parts II and III, below), I identify four main rights established by the Supreme Court: (1) the right to effective representation; (2) the right to meaningful participation; (3) the right to equal participation; and (4) the right to a free and informed vote.

The Court has described the first two rights—the right to effective representation and the right to meaningful participation—as falling within the ambit of section 3 of the *Charter*. The next two rights—the right to equal participation and the right to a free and informed vote—are conceptually related to the right to vote, but they are not described by the Court as falling within the ambit of section 3. Although the right to vote is grounded in section 3 of the *Charter*, some of the Court's decisions under sections 2 and 15 of the *Charter* have had an important impact on the meaning of the right to vote, construed more generally. For example, in cases that consider whether campaign finance regulations violate section 2(b), the Court has paid significant attention to the functioning of the democratic system.[50] As described in Part III, the Court appears to have derived these two rights from the Constitution's overarching commitment to the principle of democracy.

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46. Christopher D Bredt & Laura Pottie, "Liberty, Equality and Deference: A Comment on Colin Feasby's 'Freedom of Expression and the Law of the Democratic Process'" (2005) 29 Sup Ct L Rev (2d) 291 at 292.
47. *Ibid*.
48. The structural approach is discussed in detail below in Part I(D).
49. See *supra* note 4.
50. See Part III, below, for a discussion of these cases.

There is already some judicial support for the idea that the *Charter* protects multiple democratic rights under section 3. In *Figueroa v Canada*, for instance, the Court stated that "the democratic *rights* entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process."[51] Writing for the majority, Justice Iacobucci described section 3 as containing entrenched "democratic *rights*."[52] Justice LeBel's concurring opinion in *Figueroa* provides further support for the claim that the Court has announced a set of interlocking and at times conflicting democratic principles. Justice LeBel referred to the complexity of such concepts as effective representation and meaningful participation, noting that such "multifaceted concepts ... comprise a number of intertwined and often opposed principles."[53]

In addition, I argue that these democratic rights, or at least some combination of them, are present in most of the Court's law of democracy decisions. Although these rights are often compatible with one another, they are also in considerable conflict in certain contexts. As described in more detail in Part III(C), I suggest that we should not be overly troubled by the existence of conflict and inconsistency among these various democratic principles; indeed, such conflict and inconsistency is to be expected given the highly complex and multifaceted nature of democracy itself. To this extent, I agree with those scholars who argue that the Court's law of democracy decisions cannot be explained by adhering to a single value or model.[54] I also agree with those scholars who claim that the egalitarian model describes a significant dimension of the Court's jurisprudential approach to the electoral system.[55]

C. DEMOCRATIC RIGHTS AS STRUCTURAL RIGHTS

As the Court recognized in the *Secession Reference*, democracy has both individual and institutional aspects.[56] I argue that democratic rights can be conceived of in a similar way; that is, democratic rights have both an individual dimension and an institutional dimension. While individuals are the rights-holders, the exercise of these rights takes place within a particular political, institutional, and societal context. I have used the term "structural rights" to capture the complex nature of

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51. *Figueroa*, *supra* note 10 at para 29 [emphasis added].
52. *Ibid* [emphasis added].
53. *Ibid* at para 96.
54. See Bredt & Kremer, *supra* note 45; Bredt & Pottie, *supra* note 46.
55. See Feasby, "Egalitarian Model," *supra* note 43.
56. *Secession Reference*, *supra* note 8 at paras 61, 63.

democratic rights.[57] Structural rights are individual rights that take into account the broader institutional framework within which rights are defined, held, and exercised.[58] The participation of individuals is the key focus (hence the emphasis on rights), but individuals participate within an institutional framework that is constituted by relations of power (hence the emphasis on structure). Structural rights theory offers a new way to account for the individual and institutional nature of democratic rights.

Consider, for example, the right to vote. The right to vote presupposes the existence of a broader institutional framework. By the broader institutional framework, I am referring not only to governmental and societal institutions, but also to the mechanisms by which votes are counted, the configuration of electoral districts, the rules by which political parties are regulated, and so forth. As Justice Lebel noted in *Figueroa*, the right to vote:

> is ultimately a right of each individual citizen, [but it] cannot be understood without reference to its social and systematic context. The right to vote and be a candidate do not fit the classic model of a negative individual right to be free from government interference. Citizens cannot exercise s. 3 rights on their own, without the state's involvement. Rather s. 3 imposes a positive obligation on the government to set up an electoral system which, in turn, provides for democratic governance in accordance with the choices of Canadian voters.[59]

The right to vote is not even intelligible in the absence of an elaborate infrastructure consisting of elections, constituencies, political parties, and governmental institutions. While structural rights theory can be applied to various rights, it is particularly applicable to democratic rights since they have both an individual and an institutional dimension. Although the Court does not use the

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57. Dawood, "Electoral Fairness," *supra* note 14 at 500-01.
58. James Gardner defines structural rights as those rights, such as the right to vote, that are valued instrumentally for maintaining a system of democratic government. See James A Gardner, "The Dignity of Voters—A Dissent" (2010) 64 U Miami L Rev 435 at 443-44. Steven G Gey discusses another use of the term "structural rights." See Gey, "The Procedural Annihilation of Structural Rights" (2009) 61:1 Hastings LJ 1. For Gey, structural rights are "constitutional provisions that structure the government's interaction with its citizens and limit the power of government in order to prevent government overreaching" (*ibid* at 4). Structural rights include any allocation of power within government, and include constitutional provisions that protect the freedom of speech, the separation of church and state, due process, equal protection, and voting rights *(ibid* at 4-14). Gey argues that the US Supreme Court has restricted the jurisdiction and remedial authority of federal courts, thereby putting obstacles in the way of holding the government accountable (*ibid* at 22-23).
59. *Figueroa*, *supra* note 10 at para 133.

term "structural rights," its approach demonstrates a noteworthy attention to the dual nature of democratic rights.

Although structural rights manifest in various ways, it is possible to identify four situations in which a right could be described as structural. These four possible forms of structural rights are by no means mutually exclusive; indeed, there is considerable overlap between these forms. In addition, these four forms are meant to illustrate the concept of structural rights rather than to provide a strict categorization. In general, structural rights arise when: (1) the right presupposes an institutional framework without which the right cannot be exercised; (2) the right is framed in such a way that it accounts for how the broader institutional framework impacts the exercise of the right; (3) the right is intelligible only with reference to a system-wide account of how power, fairness, or equality ought to be distributed; or (4) the right accounts for the ways in which the activities of other individuals or private entities affects the exercise of the right. A given right could conceivably take all four forms.

The first form of structural rights arises when the right presupposes an institutional framework without which the right cannot be exercised. For example, the right to vote presupposes the existence of an entire institutional framework, which includes, among other things, elections, candidates, political parties, constituencies, and legislatures. Without these institutions, the right to vote cannot be exercised.

The second form of structural rights arises when the right is framed in such a way that it accounts for how the broader institutional framework affects the right. For example, the Court stated in *Figueroa* that the right to meaningful participation was affected by certain rules that denied benefits to smaller political parties.[60] Although these rules did not prevent citizens from casting a ballot, they diminished the ability of citizens to participate fully in the democratic process. The right to meaningful participation is a structural right because it is based on the idea that an individual's ability to participate is affected by the broader institutional framework within which her participation is taking place. In contrast to the first form, which is concerned with institutions that are directly required for voting to take place, the second form is focused on institutions that have an indirect effect on the strength of the right to vote.

The third form of structural rights arises when the right is intelligible only with reference to a system-wide assessment of how power, fairness, or equality ought to be distributed. An example of the third form of structural rights is the right

60. *Ibid* at para 39.

to an equal vote. Although the right to an equal vote is held by individuals, it is based implicitly on an assessment of how power ought to be distributed across a political system. Justice Lebel observes, for instance, that "[e]valuating the fairness of the system involves looking at how each citizen fares in relation to others."[61]

The fourth form of structural rights arises when the right accounts for the ways in which the activities of other individuals or private entities affect the exercise of the right. For example, the right of equal participation, as recognized by the Court in *Harper v Canada*,[62] is based on the idea that an individual's power in a democracy can be affected by the activities of other individuals who are exercising their democratic rights. Citizens with greater financial means can buy more political speech, and thereby drown out the voices of those with fewer means.[63] Although the right to equal participation is held by individuals, it accounts for the ways in which the activities of other individuals or private entities affect the exercise of the right.

The Court's attention to the institutional framework within which rights are exercised is conceptually consistent with the contextual approach to section 1 analysis. Under the contextual approach, courts consider how the legislative provision affects the right in practice, rather than simply balancing the abstract value of the right against the abstract value of the restriction. As Justice Wilson explained in *Edmonton Journal v Alberta (AG)*,[64] "[o]ne virtue of the contextual approach … is that it recognizes that a particular right or freedom may have a different value depending on the context."[65] For example, political speech might be deemed more valuable than commercial speech. The structural rights approach is contextual in some respects because it is concerned with how rights operate in practice within an institutional setting, but it is not contextual in the same sense as section 1 balancing. The contextual approach demands that courts weigh the value of the right in practice against the value of the restriction in practice when engaging in section 1 balancing. By contrast, structural rights are contextual not because of section 1 balancing but because the very definition of the right contains an institutional dimension within it.

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61. *Ibid* at para 133.
62. *Harper*, *supra* note 10 at para 61.
63. *Ibid* at para 62.
64. *Edmonton Journal (The) v Alberta (Attorney General)*, [1989] 2 SCR 1326, 64 DLR (4th) 577 [*Edmonton Journal*].
65. *Ibid* at 1355.

D. STRUCTURAL RIGHTS AND THE LAW OF DEMOCRACY

The Court has identified the following four rights in its law of democracy decisions: the right to effective representation, the right to meaningful participation, the right to equal participation, and the right to a free and informed vote. I argue that these four democratic rights are best understood as structural rights. Although the Court does not employ the language of "structural rights," I contend that its theory of democratic rights is notable for its attention to the complex individual-institutional nature of democratic rights. As described in Parts II and III, the Court has described these rights as being held by individuals, but it is also attuned to the ways in which the larger social and political infrastructure affects the exercise of these rights.

In addition, I argue that it is possible for courts to regulate the structural dimensions of the democratic system by using an individual rights regime. In particular, I claim that the Court has used these four democratic rights to regulate the political process as a whole. By diversifying the right to vote to include subsidiary democratic rights, and by recognizing the dual individual-institutional nature of these democratic rights, the Court has supervised various aspects of the democratic process such as electoral redistricting, campaign finance regulation, political equality, and the regulation of political parties. The Court's approach enables it not only to protect the activities of voting and standing for office, as provided for in section 3, but also to regulate the democratic system more broadly.

The concept of structural rights bears affinity with other "structural" approaches within the scholarly literature.[66] In the American election-law field, the structural approach was first developed by the political markets theorists. According to the political markets theorists, democratic politics are "akin in important respects to a robustly competitive market—a market whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition."[67] Dominant political parties, however, have a propensity to manipulate the rules of the game in order to reduce electoral competition.[68] By locking up political institutions, dominant parties are able to secure permanent partisan advantage. The political

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66. For a discussion of the structural approach to constitutional interpretation, see Charles L Black, Jr, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969) at 6; Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982) at 74; Philip Bobbitt, *Constitutional Interpretation* (Williston, VA: Blackwell, 1991) at 12-13; J Harvie Wilkinson III, "Our Structural Constitution" (2004) 104:6 Colum L Rev 1687 at 1687-88.
67. Samuel Issacharoff & Richard H Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50:3 Stan L Rev 643 at 646.
68. *Ibid* at 644.

markets approach differs from the traditional individual rights approach that is used by courts in the United States.[69] Under the individual rights approach, courts employ a balancing test that weighs an individual's right to equal protection under the law against the interests of the state.[70]

By contrast, political markets theorists argue that courts should focus on the *structure* of partisan competition. As Richard Pildes argues, the judicial review of democratic processes implicates the "systemic consequences that institutional structures and legal rules generate for political practice."[71] Instead of balancing individual rights against state interests, courts should develop structural solutions to prevent partisan self-entrenchment.[72] While the individualist and structural approaches are usually viewed as alternative approaches, scholars have observed that certain election law cases can be described as containing both individualist and structural elements.[73]

In the Canadian law of democracy literature, several scholars have argued for a political markets/structural approach to the Court's cases.[74] I have described this development in the field as the "structural turn" in the Canadian law of democracy literature.[75] These scholars have argued that the Court should respond to the problem of partisan self-dealing in election law, and they have applied the political markets/structural approach to a number of topics in Canadian politics.[76]

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69. Richard Hasen, *The Supreme Court and Election Law: Judging Equality from* Baker v Carr *to* Bush v Gore (New York: New York University Press, 2003) at 48-49.
70. This approach is used when the formal right to access to the vote has been denied, or when a group's voting power has been diluted as a result of, for instance, a new redistricting map. See *South Carolina v Katzenbach*, 383 US 301, 86 S Ct 803 (1966); *Harper v Virginia Board of Elections*, 383 US 663, 86 S Ct 1079 (1966); *White v Regester*, 412 US 755, 93 S Ct 2332 (1973); *Whitcomb v Chavis*, 403 US 124, 91 S Ct 1858 (1971).
71. Richard H Pildes, "Foreword: The Constitutionalization of Democratic Politics" (2004) 118:1 Harv L Rev 28 at 41.
72. *Ibid*.
73. Heather K Gerken, "Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum" (2004) 153:1 U Pa L Rev 503 at 512; Guy-Uriel E Charles, "Democracy and Distortion" (2007) 92:4 Cornell L Rev 601 at 657.
74. These scholars include Heather MacIvor, Colin Feasby, Christopher Manfredi, Mark Rush, Christopher Bredt, Laura Pottie, and Michael Pal. For a detailed discussion, see Dawood, "Electoral Fairness," *supra* note 14 at 511-18.
75. *Ibid* at 503.
76. See Colin Feasby, "Constitutional Questions," *supra* note 12; Colin Feasby, "The Supreme Court of Canada's Political Theory and the Constitutionality of the Political Finance Regime" in KD Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Oxford: Hart, 2006) 243 [Feasby, "Political Finance"]; Colin Feasby, "Freedom of Expression and the Law of the Democratic Process" (2005) 29 Sup Ct L Rev (2d) 237 [Feasby, "Democratic Process"]; Heather MacIvor, "Do Canadian Political

The common concern is that political insiders are manipulating the rules of the electoral game to secure a partisan advantage.

What is the difference between the "structural" approach and the "structural rights" approach? The structural approach holds that courts should use system-wide structural solutions to resolve problems like partisan gerrymandering because the conventional individual rights/equal protection approach is not well equipped to respond to such problems. By contrast, the structural rights approach holds that courts can use individual rights to remedy the structural deficiencies of the democratic system.

In previous work, for example, I developed a structural rights approach to respond to the problem of partisan self-dealing in election laws.[77] Specifically, I argue that the Court should interpret the right to vote as encompassing a new democratic right—the right to a fair and legitimate democratic process.[78] The Court has already recognized a "right to participate in a fair election,"[79] and I argue that this right should be theorized and expanded. I show how the Court could use the right to a fair and legitimate democratic process to remedy the problem of partisan rule-making in election laws.[80]

The structural rights approach described in this article extends beyond the problem of partisan self-dealing to encompass the Court's regulation of the structure of democratic institutions as a whole. The Court's bundle of democratic rights

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Parties Form a Cartel?" (1996) 29:2 Can J Pol Sci 317 [MacIvor, "Cartel"]; Heather MacIvor, "Judicial Review and Electoral Democracy: The Contested Status of Political Parties under the *Charter*" (2002) 21 Windsor YB Access Just 479 [MacIvor, "Contested Status"]; Heather MacIvor, "The Charter of Rights and Party Politics: The Impact of the Supreme Court Ruling in *Figueroa v. Canada (Attorney General)*" (2004) 10:4 IRPP Choices 1 [MacIvor, "Party Politics"]; Christopher Manfredi & Mark Rush, "Electoral Jurisprudence in the Canadian and U.S. Supreme Courts: Evolution and Convergence" (2007) 52:3 McGill LJ 457 [Manfredi & Rush, "Evolution and Convergence"]; Christopher Manfredi & Mark Rush, *Judging Democracy* (Peterborough: Broadview Press, 2008) [Manfredi & Rush, *Judging Democracy*]; Mark Rush & Christopher Manfredi, "From Deference and Democracy to Dialogue and Distrust: The Evolution of the Court's View of the Franchise and its Impact on the Judicial Activism Debate" (2009) 45 Sup Ct L Rev (2d) 19 [Rush & Manfredi, "Deference and Democracy"]; Bredt & Pottie, *supra* note 46; Michael Pal, "Breakdowns in the Democratic Process and the Law of Canadian Democracy" (2012) 57:4 McGill LJ 299; Yasmin Dawood, "Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context" (2006) 4:1 Int'l J Const L 269 (2006); Dawood, "Electoral Fairness," *supra* note 14.

77. *Ibid* at 503-05.
78. *Ibid* at 519-23.
79. *Figueroa*, *supra* note 10 at para 51.
80. Dawood, "Electoral Fairness," *supra* note 14 at 550-56.

approach, combined with its recognition of the individual-institutional nature of democratic rights, has enabled it to supervise various aspects of the electoral process. Rather than focusing narrowly on protecting individual rights, the Court has also addressed the system-wide aspects of the democratic process, such as the structure of representation, electoral redistricting, the role of money in elections, and the regulation of political parties. Thus, a central claim of this article is that it is possible for courts to regulate the structural dimensions of the democratic system by using individual rights.

II. THE RIGHT TO VOTE, REDISTRICTING, AND REGULATING POLITICAL PARTIES

This Part focuses on two of the democratic rights recognized by the Court—the right to effective representation and the right to meaningful participation. In addition to describing the Court's "bundle of democratic rights" approach to the right to vote, this Part argues that the rights to effective representation and meaningful participation, respectively, can be understood as structural rights. The Court used these rights to regulate democratic participation, the structure of political representation, the rules governing political parties, and the redrawing of electoral boundaries.

A. THE RIGHT TO EFFECTIVE REPRESENTATION

The right to effective representation was first announced by the Supreme Court in *Reference re Provincial Boundaries (Saskatchewan)* (*Saskatchewan Reference*).[81] At issue in the case was whether Saskatchewan's electoral boundaries violated the right to vote as protected by section 3 of the *Charter*.[82] In Saskatchewan's electoral map, there were variances in the population sizes of the electoral districts that were within plus or minus 25 per cent of the provincial quotient.[83] The independent boundary commission that was charged with redrawing Saskatchewan's electoral

81. *Saskatchewan Reference*, *supra* note 10.
82. For a discussion of the constitutional provisions that affect the drawing of electoral boundaries, see Kent Roach, "One Person, One Vote? Canadian Constitutional Standards for Electoral Distribution and Districting" in David Small, ed, *Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform* (Toronto: Dundern Press & Royal Commission on Electoral Reform and Party Financing and Canada Communication Group, 1991) 1 at 8-9 [Roach, "One Person, One Vote?"].
83. The provincial quotient is calculated by dividing the total voting population in the province by the number of ridings. The two northern ridings varied within plus or minus 50 per cent of the provincial quotient. See *Saskatchewan Reference*, *supra* note 10 at 175, 190.

districts was also bound by two restrictions: First, urban and rural ridings must adhere to a strict quota, and second, urban ridings must coincide with municipal boundaries.[84] As a result of these restrictions, the urban districts had more voters on average than the rural districts, and were therefore under-represented as compared to the rural areas.[85] The resulting electoral map thus tended to favour rural voters.

In a five to three decision, Justice McLachlin (as she was then) held on behalf of the majority that the electoral boundaries did not infringe the *Charter*.[86] The majority rejected the idea that electoral districts must adhere to the one person, one vote principle.[87] In a key passage, Justice McLachlin stated that "the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power per se, but the right to 'effective representation.'"[88] According to the majority, the "values and principles animating a free and democratic society are arguably best served by a definition that places effective representation at the heart of the right to vote."[89] The majority also concluded that the disparity between the rural and urban areas did not violate the right to vote.[90] In addition, the majority held that the

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84. *Electoral Boundaries Commission Act,* SS 1986-87-88, c E-6.1. The drawing of electoral boundaries in Canada is governed in part by a federal statute. For more information, see the *Electoral Boundaries Readjustment Act,* RSC 1985, c E-3. For a discussion, see Ronald E Fritz, "The 1990s Federal Boundaries Readjustments and the *Charter*" (1998) 61:2 Sask L Rev 467 at 470-73 [Fritz, "Federal Electoral Boundaries"]. For a history of boundary adjustment in Canada, see Ronald E Fritz, "The Saskatchewan Electoral Boundaries Case and Its Complications" in John C Courtney, Peter MacKinnon & David E Smith, eds, *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Saskatoon: Fifth House, 1992) 71 at 74-77 [Fritz, "Saskatchewan Electoral Boundaries"]. See also Robert G Richards & Thomson Irvine, "Reference re Provincial Electoral Boundaries: An Analysis" in John C Courtney, Peter MacKinnon & David E Smith, eds, *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Saskatoon: Fifth House Publishers, 1992) 48 at 48-49. See also John C Courtney, "Redistricting: What the United States Can Learn From Canada" (2004) 3:3 Election LJ at 493-95. For a discussion of how boundary adjustment takes place, see John C Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (Montreal: McGill-Queen's University Press, 2001). See also, Ron Levy, "Regulating Impartiality: Electoral-Boundary Politics in the Administrative Arena" (2008) 53:1 McGill LJ 1 at 9-10.

85. *Saskatchewan Reference*, *supra* note 10 at 169.

86. Joining the majority were Justices La Forest, Gonthier, McLachlin, Stevenson, and Iacobucci.

87. In 1964, the US Supreme Court adopted a one person, one vote principle for state legislative districts in *Reynolds v Sims*, 377 US 533, 84 S Ct 1362 (1964).

88. *Saskatchewan Reference*, *supra* note 10 at 183.

89. *Ibid* at 188.

90. The Court found that the quota of seats for the rural and urban areas coincided to a large degree with the voting populations of the two areas. McLachlin J was also persuaded that rural areas are more difficult to serve because they present difficulties in terms of transportation and communication. *Ibid* at 192-95.

outcome, and the process by which the map was determined, did not infringe section 3.[91] In a dissenting opinion, Justice Cory concluded that there had been an infringement of section 3, and furthermore that the government had failed to justify the infringement under section 1.[92]

The *Saskatchewan Reference* decision has generated a large body of scholarly commentary.[93] Various criticisms have been raised over the years with respect to the decision. Some scholars have argued that the conception of effective representation is problematic.[94] Commentators have also criticized the Court's rejection of the

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91. *Ibid* at 197.
92. Cory J focuses on the process by which the electoral map was drawn. For more information, see Manfredi & Rush, *Judging Democracy*, *supra* note 76 at 73-76.
93. There are a number of excellent analyses of the case. See Fritz, "Federal Electoral Boundaries," *supra* note 84 at 467-70. See also Fritz, "Saskatchewan Electoral Boundaries," *supra* note 84; Ronald Fritz, "Challenging Electoral Boundaries Under the *Charter*" (1999) 5:1 Rev Const Stud 1 at 9-12 [Fritz, "Challenging Electoral Boundaries"]. The *Saskatchewan Reference* decision has sparked considerable academic commentary comparing the approach both among provinces and between countries. For a comparison of different countries, see Nicholas Aroney, "Democracy, Community, and Federalism in Electoral Apportionment Cases: the United States, Canada, and Australia in Comparative Perspective" (2008) 58:4 UTLJ 421. See also Elizabeth Daly, "Idealists, Pragmatists and Textualists: Judging Electoral Districts in America, Canada and Australia" (1998) 21:2 BC Int'l & Comp L Rev 261.
94. See Mark Carter, "Reconsidering the *Charter* and Electoral Boundaries" (1999) 22:1 Dal LJ 53. Carter, for example, argues that effective representation is a "problematic concept" because its "vagueness invites extensive judicial interpretation and it promises little assistance to citizens who are concerned that the right to vote should provide some protection against cynical political activity" (*ibid* at 58). Other scholars contend that the various factors that comprise effective representation are vague and indeterminate. See Fritz, "Saskatchewan Electoral Boundaries," *supra* note 84. Fritz argues that although such factors as "community of interest, rate of growth, the conditions of communication and transportation networks, and special geographic conditions" should be taken into account, such factors should rarely justify major deviations from voter parity (*ibid* at 78-82). See also Fritz, "Challenging Electoral Boundaries," *supra* note 93 at 5-17 (discussing factors and concluding that the factors are so complex that courts are likely to defer to boundary commissions). David Johnson argues, for example, that the factors are "questionable at best and unprincipled at worst." See David Johnson, "Canadian Electoral Boundaries and the Courts: Practices, Principles and Problems" (1994) 39:1 McGill LJ 224 at 226. He provides a detailed analysis of the indeterminate and vague nature of such factors as community of interest, and the practical and theoretical problems raised by the incorporation of minority representation. Fritz argues that McLachlin J "does not establish a hierarchy of importance for the other factors" other than parity of voting power, which is of "prime importance." See Fritz, "Challenging Electoral Boundaries," *supra* note 93 at 10. Fritz argues further that the individual is faced with "considerable uncertainty in assessing whether his right has been infringed" (*ibid*).

one-person-one-vote standard,[95] while others have argued that the *Charter* does not mandate one person, one vote.[96] Kent Roach has argued that the Court's decision was neither surprising nor disturbing because it accorded with the Court's commitment to minorities and other non-majoritarian communities of interest.[97] Other scholars have argued that the Court's decision failed to remedy the disparity between the urban and rural voters, and moreover, that the Court ignored the possibility that the rules governing the boundary drawing were motivated by partisan considerations.[98]

This article focuses on another dimension of the *Saskatchewan Reference* decision, namely the Court's theory of democratic rights. The Court employs a "purposive approach" when determining the scope and meaning of a *Charter* right.[99] In *Hunter v Southam* the Court stated that a purposive approach identifies the scope of a *Charter* right by "specif[ying] the purpose underlying" the right, or by "delineat[ing] the nature of the interests it is meant to protect."[100] Similarly in *R v Big M Drug Mart*,[101] the Court stated that the "the meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the

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95. See Brian Studniberg, "Politics Masquerading as Principles: Representation by Population in Canada" (2009) 34:2 Queen's LJ 611 at 629. See also Michael Pal & Sujit Choudhry, "Is Every Ballot Equal? Visible-Minority Vote Dilution in Canada" (2007) 13:1 IRPP Choices 1.
96. See FL Morton & Rainer Knopff, "Does the *Charter* Mandate 'One Person, One Vote?'" (1992) 30:2 Alta L Rev 669 at 671. Morton and Knopff argue that there is "no explicit requirement of voter equality in section 3 or any other *Charter* section. Nor is there any legislative history to suggest that the framers of the *Charter* intended section 3 to include an implied voter equality principle" (*ibid*). Allan Tupper contends, however, that "Morton and Knopff's arguments flow from a dated and static view of democracy" and that "the 'right to vote,' to be meaningful in a democracy, must embrace the principle of 'one person, one vote' at the ballot box." See Allan Tupper, "Democracy and Representation: A Critique of Morton and Knopff" (1992) 30:2 Alta L Rev 695 at 696-97.
97. Kent Roach, "*Charter*ing the Electoral Map into the Future" in John C Courtney, Peter MacKinnon & David E Smith, eds, *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Saskatoon: Fifth House, 1992) 200 at 200-01, 208. In addition, Roach observes that the distribution formula under the Constitution is "consistent with the traditional practice of tempering representation by population with concerns about equitable regional representation." Roach, "One Person, One Vote?," *supra* note 82 at 10.
98. Dawood, "Electoral Fairness," *supra* note 14 at 537-45; Carter, *supra* note 94 at 57.
99. For a general analysis of the purposive approach, see Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005) at 378; Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 533; David M Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990) at 15-16.
100. *Hunter v Southam*, [1984] 2 SCR 145, 11 DLR (4th) 641 at 157.
101. *R v Big M Drug Mart Ltd,* [1985] 1 SCR 295 at para 116, 18 DLR (4th) 321 [*Big M*].

purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect."[102]

In order to determine the purpose of a right, the Court stated that judges should pay attention to "the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter."[103] A purposive interpretation is "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection," but one that nonetheless places the right in "its proper linguistic, philosophic and historical contexts."[104] As Jonathan Black-Branch puts it, the purposive approach "aims at teasing out the core values underpinning a free and democratic society."[105] The Court enjoys a fair amount of discretion when determining the purpose of a constitutional right.[106]

In the decision, the Court identified the purpose of the right to vote as yet another democratic right—the right to effective representation. It is significant that the Court interpreted the right to vote as containing a subsidiary democratic right within it. Two implications ensue: first, the right to vote can be described as consisting of a bundle of democratic rights; second, this approach provides the Court with the ability not only to protect the activities of voting and standing for office, as contemplated by the text of section 3, but also to regulate the structure of democratic institutions.

It is also significant that the Court described the right to effective representation in both individual and institutional terms. Although the Court described the right to effective representation as being held by individuals, it was attuned to the way in which the exercise of the right to vote is influenced by the larger social and political infrastructure in which individuals find themselves. For this reason, I

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102. *Ibid*.
103. *Ibid* at para 117.
104. *Ibid*. For a discussion of the purposive approach in *Big M*, see Peter W Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28:4 Osgoode Hall LJ 817 at 821.
105. Jonathan L Black-Branch, "Constitutional Adjudication in Canada: Purposive or Political?" (2000) 21:3 Stat L Rev 163 at 165.
106. Sidney R Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms" (1987) 25:1 Osgoode Hall LJ 1 at 13-21; Black-Branch, *supra* note 105 at 163; Peter Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 10 July 2012), 5th ed (Toronto: Carswell, 2007), 36.8(c).

claim that the right to effective representation can be understood as a structural right because it situates an individual's right to vote within a larger social, political, and institutional context. The right to effective representation is based on the idea that an individual's voting power is affected by the configuration of the political system as a whole. In *Saskatchewan Reference*, the Court identified several conditions for the achievement of effective representation:

> The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.[107]

An important element of effective representation is the "relative parity of voting power."[108] According to the Court, the "legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative."[109] For this reason, vote dilution leads to an "uneven and unfair representation."[110] As Heather Gerken has argued, vote dilution constitutes a structural harm because it is implicitly based upon a theory about how legislative power should be distributed across a system.[111] In a similar way, the right to effective representation has a structural dimension. Although this right is held by individuals, it is premised upon the idea that the power of an individual's vote is affected by the way in which political power is distributed system-wide.

The Court found that while the parity of voting power is of "prime importance," it is not the only relevant factor. For a start, absolute voter parity is impossible to achieve because "[v]oters die, voters move."[112] Even if voter parity is achieved, it may not be desirable if it detracts from effective representation.[113] For these reasons, the Court held that there were additional considerations that were relevant to achieving effective representation:

> Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but

107. *Saskatchewan Reference*, *supra* note 10 at 183-84.
108. *Ibid*.
109. *Ibid*.
110. *Ibid*.
111. Gerken, *supra* note 73 at 521.
112. *Saskatchewan Reference*, *supra* note 10 at 184.
113. *Ibid*.

> examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.[114]

The Court identified a number of factors—geography, community history, community interests, and minority representation—that contribute to the effectiveness of a representative scheme. All of these factors have an impact on the strength of a person's vote. These factors are *institutional*—they are concerned with the social and political context within which an individual exercises his or her right to vote. Redistricting commissions are charged with taking geography and community into account because the strength of an individual's vote is affected by the voting behaviour of the other individuals within her constituency. The Court also noted that the concept of effective representation recognizes cultural and group identity, in addition to enhancing the participation of individuals in the electoral process.[115] A system based on a one person, one vote principle would not be equipped to take into account the various factors that affect the strength of an individual's vote. The Court observed that important democratic values, such as respect for equality, social justice, and group rights, are better protected by a democratic system that is based upon effective representation rather than the one person, one vote principle.[116]

The Court also provided a nuanced account of representation, one that was attentive to the structural dimension of the political system. Representation was defined as "having a voice" in governmental deliberations and the ability to "bring one's grievances" to the attention of the government.[117] For the Court, representation did not simply mean casting a ballot for the candidate of one's choice on election day. In addition, Justice McLachlin was concerned with the effectiveness of the representative scheme as a whole. She stated, for instance, that "only those deviations should be admitted which can be justified on the ground that they contribute to *better government of the populace as a whole*, giving due weight to regional issues within the populace and geographic factors within the territory governed."[118] The right to effective representation can be viewed as a structural right because it is based upon the idea that the power of an individual's vote is affected by the way that other individuals vote and by the institutional infrastructure that translates votes into seats.

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114. *Ibid*.
115. *Ibid* at 188.
116. *Ibid*.
117. *Ibid* at 183.
118. *Ibid* at 185 (quoting *Dixon v British Columbia (Attorney General)* (1989), 59 DLR (4th) 247, 4 WWR 393 at 414 (BCSC) [emphasis added]).

B. THE RIGHT TO MEANINGFUL PARTICIPATION

Another strand in the bundle of democratic rights is the right to play a meaningful role in the democratic process. This right was first announced by the Court in a 1993 decision, *Haig v Canada*,[119] and later elaborated at length in *Figueroa*.[120] At issue in *Haig* was whether section 3 guaranteed the right to vote in the national referendum on the Charlottetown Accord.[121] In all provinces and territories except Quebec, the referendum took place under federal legislation.[122] In Quebec, the referendum took place under provincial legislation that imposed a six-month residency requirement on all voters.[123] Graham Haig, who had moved from Ontario to Quebec during the relevant period, was ineligible to vote in Quebec because he did not meet the six-month residency requirement and was also ineligible to vote in Ontario because he no longer resided in an area covered by the federal legislation.[124] In *Haig*, the Court concluded that section 3 was clearly limited to the election of representatives to the provincial and federal legislatures, and hence did not guarantee the right to vote in a referendum.[125] The Court distinguished a referendum, which is "basically a consultative process, a device for the gathering of opinions," from an election, which is binding on government.[126]

The *Haig* decision is important because it introduced another right to the bundle of democratic rights protected by section 3. Writing for the majority, Justice L'Heureux-Dubé quoted at length from *Saskatchewan Reference* on the concept of effective representation. Justice L'Heureux-Dubé then stated the following:

> The purpose of s. 3 of the *Charter* is, then, to grant every citizen of this country the *right to play a meaningful role in the selection of elected representatives* who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate.[127]

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119. *Haig*, *supra* note 10.
120. *Figueroa*, *supra* note 10.
121. The Charlottetown Accord was an agreement containing proposed amendments to the Constitution, signed by the Prime Minister of Canada, the leaders of all the provinces and territories and representatives of four aboriginal groups on 29 August 1992. The Accord was later subjected to concurrent referenda held in Quebec and the remainder of Canada on 26 October 1992. *Haig*, *supra* note 10 at 1007-08.
122. See *Referendum Act*, SC 1992, c 30.
123. See *Referendum Act*, RSQ c C-64.1.
124. *Haig*, *supra* note 10 at 1009.
125. *Ibid* at 1033.
126. *Ibid* at 1032.
127. *Ibid* at 1031 [emphasis added].

The right to play a meaningful role in the democratic process was further elaborated in *Figueroa*.[128] In *Figueroa*, the head of the Communist Party of Canada challenged the constitutionality of a requirement that political parties nominate candidates in at least fifty electoral districts in order to register as a political party.[129] Registered political parties are granted a number of benefits under the *Canada Elections Act*, including the right to have party affiliations listed on the ballot, to issue tax receipts for donations received outside the election period, and to transfer unspent election funds to the party.[130] A majority of the Court held that the fifty-candidate rule violated section 3 and was not justifiable under section 1.[131]

Writing for the majority, Justice Iacobucci stated that while effective representation was a relevant goal under section 3, there was another important aspect of section 3:

> [T]his Court has already determined that the purpose of s. 3 includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also to the ***right of each citizen to play a meaningful role*** in the electoral process. This, in my view, is a more complete statement of the purpose of s. 3 of the ***Charter***.[132]

Justice Iacobucci identified the "right of each citizen to play a meaningful role in the electoral process" as an essential component of section 3. Justice Iacobucci noted that the section 3 rights are "participatory in nature," rather than being focused solely on the composition of Parliament.[133] He interpreted section 3 as protecting a right of democratic participation:

> On its very face, then, the central focus of s. 3 is the right of each citizen to participate in the electoral process. This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state.[134]

The "fundamental purpose of s. 3 ... is to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent

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128. *Figueroa*, *supra* note 10.
129. *Ibid* at para 3.
130. *Ibid* at para 4.
131. *Ibid* at para 90.
132. *Ibid* at para 25.
133. *Ibid* at para 26.
134. *Ibid*.

such a right, ours would not be a true democracy."[135] Participation is essential because it ensures that elected representatives are aware of the needs and interests of a wide array of citizens.[136] For these reasons, the Court concluded that democratic participation has an "intrinsic value," which is "independent of its impact upon the actual outcome of elections."[137]

The Court's bundle of democratic rights approach became apparent in the *Figueroa* decision. As described in Part I, Justice Iacobucci stated that "the *democratic rights entrenched in s. 3* ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process."[138] In other words, the right to vote, as protected by section 3, is comprised of multiple democratic rights. This interpretation is supported by Justice Iacobucci's assertion that section 3 was not exhausted by the concept of effective representation. In addition to the right of each citizen to vote for and be represented by an elected official, the purpose of section 3 also includes the "right of each citizen to play a meaningful role in the electoral process."[139] Justice Iacobucci stated that this was "a more complete statement" of the scope of the right to vote.[140]

Justice LeBel's concurrence provides additional support for the bundle of rights approach. Justice LeBel described the complexity of such concepts as effective representation and meaningful participation, noting that such "multifaceted concepts ... comprise a number of intertwined and often opposed principles."[141] He argued that the "concept of meaningful participation, like effective representation, comprises a number of different aspects."[142] For Justice LeBel there thus exists an additional bundle of rights within each right. He also noted that it

> can be just as meaningful -- sometimes, perhaps, more so -- to participate as a member of a community or a group (such as a political party) as it is to participate as an individual, and enhancing opportunities for the first kind of participation almost unavoidably entails some cost in terms of purely individualistic participatory values.[143]

In other words, the right of meaningful participation can mean a number of things depending on the particular context.

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135. *Ibid* at para 30.
136. *Ibid* at para 28.
137. *Ibid* at para 29.
138. *Ibid* [emphasis added].
139. *Ibid* at para 25.
140. *Ibid*.
141. *Ibid* at para 96.
142. *Ibid* at para 118.
143. *Ibid*.

In addition, a close examination of the right to meaningful participation shows that it can be understood as a structural right. The concept of "meaningful participation" is based on the idea that an individual's ability to participate is affected by the broader institutional framework within which participation is taking place. In *Figueroa*, the Court found that denying the benefits of registered party status to parties that do not meet the fifty-candidate threshold undermined the "right of each citizen to meaningful participation in the electoral process."[144] The government offered three objectives to justify the requirement: (1) improving the electoral process through public financing of political parties; (2) preserving the integrity of the electoral process; and (3) ensuring that a viable governmental option is produced by the electoral process.[145] The Court stated that the first and second objectives were pressing and substantial but that they failed the proportionality test.[146] As for the third objective—ensuring that a viable governmental option is produced by the electoral process—the Court found that it was "extremely problematic."[147] The Court asserted that legislation expressly enacted to diminish the likelihood of electing certain candidates violates the basic principles of democratic government.[148]

The Court found that political parties are essential for the participation of ordinary citizens. They act "as both a vehicle and outlet for the meaningful participation of individual citizens in the electoral process."[149] Thus, the structure of rules governing political parties has a direct impact on the ability of individual citizens to play a meaningful role in democratic politics.[150] In addition, the Court found that the contribution of a political party to the electoral process did not depend on its ability to form a government.[151] Political parties are essential to participation "[i]rrespective of their capacity to influence the outcome of an election."[152] Smaller parties "are both a vehicle for the participation of individual citizens in the open debate occasioned by the electoral process and an outlet for the expression of support for political platforms that are different from those

144. *Ibid* at para 47.
145. *Ibid* at para 61.
146. *Ibid* at paras 62, 70, 72.
147. *Ibid* at para 80.
148. *Ibid*.
149. *Ibid* at para 39.
150. For a discussion of the role of political parties in a democracy, see Janet L Hiebert, "Money and Elections: Can Citizens Participate on Fair Terms Amidst Unrestricted Spending?" (1998) 31:1 Can J Pol Sci 91 at 108.
151. *Figueroa*, *supra* note 10 at para 39.
152. *Ibid*.

adopted by political parties with a broad base of support."[153] The Court stated that all political parties act as "a vehicle for the participation of individual citizens in the political life of the country."[154] As Heather MacIvor notes, the Court treated political parties as "key players in democratic self-government."[155] Political parties, whether large or small, make it possible for the views of individuals to be represented in a national debate.[156]

The right to meaningful participation is a structural right because it is attuned to the institutional and social context within which participation takes place. The participation of individuals in democratic politics is impacted by the rules that govern political parties. The Court's attentiveness to the interplay between the individual and institutional aspects of participation is similar to its approach to effective representation. For both of these rights, the Court provided a nuanced account of the distribution of power within a political system, and the ways in which the rules of democracy affect this distribution. Although these rights are held by individuals, the Court took into account the institutional framework within which these rights are exercised. In addition, the Court used these rights to regulate complex problems involving representation, democratic participation, political parties, and electoral redistricting.

A remaining question involves the constitutional status of the right to effective representation and the right to meaningful participation. The Court described these two rights as the "purpose" or "focus" of the section 3 right to vote. It is not evident that these rights enjoy the same constitutional status as entrenched *Charter* rights. The right to vote as protected by section 3 of the *Charter* is treated as an inviolable right. The constitutional status of the "right to effective representation" and the "right to meaningful participation" is less clear. Whereas the section 3 right to vote might be viewed as a "trump"[157] that acts as a veto in the face of other competing interests, the rights to effective representation and meaningful participation may command less constitutional clout.

I suggest, therefore, that these subsidiary democratic rights, at least in the context of the Court's cases, should not necessarily be viewed as traditional constitutional

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153. *Ibid* at para 46.
154. *Ibid* at para 40.
155. MacIvor, "Contested Status," *supra* note 76 at 482. According to MacIvor, the Court in *Figueroa* followed a "party-equality" approach because it held that the state is not permitted to disadvantage smaller parties by denying them various benefits made available to the larger parties. See *ibid* at 479, 486.
156. *Figueroa*, *supra* note 10 at para 40.
157. Dworkin argues that "[i]ndividual rights are political trumps held by individuals." See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) at xi.

rights. That is, these rights are not necessarily stand-alone constitutional rights that give rise to state obligations. To explain their status, it is useful to make a distinction between "hard rights" and "soft rights." I shall define "hard rights" as those rights that give rise to state obligations to act or to refrain from acting. Constitutionally entrenched rights, such as the right to vote, are hard rights. By contrast, the rights to effective representation and meaningful participation are better conceived as what I shall call "soft rights." Unlike hard rights, soft rights are quasi-rights that serve an interpretive function. By this I mean that these soft rights give meaning and content to the Court's understanding of democracy and the right to vote. The right to effective representation and the right to meaningful participation are not necessarily stand-alone constitutional rights, but are instead better conceived as soft rights that provide meaning and interpretive content to the right to vote.

III. DEMOCRATIC RIGHTS, CAMPAIGN FINANCE, AND ELECTORAL SPEECH

This Part considers two additional democratic rights recognized by the Court—the right to equal participation and the right to a free and informed vote. The Court recognized these democratic rights in section 2(b) freedom of expression cases. Although these rights are conceptually connected to the right to vote, they were not described as falling within the ambit of section 3. I suggest that these rights attach in a more general sense to an overarching constitutional commitment to democratic government.[158] The Court used these rights to regulate campaign finance, individual participation, electoral speech, and informed voting.

A. THE RIGHT TO EQUAL PARTICIPATION

The Court first recognized a "right of equal participation in democratic government" in *Libman v Quebec (AG)*.[159] At issue in *Libman* was the constitutionality of the third-party spending limits set out in Quebec's *Referendum Act*, which laid forth the rules for the referendum on the Charlottetown Accord.[160] Robert Libman, who was president of the Equality Party, did not wish to join either the "yes" or the "no" position on the referendum question, and instead wished to advocate in favour of abstaining from the vote.[161] The referendum legislation, however, required that

158. As described in Part I(A), above, the Court has interpreted the Constitution as establishing and protecting a democratic form of government.
159. *Libman*, *supra* note 10 at para 47.
160. *Ibid* at para 1.
161. *Harper*, *supra* note 10 at para 60.

regulated expenses be incurred only through a national committee, which meant that individuals who supported neither option were limited to unregulated expenses.[162] Mr. Libman argued that these restrictions infringed the freedoms of expression and association, and the right to equality.[163] He argued that any individual or group should have the right to receive public funding and to incur regulated expenses.[164]

The Court held that the restrictions infringed the freedom of political expression and could not be upheld under section 1 of the *Charter*.[165] It found that the provisions did not meet the minimal impairment test because the limits imposed on groups that do not affiliate themselves with the national committees are so restrictive that they amount to a total ban.[166] It emphasized that "freedom of expression is of crucial importance in a democratic society"[167] and that the "connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and [that] the nature of this connection is largely derived from the Canadian commitment to democracy."[168]

In *Libman*, the Court stated that it was important to "prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources."[169] As noted by Colin Feasby, the Court appeared to favour an "egalitarian" approach to the rules governing spending during a referendum or an election.[170] The basic idea is that those with greater wealth should not be permitted to control the electoral process and thereby disadvantage those with less wealth; that is, disparities in private wealth should not be translated into disparities of political influence.[171] The Court described the egalitarian aspect of spending limits as follows:

> [S]pending limits are essential to ensure the primacy of the principle of fairness in democratic elections. The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens.

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162. *Libman*, *supra* note 10 at para 14.
163. *Ibid* at paras 2, 27.
164. *Ibid* at para 18.
165. *Ibid* at paras 35, 85.
166. *Ibid* at para 82.
167. *Ibid* at para 28.
168. *Ibid* at para 29, citing *R v Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1 at para 89.
169. *Libman*, *supra* note 10 at para 41.
170. Feasby, "Egalitarian Model," *supra* note 43 at 8, 31-32.
171. *Ibid* at 9-11. (Drawing on the work of John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972); Cass Sunstein, *Democracy and the Problem of Free Speech*, 2d ed (New York: Free Press, 1995); Owen Fiss, *The Irony of Free Speech* (Cambridge: Harvard University Press, 1996).

> If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate.[172]

The Court then recognized a "right of equal participation in democratic government."[173] This right was discussed again in *Harper*.[174] At issue in *Harper* was the constitutionality of third-party spending limits as provided for in the *Canada Elections Act*.[175] Third-party spending refers to campaign spending that is conducted by individuals or groups that are neither candidates nor political parties. Although the provisions of the Act had been struck down by the lower courts[176] as violations of the *Charter*'s guarantees of freedom of expression and association, a six-to-three majority of the Court upheld the constitutionality of the third-party spending limits. The Court majority confirmed that Parliament had adopted an egalitarian model of elections, under which wealth is the main obstacle that prevents individuals from enjoying an equal opportunity to participate in the electoral process.[177] According to the Court, spending limits are required to prevent the most affluent citizens from "monopolizing election discourse" and thereby preventing other citizens from participating on an equal basis.[178] The Court held that although the spending limits infringed upon the freedoms of expression and association guaranteed by the *Charter*,[179] the provisions were nonetheless justifiable under section 1.[180]

In *Harper*, the majority noted that in *Libman* that it had "endorsed several principles applicable to the regulation of election spending generally and of independent or third party spending specifically."[181] The first principle is the right to equal participation, which the Court described as follows:

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172. *Libman*, *supra* note 10 at para 47.
173. *Ibid*.
174. *Harper*, *supra* note 10.
175. See *Canada Elections Act*, SC 2000, c 9. For a history of the *Harper* decision and a discussion of political finance, see Richard Haigh, "He Hath a Heart of Harping: Stephen Harper and Election Spending in a Spendthrift Age" (2005) 29 Sup Ct L Rev (2d) 305 at 306-11; Andrew Geddis, "Liberté, Egalité, Argent: Third Party Election Spending and the *Charter*" (2004) 42:2 Alta L Rev 429 at 446; Jennifer Smith & Herman Bakvis, "Judicial Review and Electoral Law" in MW Westmacott & Hugh Mellon, eds, *Political Dispute and Judicial Review: Assessing the Work of the Supreme Court of Canada* (Toronto: Nelson, 2000) 64.
176. 2001 ABQB 558, 93 Alta LR (3d) 281; 2002 ABCA 301, [2002] 14 Alta LR (4th) 4.
177. *Harper*, *supra* note 10 at para 62, citing Feasby, "Egalitarian Model," *supra* note 43.
178. *Harper*, *supra* note 10 at para 61.
179. *Ibid* at para 66.
180. *Ibid* at para 121.
181. *Ibid* at para 61.

> [1] If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate. … To ensure a *right of equal participation in democratic government*, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard [equal dissemination of points of view].[182]

The Court thus identified a "right of equal participation in democratic government," which I will refer to as the "right to equal participation." The second principle is "the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties,"[183] which I refer to as the right to a free and informed vote, and which is discussed in Part III(B) below. The third, fourth, and fifth principles concerned the scope of spending limits, issue advocacy, and limits on independent spending, respectively.[184] The Court made it clear that by endorsing these principles, it had effectively adopted the egalitarian model of elections. The right to equal participation is therefore "consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society."[185]

I claim that the right to equal participation can be described as a structural right. This right has an individual aspect since, in the words of the Court, it is "premised on the notion that individuals should have an equal opportunity to participate in the electoral process."[186] It also has a structural aspect since, as described by the Court, it "promotes an electoral process that requires the wealthy from being prevented from controlling the electoral process to the detriment of others with less economic power."[187] In *Libman*, the Court stated that it was important to prevent "the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources."[188] Given the competitive nature of elections, spending limits are required to protect the equality of democratic rights and to prevent "the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable

182. *Ibid* [emphasis added and the Court's emphasis of a different portion of the quoted text removed].
183. *Ibid*.
184. *Ibid*.
185. *Ibid* at para 62.
186. *Ibid*.
187. *Ibid*.
188. *Libman*, *supra* note 10 at para 41.

opportunity to speak and be heard."[189] Likewise in *Harper*, the Court stated that "the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power."[190] The Court was thus attentive to the interplay between political power and wealth. Private citizens who spend their own funds to purchase advertising time from a private media corporation in order to participate in politics undermine the democratic rights of those citizens who lack the financial means to engage in political speech. Citizens with greater financial means can buy more political speech, and thereby exert greater political influence. For this reason the Court in *Libman* was seeking "an equality of participation and influence between the proponents of each option."[191]

The Court thus recognized that an individual's power in a democracy can be affected by the activities of other individuals who are exercising their democratic rights. The right to participate in the electoral process is understood within a larger systemic account of the distribution of wealth and political power in society. In sum, the right to equal participation is structural because it is based on the idea that an individual's rights are affected by how other individuals exercise their democratic rights and by the institutional framework within which these rights are exercised.

B. THE RIGHT TO A FREE AND INFORMED VOTE

The final right concerns the right to a free and informed vote. Versions of this right have appeared in a number of cases including *Thomson Newspapers Co v Canada (AG)*,[192] *Libman*,[193] *Harper*,[194] and *Bryan*.[195] An early version of the right to an informed vote first appeared in *Thomson Newspapers*.[196] At issue in *Thomson Newspapers* was whether an opinion poll ban violated the right to vote in section 3 and the freedom of expression in section 2(b) of the *Charter*.[197] The *Canada Elections Act* prohibited the publication or dissemination of opinion poll results in the last three days of an election period.[198] The government argued that although

189. *Ibid*.
190. *Harper*, *supra* note 10 at para 62.
191. *Libman*, *supra* note 10 at para 41.
192. *Thomson Newspapers*, *supra* note 10.
193. *Libman*, *supra* note 10.
194. *Harper*, *supra* note 10.
195. *Bryan*, *supra* note 10.
196. *Thomson Newspapers*, *supra* note 10.
197. *Ibid* at para 65.
198. See *Canada Elections Act*, RSC 1985, c E-2, s 322.1. Note, this act was repealed by (e-25) *Canada Elections Act*, SC 2000, c 9.

the opinion poll ban infringed the freedom of expression, it was nonetheless justifiable under section 1.[199] The government's objective was to "to prevent the potentially distorting effect of public opinion survey results that are released late in an election campaign leaving insufficient time to assess their validity."[200] The rationale behind the ban was thus twofold: first, to ensure that the opinion polls did not unduly influence voters; and second, to prohibit the release of poll data that could not be verified and contested in the three days before an election.[201]

Writing for a majority, Justice Bastarache found that the opinion poll ban infringed the freedom of expression, and moreover, that it could not be justified under section 1.[202] The Court concluded that the type of speech at issue was clearly political speech: "there can be no question that opinion surveys regarding political candidates or electoral issues are part of the political process and, thus, at the core of expression guaranteed by the *Charter*."[203] In its section 1 analysis, the majority was not persuaded by the government's justifications.[204] Although the majority found that the government's objective to protect voters from the influence of potentially inaccurate poll data was pressing and substantial,[205] it held that the opinion poll ban did not pass the minimal impairment stage of the test.[206] The dissent, written by Justice Gonthier, found that the opinion poll ban was consistent with the guarantee of effective representation because poll results that "cannot be assessed in a timely manner may actually deprive voters of the effective exercise of their franchise."[207]

The right to a free and informed vote can be viewed as a structural right. When describing this right, the Court was attuned to the individual and institutional aspects of exercising the franchise. In *Thomson Newspapers*, for instance, the Court acknowledged that information furnished by a private media corporation is politically significant. An individual's right to vote is affected by information about how other citizens are voting. The Court also

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199. *Thomson Newspapers*, *supra* note 10 at para 85.
200. *Ibid* at para 22.
201. *Ibid*.
202. *Ibid* at para 131. For a critique of the Court of Appeal's decision in *Thomson Newspapers*, see Colin Feasby, "Public Opinion Poll Restrictions, Elections, and the *Charter*" (1997) 55:2 UT Fac L Rev 241. Feasby argues that the polling blackout is constitutionally permissible because it promotes electoral fairness.
203. *Thomson Newspapers*, *supra* note 10 at para 92.
204. *Ibid* at paras 120-21.
205. *Ibid* at para 109.
206. *Ibid* at para 122.
207. *Ibid* at para 19.

acknowledged that the ban affects the rights of voters and the rights of media and pollsters. The Court thus drew a connection between information and democratic participation:

> This is a complete ban on political information at a crucial time in the electoral process. The ban interferes with the rights of voters who want access to the most timely polling information available, and with the rights of the media and pollsters who want to provide it. It is an interference with the flow of information pertaining to the most important democratic duty which most Canadians will undertake in their lives: their choice as to who will govern them.[208]

Justice Bastarache noted that the "purpose of providing more accurate information to Canadian voters is that they are more capable of making a free and informed choice, which engenders a freer and fairer election process."[209] The Court rejected the argument that voters would be misled by the polls, stating that "Canadian voters must be presumed to have a certain degree of maturity and intelligence. They have the right to consider the results of polls as part of a strategic exercise of their vote."[210] Justice Bastarache stated that the Court should presume that "the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information."[211]

In later cases, however, the Court became increasingly concerned that the structural effects of the informational imbalances would *impair* electoral fairness. In *Libman*, the Court upheld restrictions in third-party spending in order to "prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources."[212] In addition, the Court stated that the election spending regime "is designed to permit an informed choice to be made by ensuring that some positions are not buried by others."[213] Whereas in *Thomson Newspapers* an informed choice was associated with unregulated access to information, in *Libman* an informed choice was associated with restrictions on the kind of information to which voters would be exposed.

The right to a free and informed vote, although evident in nascent form in *Thomson Newspapers* and *Libman*, was explicitly identified in *Harper*, and later

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208. *Ibid* at para 127.
209. *Ibid* at para 98.
210. *Ibid* at para 101.
211. *Ibid* at para 112.
212. *Libman*, *supra* note 10 at para 41.
213. *Ibid*.

elaborated at length in *Bryan*.[214] In *Harper*, the Court recognized a number of principles that, taken together, endorse the egalitarian model.[215] The Court described the second principle as follows:

> Spending limits are also necessary to guarantee the ***right of electors to be adequately informed of all the political positions*** advanced by the candidates and by the various political parties [free and informed vote]… .[216]

The Court thus identified the "right of electors to be adequately informed," which I shall, following the Court, refer to as the right to a free and informed vote. The Court in *Harper* further elaborated the requirements for a free and informed vote. The first requirement for discursive equality is that voters are adequately informed of all the political positions supported by candidates and parties.[217] An informed voter "must be able to weigh the relative strengths and weaknesses of each candidate and political party… [and] must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist."[218] The second requirement is that all candidates and political parties are given a reasonable opportunity to present their positions to voters.[219] These two requirements share the same ultimate objective: to ensure that voters are fully informed about their choices.

Once again, there is a structural dimension to the Court's description of the right to a free and informed vote. The Court is concerned that a voter's information about an election can be negatively impacted by unregulated spending on political advertising. According to the Court, the "unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views."[220] Third party spending limits are essential because if "a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out."[221] Because people have unequal financial resources, direct state intervention is required to prevent the wealthy from exerting a disproportionate influence on the electoral process.[222] The concern here is the "unequal dissemination of points of view."[223] Such

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214. *Thomson Newspapers*, *supra* note 10; *Libman*, *supra* note 10; *Harper*, *supra* note 10; *Bryan*, *supra* note 10.
215. *Harper*, *supra* note 10 at para 61.
216. *Ibid* at para 61, citing *Libman*, *supra* note 10 at para 47 [emphasis in the original].
217. *Supra* note 10 at para 71.
218. *Ibid*.
219. See *ibid* at para 87.
220. *Ibid* at para 72.
221. *Ibid*.
222. *Ibid* at para 62.
223. *Ibid* at para 72.

an unequal dissemination will result in the voter not being adequately informed, which in turn affects the voter's ability to participate meaningfully in the electoral process.[224]

The Court focused considerable attention on the right to a free and informed vote in *Bryan*.[225] The case concerned the constitutionality of a provision of the *Canada Elections Act* that prohibited the transmission of election results between electoral ridings before the closing of all polling stations in Canada. The claimant had posted election results from Atlantic Canada on a website while polls were still open in other electoral ridings.[226] A five-to-four majority of the Court held that although the provision infringed the freedom of expression as protected by section 2(b), it could nonetheless be upheld under section 1. In a dissenting opinion, Justice Abella argued that the provision violated the freedom of expression in addition to not meeting the proportionality test under section 1.[227] Given the effect of staggered voting hours on reducing informational imbalance, Justice Abella concluded that the publication ban was an "excessive response to an insufficiently proven harm."[228]

It is notable that the government explicitly identified "informational equality among voters" as one of the objectives of the legislation.[229] The notion of informational equality has a structural dimension because it demands inquiry into the system by which voters gain information about an election. In the opinion for the majority, Justice Bastarache characterized the objective of the provision as "ensur[ing] informational equality by adopting reasonable measures to deal with the perception of unfairness created when some voters have general access to information that is denied to others, and the further possibility that access to that information will affect voter participation or choices."[230] The idea is that the "participation or choices" of voters will be affected by their access to information. Justice Bastarache concluded that the objective of ensuring informational equality was pressing and substantial, and that the provision satisfied the proportionality stage of the *Oakes* test.[231] He noted that informational equality is a "centrally important element of the concept of electoral fairness" and that the Court had previously held, in *Libman* and *Harper*, that the promotion of electoral fairness is a pressing and substantial objective.[232] Additionally, Justice Bastarache referred

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224. See *ibid* at para 71.
225. *Bryan*, *supra* note 10.
226. *Ibid* at para 2.
227. *Ibid* at paras 106, 133.
228. *Ibid* at para 133.
229. *Ibid* at para 12.
230. *Ibid* at para 14.
231. *Ibid* at paras 35, 41, 44, 49.
232. *Ibid* at para 35.

to the results of the Lortie Report, which indicated that the public was opposed to informational imbalances among voters.[233] The right to a free and informed vote has a structural dimension because it is concerned with the system-wide distribution of electorally relevant information to voters.

On a final note, the constitutional status of these two rights—the right to equal participation and the right to a free and informed vote—is somewhat ambiguous. The Court described them initially as "principles," but it also described each as consisting of a "right" held by electors. Christopher Bredt and Margot Finley criticize the apparent constitutional status of the right to a free and informed vote.[234] They note that the Court in *Bryan* found that the voters' freedom of expression interest did not necessarily "supersede the value of the countervailing principle that no voter should have general access to information about the results of elections unavailable to others."[235] According to Bredt and Finley, however, the freedom of expression should supersede the "putative inherently important goal of informational equality"[236] because the former is a "right explicitly guaranteed in the *Charter* while the [latter] is a principle the value of which is not at all clear, and certainly not from the evidence before the Court."[237] At the very least, I suggest that these rights serve as interpretive principles that the Court has endorsed to show its adoption of the egalitarian model. The rights to equal participation and a free and informed vote are soft rights or quasi-rights that provide content and meaning to the Court's understanding of democracy and the right to vote.

C. DEMOCRATIC COMPLEXITY

In its law of democracy decisions, the Court has developed a set of jurisprudential tools that enable it to regulate the democratic process. The Court has identified a number of democratic rights, and it has described these rights in structural terms. The Court's bundle of democratic rights approach has enabled it to tackle complex problems, including the structure of democratic institutions, the regulation of political parties, the role of money in elections, individual participation, the redrawing of electoral boundaries, and campaign advertising. Although the Court's multifaceted approach has enabled it to address many aspects of democratic governance, there are some disadvantages to this approach. As many scholars have

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233. *Ibid* at para 44.
234. Christopher D Bredt & Margot Finley, "*R. v. Bryan*: The Supreme Court and the Electoral Process" (2008) 42 Sup Ct L Rev (2d) 63 at 77.
235. *Bryan*, *supra* note 10 at para 27, cited by Bredt & Finley, *supra* note 234 at 80.
236. Bredt & Finley, *supra* note 234 at 80.
237. *Ibid* at 81.

argued, there are significant tensions among the Court's law of democracy decisions. I suggest that these tensions can be explained in part by the fact that the Court has recognized a multiplicity of democratic rights. In this section, I first consider the arguments in the scholarly literature that have criticized the Court for its lack of consistency. I then show that for its part, the Court has attempted to erase any inconsistency by reinterpreting the rights to fit with one another. Instead of suppressing these tensions, I suggest that the Court should retain the complexity and render it transparent.

As many commentators have noted, there are tensions among the Court's decisions. Andrew Geddis argues that there is a tension between *Libman* and *Thomson Newspapers*.[238] According to Geddis, *Libman* espoused an egalitarian approach while *Thomson Newspapers* emphasized individual participation.[239] In addition, Geddis claims that the dissenting justices' position in *Harper* was consistent with the holding in *Thomson Newspapers* because the "minority in *Harper* in practice gives primacy to the individual right of unencumbered—or "effective"—electoral participation."[240] Christopher Manfredi and Mark Rush similarly note that *Figueroa* protects an individual right to vote, which is in tension with the egalitarian model.[241]

In a similar vein, Jamie Cameron argues that the *Harper* decision's emphasis on the egalitarian model essentially undermined the Court's earlier protection of the principle of meaningful participation in *Figueroa*. Cameron asserts that the Court in the *Harper* case "resisted section 2(b)'s values, as well as the evidentiary requirements of section 1, to uphold provisions that effectively exclude citizens from the democratic process."[242] According to Cameron, the Court in *Harper* had to make a choice between the egalitarian model announced in *Libman* and the principle of meaningful participation that was announced in *Figueroa*.[243] As Cameron argues, the two ideas are difficult to reconcile.[244] The decision in *Figueroa* thus had to be "explained away," and to do so, Justice Bastarache held that the right of participation under section 3 (which was at stake in *Figueroa*) cannot be claimed in a case involving section 2 (which was at stake in *Harper*).[245]

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238. Geddis, *supra* note 175 at 446.
239. *Ibid* at 447-48.
240. *Ibid* at 460.
241. Manfredi & Rush, *Judging Democracy*, supra note 76 at 100, 102.
242. Jamie Cameron, "Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on *Vancouver Sun* and *Harper v. Canada*" (2005) 17 NJCL 71 at 73.
243. *Ibid* at 93.
244. *Ibid*.
245. *Ibid* at 94.

Cameron points out that if the rights of the voters were comprised by the rules disadvantaging smaller parties (as the Court held in *Figueroa*), then "it would be impossible for limits which directly prohibit individuals from playing a role in election debate not to constitute a more serious interference with rights protected by section 2(b)'s guarantee of expressive freedom."[246] Justice Bastarache's refusal to extend *Figueroa*'s participation principle to section 2(b) suggests that third party advertising undermines meaningful participation because there is an unequal dissemination of points of view, which, in turn, negatively affects the voter's ability to become informed.[247] The contradiction that emerges is that more information hinders rather than helps the voter's quest to be informed. As Cameron points out, Justice Bastarache's position is in some tension with his earlier stance in *Thomson Newspapers* that voters are rational actors and should be exposed to, rather than protected from, information that is relevant to the political process.[248] The Court ended up with a position in which the rights under section 3 and section 2(b) are treated as being inconsistent.[249] In this way, the *Harper* court was able to conclude that it was necessary to limit the speech of third parties in order to protect the voters.[250] Cameron argues that the *Harper* majority "contrived a conflict between the rights of voters and the rights of would-be participants to avoid *Figueroa*'s principle of meaningful participation."[251] According to Cameron, it is not clear why the section 3 right to an egalitarian process should trump the section 2(b) right to free expression.[252]

Christopher Bredt and Margot Finley argue with respect to the *Bryan* decision that the Court's recognition of informational equality raises certain problems.[253] In *Bryan*, the Court stated that the objective of informational equality was consistent with the egalitarian model (which it had already endorsed). Informational equality means that all voters have access or are exposed to the same information, and it was supported by the Court on the basis that it enhances electoral fairness. As Bredt and Finley point out, the Court "found that the fairness of Canada's electoral process *demands* that no individual voter have access to general information not available to any

246. *Ibid*.
247. *Harper*, *supra* note 10 at para 72, cited in Cameron, *supra* note 242 at 95.
248. Cameron, *supra* note 242 at 95.
249. *Ibid* at 101.
250. *Ibid*.
251. *Ibid*.
252. *Ibid* at 95.
253. Bredt & Finley, *supra* note 234 at 77.

other voter."[254] Yet Bredt and Finley dispute the notion that informational equality is actually "required under the Constitution or that informational equality is an essential component of maintaining confidence in the electoral process."[255] They question whether informational equality is either a realistic or a desirable objective, especially since there are any number of aspects of the electoral process, such as the resources available to political parties, that cannot be, and perhaps should not be, equalized.[256] Bredt and Finley point out the multiple ways in which voters across the country have access to different kinds of information; indeed, such disparities are essential in order for voters to have information about local issues and concerns.[257]

Instead of acknowledging these tensions, the Court has attempted to conceptually unify the various democratic rights recognized in its cases. To do so, the Court has tended to suppress the tensions among conflicting rights by redefining the rights at stake. Consider, for example, the Court's treatment of the right to a free and informed vote. In *Thomson Newspapers*, the Court adopted a libertarian approach when it equated the right to a free and informed vote with access to all electorally relevant information. In *Harper* and *Bryan*, by contrast, the right to a free and informed vote was explicitly connected to the egalitarian model. The right to a free and informed vote was equated with restrictions on the dissemination of electorally relevant information.

To minimize the discord among rights, the Court connected the right to a free and informed vote to the other democratic rights it had recognized. In *Harper*, for example, the Court created a conceptual link between the right to a free and informed vote and the right to play a meaningful role in the democratic process. It noted that:

> This case engages the informational component of an individual's right to meaningfully participate in the electoral process. The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. In short, the voter has a right to be "reasonably informed of all the possible choices."[258]

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254. *Ibid* [emphasis in original].
255. *Ibid* at 78.
256. *Ibid*.
257. *Ibid* at 79.
258. *Harper*, *supra* note 10 at para 71.

Thus a voter can only meaningfully participate in the electoral process if she is reasonably informed. The majority in *Harper* also connected the right to a free and informed vote to the right to equal participation in democratic governance. The Court stated that the electoral process is fair provided that "equality in the political discourse" exists.[259]

The problem of conflicting rights is a significant one, and while it is beyond the scope of this article to propose a comprehensive solution, it is possible to sketch the outlines of an alternative approach. I propose that instead of suppressing the conflicts among rights, the Court should be transparent about these conflicts and the trade-offs that such conflicts entail. Democratic values are always, and unavoidably, in tension with one another, and for this reason, there will inevitably be trade-offs among the various rights that constitute the right to vote and democracy more generally.

Instead of submerging the conflicts among rights as the Court has tended to do, I claim that the Court should explicitly identify the competing democratic rights that are at stake in the cases and justify the conclusion it reaches as to which right to favour. The regulation of democracy inescapably involves competing principles, and it is preferable for these competing considerations to be openly acknowledged. Indeed, Justice Bastarache noted in *Thomson Newspapers* that the freedom of expression and the right to vote are distinct rights and that, in the event they come into conflict, the rights must be balanced in such a way as to respect both rights.[260] The same approach should be adopted for conflicts within the bundle of democratic rights. In general, judicial transparency about these trade-offs is preferable to a forced coherence, at least from a democratic perspective.

IV. CONCLUSION

This article has focused on the Court's theory of democratic rights. I claim that the Court has adopted a novel approach to democratic rights, one that provides a new way for courts to engage in the oversight of democracy. First, I argue that the Court has adopted a "bundle of democratic rights" approach to its understanding of the right to vote. By this I mean that the Court has interpreted the right to vote as a plural right; that is, the right to vote is an umbrella concept that consists of several democratic rights. I identify four democratic rights in the Court's law of democracy decisions: (1) the right to effective representation; (2) the right to meaningful participation; (3) the right to equal participation; and (4) the right to a free and informed vote.

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259. *Ibid* at para 63.
260. *Thomson Newspapers*, *supra* note 10 at para 80.

In addition, this article argues that the four democratic rights identified by the Court are best understood as structural rights. The concept of structural rights captures an unusual feature of the Court's approach, namely, that the Court has described these rights so as to capture both the individual and the institutional dimensions of democratic participation. By engaging in an in-depth examination of the Court's decisions, I show that the four democratic rights mentioned above have a structural dimension. Although the Court describes these rights as being held by individuals, it is attuned to how the broader institutional framework affects the exercise of these rights.

I argue that it is possible for courts to regulate the structural dimensions of the democratic system by using the mechanism of individual rights. I show how the Court has used the subsidiary democratic rights not only to protect the right to vote but also to regulate the structure of democratic institutions. In so doing, the Court has resolved disputes over a wide array of complex issues, including electoral redistricting, campaign finance regulation, individual participation, political equality, and the regulation of political parties. A significant advantage to using rights is that courts can respond to structural problems without intervening too directly in the democratic process.

Although the Court's bundle of democratic rights approach provides it with flexible jurisprudential tools, this approach also poses certain challenges. As many commentators have noted, the Court's election-law cases are at times inconsistent with one another. This article suggests that some of the internal tensions in the Court's decisions can be explained by the conflicts that exist among these democratic rights. The democratic rights identified by the Court are not always consistent with one another because they reflect the competing values of democracy itself. Instead of suppressing the conflicts among these rights, I claim that the Court should render these conflicts transparent and provide a justification for the resolution it ultimately reaches.

In sum, the Court's approach to democratic rights has provided it with the conceptual resources to respond to the highly complex nature of democratic governance and participation. By diversifying the right to vote so that it includes additional democratic rights, the Court has developed a set of sophisticated jurisprudential tools with which to regulate the democratic process. The Court's attention to the structural dimension of democratic rights not only enables it to respond to the individual and institutional aspects of democracy, it also sheds fresh light on the nature of democratic rights. The Court's approach serves as a helpful paradigm for courts in other jurisdictions that are also facing the challenges associated with the judicial review of the laws of democracy.