DEMOCRATIC RIGHTS ON TRIAL: JUDICIAL REASONING, CHARTER LITIGATION AND THE SHAPING OF CANADIAN DEMOCRACY

by

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ABSTRACT

The purpose of this essay is to gain a greater understanding of judicial reasoning and strategic judicial behaviour through analysing Charter cases in one of its major subfields: democratic rights. While many authors have previously sought to address democratic rights cases dealing with judicial reasoning, none have offered a unified and comprehensive theory of democratic rights litigation that addresses all of the field's major subcomponents, including prisoners' voting rights, referendum and election campaign finance restrictions, party subsidies, and electoral boundaries. This essay will seek to provide a unified and comprehensive theory through looking at democratic rights cases involving all four major areas. It will ultimately argue that democratic rights litigation can best be understood as a product of tensions between two major lines of judicial reasoning, remedial egalitarianism and procedural libertarianism, over the constitutional meaning of equality. This essay will begin by exploring the nature of judicial reasoning and strategic behaviour, and then turn to defining and explaining the two major lines of judicial reasoning that characterize democratic rights litigation. Next, it will seek to apply the theoretical concepts of remedial egalitarianism and procedural libertarianism to explain judicial rulings involving the intersection between democratic rights on the one hand and freedom of expression and representation on the other. This essay concludes by speculating about where democratic rights litigation is likely to go in the future and how Canada's experiences might be relevant to scholars abroad.

LAY SUMMARY

This essay is designed to foster greater understanding of judicial reasoning and strategic judicial behaviour as it relates to Charter litigation. In the aftermath of the entrenchment of the Charter of Rights and Freedoms in 1982, the courts have become an ever more important presence in the lives of Canadian citizens. In general, scholars tend to give greater attention to issues that play more with the general public, such as abortion, same-sex marriage, and assisted suicide. Fewer authors have focused on questions dealing with democratic rights, which cuts to the very heart of Canadian democracy. This essay seeks to gain a greater understanding of the judicial reasoning behind decisions involving democratic rights to better understand some of the core issues that define Canadian democracy. At the same time, it will assess the direction in which democratic rights litigation will likely head in the future.

PREFACE

This dissertation is original, unpublished work by the author, Jonah Isaac Goldberg.

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DEDICATION

This thesis is dedicated to my family, and the fantastic team of surgeons and medical staff at Vancouver General Hospital – without you, this thesis would never have been possible.

INTRODUCTION

Judicial reasoning has become the focus of a great deal of attention in the academic literature dealing with the judiciary, both in Canada and around the world. In Canada, debates over judicial reasoning have become more pronounced in the aftermath of the entrenchment of the Charter of Rights and Freedoms, which greatly expanded the role of the judicial branch in the shaping of public policy in Canada. Knopff and Morton offered one of the earliest and most comprehensive accounts of the role of political thought in the judicial decision-making process, with a focus on the Supreme Court in particular.[1] Knopff and Morton point to five key clusters of interest groups that emerged as powerful forces in the Charter litigation process, which in turn influenced the judicial decision-making process and encouraged the advent of new lines of judicial reasoning unique to the Charter era. Two of the five forces Knopff and Morton point to are particularly relevant in exploring the judicial reasoning behind democratic rights litigation. The first of the two forces is egalitarian in character. According to Knopff and Morton, the egalitarian approach seeks to encourage greater social equity in pursuit of equality of outcome. This can be achieved through various means, including discriminating against some to produce better results-based equality for society as a whole.[2] The second of the two forces is more closely aligned with the libertarian tradition. Knopff and Morton argue that the libertarian approach seeks to protect individual freedom from the potentially oppressive power of the state.[3] While Knopff and Morton do not specifically focus on democratic rights, they laid out important foundational concepts that remain relevant in the contemporary era. At the same time, other authors have sought to fill the void by placing a greater degree of focus on a core subset of cases dealing with democratic rights.

[1] See Rainer Knopff and F.L. Morton, *Charter Politics*, (Scarborough: Nelson Canada, 1992).
[2] Rainer Knopff and F.L. Morton, *The Charter Revolution and the Court Party*, (Peterborough: Broadview Press, 2000), 67.
[3] Ibid, 63.

In the aftermath of the entrenchment of the Charter of Rights and Freedoms in 1982, there have been at least thirteen major Charter cases dealing with issues involving democratic rights, including prisoners' voting rights, referendum and election campaign finance restrictions, party subsidies, and electoral boundaries. When taken together, these thirteen cases provide a unique subset of examples in which to study the judicial reasoning and strategic behaviour utilized by some of Canada's highest courts. While many authors have sought to address democratic rights cases dealing with judicial reasoning and strategic judicial behaviour, none have offered a unified and comprehensive theory of democratic rights litigation. This essay will seek to provide a unified theory and demonstrate that democratic rights litigation has been shaped by the interaction between two distinct lines of judicial reasoning and their competing visions of the constitutional meaning of equality.

A UNIFIED THEORY OF SECTION THREE JUDICIAL REASONING

Academics have traditionally been relatively divided in seeking to explain the judicial reasoning underlying decisions handed down by the courts in democratic rights cases. Scholars such as Feasby [4] and MacIvor [5] see clear signs of egalitarianism in the Supreme Court's rulings in *Libman*, *Harper*, and *Figueroa*. They argue that the Supreme Court was progressive and egalitarian in indicating a willingness to limit the ability of wealthy groups and individuals to dominate the public discourse during campaigns and taking action to prevent the government from imposing discriminatory policies on smaller political parties. Manfredi and Rush look at the same

[4] See Colin Feasby, "Libman v. Quebec (A.G.) and the Administration of the Process of Democracy Under the Charter: The Emerging Egalitarian Model," *McGill Law Journal* 48(1): 5-38. Colin Feasby, "Freedom of Expression and the Law of the Democratic Process," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 29(1): 237-289. Colin Feasby, "The Supreme Court's Political Theory and the Constitutionality of the Political Finance Regime," in *Party Funding and Campaign Financing in International Perspective*, eds. Keith Ewing and Samuel Issacharoff (Portland: Hart Publishers, 2006).

[5] See Heather MacIvor, "The Charter of Rights and Party Politics: The Impact of the Supreme Court Ruling in Figueroa v. Canada (Attorney General)," *Choices* 10(4): 1-28.

three cases through a very different lens.[6] They suggest that the Supreme Court's majority decisions in *Libman* and *Figueroa*, as well as Chief Justice McLachlin's dissent in *Harper*, reflect libertarian values and a deep concern on the part of the Court that the government was attempting to pursue incumbent entrenchment by limiting the diversity of public opinion and restricting participation in the democratic process.

The fact that Feasby and MacIvor on the one hand and Manfredi and Rush on the other came to very different conclusions based on the same three Supreme Court rulings does not necessarily mean that either perspective was wrong. Rather, it is a clear sign that multiple forces of judicial reasoning were at work. What tends to be missing is a unified and comprehensive theory of democratic rights litigation. This essay will endeavor to remedy that deficiency by addressing all of the field's four major sub-sections. It will ultimately argue that every Charter case dealing with democratic rights has been shaped by interactions between two very different lines of judicial reasoning: remedial egalitarianism and procedural libertarianism.

My definition of remedial egalitarianism is very much in tune with the egalitarian definition put forward by Knopff and Morton, but this new term places a special emphasis on egalitarianism's *remedial* priorities. The judicial reasoning of remedial egalitarianism is primarily concerned with the need to pursue greater social equity in the name of equality of outcome: it promotes discrimination against some to facilitate results-based equality for all. At its core, remedial egalitarianism in the field of democratic rights is concerned with the need to limit the influence of society's most powerful actors while helping the most vulnerable. To hold powerful societal actors in check, remedial egalitarianism would support restrictions on third party spending during referendums and election campaigns. Furthermore, as a means of aiding its most vulnerable,

[6] See Christopher Manfredi and Mark Rush, "Electoral Jurisprudence in the Canadian and US Supreme Courts," *McGill Law Journal* vol.52 no.3 (2007): 457-493.

remedial egalitarianism would favour the enfranchisement of prison inmates, the extension of per-vote subsidies to smaller political parties, and the overrepresentation of rural and minority communities in provincial legislatures. Remedial egalitarianism is pervasive not only in Charter litigation but also in the constitution itself. It is entrenched through the affirmative action elements of sections 6(4) and 15(2) of the Charter of Rights and Freedoms and the constitutionally embedded federal equalization program.

While Knopff and Morton's libertarian definition might be suitable to encompass the libertarian positions posited by Manfredi and Rush in response to the *Libman*, *Harper*, and *Figueroa* cases, it does not adequately extend to cover the more conservative, procedural-based positions articulated by the courts in electoral boundary cases. As an alternative, this essay will bring together the concepts of libertarianism and procedural formalism into a broader line of judicial reasoning called procedural libertarianism. Procedural libertarianism is characterized by a desire to protect individual freedom, liberty, and autonomy from the potentially abusive power of the state through the establishment and maintenance of formal equality of opportunity and equal participation in the democratic process. Procedural libertarianism rejects the idea of allowing courts or governments to employ discriminatory practices and disregard procedural equality for the sake of achieving specific end-goals, which remedial egalitarianism often favours. To uphold a formal interpretation of equality of opportunity, procedural libertarianism would favour the enfranchisement of prison inmates and the extension of per-vote subsidies to smaller political parties, but it would oppose restrictions on third party advertising and skewing parliamentary representation in favour of any one group or specific community.

While remedial egalitarianism and procedural libertarianism represent distinct lines of judicial reasoning grounded in two very different sets of values, the two forces can interact with each other,

and often do so in a positive way. The very nature of remedial egalitarianism and procedural libertarianism frequently leads the two approaches to reach opposing conclusions, but there are many cases in which the interests of the two philosophies align or reach an equitable compromise. In the first section of this paper, which deals with the core democratic rights cases of *Sauvé I*, *Sauvé II*, *Libman*, *Harper*, and *Figueroa*, the two lines of reasoning tend to align or stand in opposition to each other, while in the second section of this paper, which deals with electoral boundary litigation, the two lines of reasoning were able to reach an equitable compromise.

Traces of remedial egalitarianism and procedural libertarianism can be found in all thirteen of the democratic rights cases studied in this paper. Such a level of consistency suggests that judges have their own political agendas and policy goals, and that they are willing to act to achieve their objectives. As Knopff, Baker, and LeRoy have observed, "politicians clad in robes are no less inclined to act strategically than their unrobed counterparts."[7] In the field of democratic rights, signs of remedial egalitarianism and procedural libertarianism can be found in judicial rulings spanning multiple decades and at the federal and provincial levels. This suggests that both lines of judicial reasoning are pervasive across the Canadian judicial system.

In reaching their verdicts, justices act strategically. They are acutely aware of the preferences of their colleagues on the court, who are internal actors, as well as the preferences of legislative, executive, and judicial powers and the general public, who are external actors.[8] Thus, justices do not act unilaterally in pursuit of their own goals. As James Gibson has observed, judicial decision-making is a "function of what [judges] prefer to do, tempered by what they think they ought to do,

[7] Rainer Knopff, Dennis Baker and Sylvia LeRoy, "Courting Controversy: Strategic Judicial Decision Making," in *Contested Constitutionalism,* eds. James B. Kelly and Christopher P. Manfredi (Vancouver: UBC Press 2009), 66.
[8] Ibid.

but constrained by what they perceive is feasible to do."[9] If a justice's core objective is to see his or her "favoured policies become the law of the land, then [he or she] must take into account the preferences of other key actors, and the actions they expect them to take."[10] The judicial branch, with rare exceptions, cannot simply dictate public policy. Even if there is relative consensus among members of the court, judicial rulings do not frequently stray far from the mainstream. Judges regulate their decisions, at least in part, based on the perception of their institutional legitimacy.[11] Major change usually only occurs when there is substantial consensus among the three branches of government and the general public. Hence, the interaction between remedial egalitarianism and procedural libertarianism is governed by the justices' own priorities, but also by their perception of what will be seen as acceptable by other major actors.[12] More moderate or compromise verdicts, which can be found frequently within the field of democratic rights, may very well be the result of strategic interaction between the justices themselves and their understanding of the expectations of others. Compromise verdicts can often be identified through unanimous rulings, minimal explanation, and politically motivated solutions.[13]

In addition, judicial decisions do not exist in silos: when justices are issuing a verdict, they pay careful attention to established legal doctrines, precedent, the views of their colleagues, and the outcomes of related cases, as well as their own predispositions.[14] Once courts issue verdicts, the

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[9] James Gibson, "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior," *Political Behavior* vol.5 no.1 (1983): 9.
[10] Lee Epstein and Jack Knight, "Mapping Out Strategic Terrain: The Informal Role of Amici Curiae," in *Supreme Court Decision Making: New Institutionalist Approaches,* eds. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999), 217.
[11] Christopher Manfredi, "Strategic Judicial Behaviour and the Canadian Charter of Rights and Freedoms," in *The Myth of the Sacred: The Charter, the Courts, and the Politics of Constitutionalism in Canada,* eds. Patrick James et al. (Montreal: McGill-Queen's University Press, 2002), 150.
[12] Forrest Maltzman, James F. Spriggs II and Paul J Wahlbeck, "Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision Making," in *Supreme Court Decision Making: New Institutionalist Approaches,* eds. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999), 47.
[13] Knopff et al., "Courting Controversy," 76.
[14] Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada,* (Vancouver, UBC Press), 13, 20.

lines of thought they employed, and the judicial reasoning they relied upon, will be relevant to all future cases dealing with similar subjects. Thus, it should be no surprise that the remedial egalitarian and procedural libertarian lines of reasoning, which were established in some of the earliest rulings involving democratic rights litigation, continue to be relevant in all cases that address similar issues. While that does not imply that the rulings will always be made in the same direction, it does suggest that justices will at least carefully consider the perspectives of remedial egalitarian and procedural libertarian advocates when dealing with democratic rights litigation cases.

Why might judges choose to consistently support a specific line of judicial reasoning? There are at least two major reasons. First, judges want credibility in the eyes of their colleagues and external actors. In reaching their decisions, judges are expected to articulate compelling reasons to justify their decision to support or oppose the legislation in question. Employing an ad hoc approach, in which judges focus only on the circumstances of the moment rather than engaging in a broader process of judicial reasoning, will hurt their credibility over the long-term. To earn greater credibility, judges need to articulate a consistent set of values that enables others to predict where they might stand on similar issues. Second, judges want to be persuasive and have a degree of influence over others. If a judge is known to ascribe to a consistent approach in judicial reasoning, he or she will be more likely to persuade likeminded members of the court and external actors to support their cause. Those two reasons help to explain why judges tend to be relatively consistent in their reasoning in specific areas of Charter litigation.

This essay will seek to gain a greater understanding of the role of judicial reasoning in Charter litigation by focusing on cases that deal with one of its major categories: democratic rights. The outline of the essay is as follows. The first section will address five of the most prominent Charter

litigation cases involving democratic rights: *Sauvé I* (1993), *Sauvé II* (2002), *Figueroa* (2003), *Libman* (1997), and *Harper* (2004). These five cases are grouped together because they are all tied to issues involving the relationship between freedom of expression, democratic rights, and elections, as well as the strategic interplay between the remedial egalitarian and procedural libertarian modes of judicial reasoning. Both philosophies are prominent in the cases, but in strange permutations and combinations.

The second section of this essay will address cases that consider the constitutional meaning of representation and how closely governments should adhere to the principle of representation by population. This section will begin with some background information on the history of electoral boundaries and malapportionment in Canada. It will then use two representative cases from among the eight reference cases that have dealt with the question of meaningful representation. Overall that jurisprudence has featured two distinct phases. Judicial reasoning in the first phase was procedurally libertarian in character and encouraged greater voter parity, while reasoning in the second phase was more egalitarian and facilitated remedial outcomes. By looking at the consequences of the two phases taken together, this section of the essay will assert that a middle ground between procedural libertarianism and remedial egalitarianism has been found in judicial rulings dealing with electoral boundaries.

DEMOCRATIC RIGHTS, FREEDOM OF EXPRESSION, AND CHARTER LITIGATION

This first major subsection of the paper will explore the intersection between the issues of democratic rights and freedom of expression as it relates to Charter litigation. A series of landmark cases in the 1990s and early 2000s highlighted the strategic interaction between the remedial egalitarian and procedural libertarian modes of judicial reasoning as it relates to democratic rights. In the *Sauvé I*, *Sauvé II*, and *Figueroa* cases, the two lines of reasoning were used together in a

cooperative effort to strike down federal legislation that imposed on freedom of expression and encouraged greater inequality, leading to the enfranchisement of prison inmates and the extension of per-vote subsidies to smaller political parties. Conversely, in the *Libman* and *Harper* cases, the two modes of judicial reasoning were at odds about whether or not the government should be allowed to restrict freedom of expression for the sake of fostering greater equality by imposing restrictions on third party spending during referendum and election campaigns. The majority in *Libman* rejected the government's restrictions and relied on a procedurally libertarian line of argument, while the majority in *Harper* upheld the government's restrictions and justified their decision through remedial egalitarianism. The *Sauvé, Sauvé II,* and *Figueroa* cases, which led to cooperation between the two sets of judicial reasoning, will be considered first, while the *Libman* and *Harper* cases, which led to conflict between the two modes of judicial reasoning, will be explored second.

Sauvé v Canada (1993, 2002)

The *Sauvé* case was dealt with at the Supreme Court level in two installments, with the first of the two verdicts handed down in 1993. The plaintiff, Richard Sauvé, was a prison inmate serving a life sentence for first degree murder. Sauvé was challenging the constitutionality of section 51(e) of the *Canada Elections Act*, which prevented prison inmates from voting. Sauvé argued that the legislation in question violated his section three democratic rights, which includes the right to vote. In a unanimous ruling, the Supreme Court stuck down section 51(e) for failing the minimal impairment portion of the *Oakes* test, specifically because it treated all prison sentences equally.[15] The Chrétien government responded to Sauvé's Charter challenge by amending section 51(e) of the *Canada Elections Act*, changing the provision to instead prevent prison inmates with sentences

[15] *Sauvé v. Canada (Attorney General) (1993),* 439.

of two years or more from voting.[16] Sauvé, who was serving a life sentence, challenged the amended law, and the new case reached the Supreme Court in 2002.

When the Supreme Court considered the federal government's amended version of the *Canada Elections Act* in 2002, it was immediately clear that the legislation violated section three of the Charter. The question faced by the Court was whether or not the legislation could be saved by section one.[17] The Supreme Court therefore applied the *Oakes* test to the amended legislation. Writing for the majority, Chief Justice McLachlin argued that the federal government's new legislation failed all four aspects of the *Oakes* test: the government failed to identify a pressing and substantial objective, the means were not proportional to the effects, there was no rational connection between the legislation's goals and its effects, and the legislation did not meet the standards of minimal impairment. The Court therefore struck down the government's new legislation, paving the way for the enfranchisement of all prison inmates.[18]

Chief Justice McLachlin began her ruling by noting that the Charter's section on democratic rights is one of its most pre-eminent components.[19] The Charter's architects chose not to make section three subject to the notwithstanding clause, indicating its fundamental importance. Thus, McLachlin argued that any attempt to limit Canadians' democratic rights must be scrutinized with great care. Chief Justice McLachlin framed the Sauvé debate as "a conflict between the right of citizens to vote – one of the most fundamental rights guaranteed by the Charter – and Parliament's denial of that right."[20] Voting rights were given special importance in the Charter because "the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen

[16] *Sauvé v. Canada (Attorney General) (2002)*, para 1.
[17] Ibid, para 6.
[18] Ibid, para 62.
[19] Ibid, para 13.
[20] Ibid.

to vote."[21] Hence, "the right to vote, which lies at the heart of Canadian democracy, can only be trammeled for good reason."[22] In the opinion of the majority, the government's stated goals of promoting civic responsibility and providing for additional sanction for criminals were insufficient in warranting the denial of the right to vote to any group of Canadians, including prison inmates.

McLachlin's majority opinion went on to question the very merits of the government's approach, arguing that if the government's end-goal was to encourage greater civic responsibility among the prison inmate population, the government should prioritize rehabilitation over additional sanctions.[23] McLachlin asserted that "to deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility."[24] In addition, the majority reasoned that disenfranchising any portion of the population "finds no place in a democracy built upon the principles of inclusiveness, equality, and citizen participation."[25] McLachlin also suggested that the disenfranchisement of prison inmates unfairly targeted minority populations. More specially, she argued that because First Nations peoples constitute a disproportionate percentage of Canada's prison inmate population, preventing prison inmates from voting would further marginalize First Nations peoples from the rest of Canadian society, another deleterious effect.[26]

The majority clearly employed procedural libertarian and remedial egalitarian lines of judicial reasoning in justifying their verdict. Procedural libertarianism focuses on the importance of protecting individuals from the potentially abusive power of the state and ensuring that every Canadian citizen has an equal role to play in the democratic process. The Supreme Court felt that,

[21] *Sauvé v. Canada (Attorney General) (2002),* para 31.
[22] Ibid, para 1.
[23] Ibid, para 21.
[24] Ibid, para 38.
[25] Ibid, para 41.
[26] Ibid, para 60.

through section 51(e) of the *Canada Elections Act*, the federal government was exceeding its authority by preventing a certain group of Canadians from participating in the democratic process. The majority argued that the government did not have the right to disenfranchise any one segment of the Canadian population, because all Canadians must have an equal role to play in the democratic process. These justifications clearly reflect procedural libertarian judicial reasoning.

At the same time, the majority ruling also placed an important emphasis on remedial egalitarianism. McLachlin continually underscored the importance of rehabilitation, social responsibility, citizen participation, and minority rights, all of which reflect a remedial egalitarian outlook. The majority's desire to ensure that prison inmates remained a part of the democratic process and civil society demonstrates their commitment to the social equity aspect of remedial egalitarianism. In addition, Chief Justice McLachlin's special concern for the disproportionate impact the disenfranchisement of prison inmates had on First Nations peoples connects directly to the protection of vulnerable minority communities, a crucial element of remedial egalitarianism.

Judicial reasoning evidently played an important role in the Supreme Court's final ruling in the 2002 iteration of the *Sauvé* case. Nonetheless, Knopff, Baker, and LeRoy have pointed out that in retrospect judicial reasoning and strategic judicial behaviour played a crucial role in the 1993 *Sauvé* ruling as well.[27] The Court's unanimous ruling in 1993 struck down section 51(e) of the *Canada Elections Act*, which at the time prevented all prison inmates from voting. The justices rejected the legislation on the grounds of minimal impairment. This allowed the Court to temporarily avoid issuing a ruling on whether or not the government had the authority to impose any limits on prisoners' voting rights, which was the core issue at stake. Knopff, Baker, and LeRoy have argued that the Court relied on minimal impairment because no clear majority existed on the

[27] Knopff et al, "Courting Controversy," 74.

Supreme Court of Canada for anything more substantial.[28] When the second *Sauvé* case reached the Supreme Court in 2002, membership turnover ensured that the coalition of justices opposed to placing any restrictions on prisoners' voting rights was large enough to decide the case in Sauvé's favour and strike down the government's restrictions altogether.[29]

Figueroa v. Canada (2003)

The *Figueroa* case reached the Supreme Court in 2003. The leader of the Communist Party of Canada, Miguel Figueroa, challenged the constitutionality of sections 24(2), 24(3), and 28(2) of the *Canada Elections Act* of 1985. More specifically, Figueroa objected to the law's requirement that a party run candidates in at least fifty ridings in an election in order to be considered eligible for official party status.[30] Under the *Canada Elections Act*, official party status is accompanied by a number of benefits, including the ability to issue tax receipts for donations made outside of the writ period, transfer unspent campaign funds to the party, and list the party's name beside its candidates on the ballot.[31] Figueroa claimed that the provisions of the *Canada Elections Act* in question violated his right to effectively participate in the democratic process, which is guaranteed under section three of the Charter. In its defence, the government argued that the fifty candidate threshold was a means of improving the electoral process and protecting the integrity of Canada's party financing system by guarding against the possibility of fraudulent political parties receiving special benefits and ensuring that political parties seek broad-based support.[32] The Ontario Court of Appeal ruled in Figueroa's favour, but the federal government chose to appeal the ruling to the Supreme Court of Canada.[33]

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[28] Knopff et al, "Courting Controversy," 80.
[29] Ibid, 82.
[30] *Figueroa v. Canada (Attorney General) (2003),* para 3.
[31] Ibid, para 4.
[32] Ibid, para 22.
[33] Ibid, para 14.

All nine members of the Supreme Court agreed that the three provisions of the *Canada Elections Act* in question violated section three of the Charter, but the Court issued two separate opinions. The majority opinion, written by Justice Iacobucci, focused on the government's attempt to limit freedom of expression and the diversity of public opinion in the democratic process. Iacobucci argued that section three of the Charter should be interpreted broadly, guaranteeing all Canadians the right to play a meaningful role in the democratic process.[34] He went on to suggest that the free flow of a diverse set of opinions is of central importance in the functioning of a free and democratic society.[35] While Iacobucci noted that it is true that "the electoral process is the means by which elected representatives are elected and governments are formed…it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy."[36] According to Iacobucci, all political parties, large or small, can serve as vehicles through which Canadians engage in the democratic process.[37] Encouraging the participation of a multiplicity of parties "enhances the capacity of individual citizens to express an opinion as to the type of country they would like Canada to be through the exercise of the right to vote."[38] Iacobucci was therefore deeply concerned with the two-tiered party system that sections 24(2), 24(3), and 28(2) of the *Canada Elections Act* effectively created. He argued that section three of the Charter "imposes on Parliament an obligation not to interfere with the right of each citizen to participate in a fair election."[39] The majority concluded that the government's decision to treat some political parties differently than others meant that Parliament was directly interfering with that right. The Iacobucci-led majority agreed with the government that the need to improve

[34] *Figueroa v. Canada (Attorney General) (2003)*, para 25.
[35] Ibid, para 28.
[36] Ibid, para 29.
[37] Ibid, para 40.
[38] Ibid, para 43.
[39] Ibid, para 51.

the electoral process and protect the integrity of Canada's party financing system was pressing and substantial.[40] However, in both cases the government was unable to demonstrate rational connection and minimal impairment.

The concurring opinion was authored by Justice LeBel. According to Justice LeBel, despite the fact that individual participation in the democratic process is an important right guaranteed to Canadians under section three of the Charter, section three is equally concerned with the representation of communities.[41] LeBel argued that section three should be interpreted in line with Canada's political traditions, which includes the ideals of collectivism.[42] LeBel pushed back against the majority opinion, asserting that "an individualistic approach is difficult to reconcile with the characteristic values of Canadian politics."[43] Furthermore, he argued that "participation in the electoral process typically involves individual citizens acting as members of political groups, and alliances both within and between such groups can render participation more meaningful and result in better representation of communities and of national political preferences."[44] Thus, "it can be just as meaningful to participate as a member of a group as it is to participate as an individual."[45] In contrast with Justice Iacobucci, Justice LeBel suggested that the government can at times interfere with individual participation in the democratic process without depriving Canadians of meaningful political representation.[46] However, LeBel ultimately concluded that the three sections of the *Canada Elections Act* in question violated section three of the Charter and could not be saved by section one.[47] By imposing a fifty candidate threshold, the *Canada Elections Act*

[40] *Figueroa v. Canada (Attorney General) (2003),* para 64.
[41] Ibid, para 101.
[42] Ibid, para 103.
[43] Ibid, para 102.
[44] Ibid, para 101.
[45] Ibid, para 118.
[46] Ibid, para 103.
[47] LeBel suggested that the legislation could not be saved by section one but refrained from doing a full section one analysis.

effectively created a two-tiered party system, providing some groups with preferential treatment over others. The fifty candidate threshold worked to the benefit of single issue parties while unfairly targeting parties based in specific provinces or regions.[48] LeBel was particularly concerned that parties based in smaller provinces would be unfairly targeted by the legislation, while parties based in Ontario or Quebec would be able to gain the additional government benefits afforded to "national" political parties.[49]

Justice Iacobucci's majority opinion clearly relied on procedural libertarian lines of judicial reasoning to justify the Court's opposition to the three sections of the *Canada Elections Act* in question, while Justice LeBel's concurring opinion was grounded in remedial egalitarianism. Justice Iacobucci opposed the government's legislation because he felt that the *Canada Elections Act* represented an attempt on the part of the government to unduly interfere with the democratic rights of Canadian voters. He also felt that all political parties should be treated equally when it comes to government benefits. This skepticism of the government's motives and support for procedural equality reflects the ideals of procedural libertarianism. Conversely, Justice LeBel came out in opposition to the legislation because it unfairly discriminated against some of Canada's smaller political parties while favouring larger and more influential ones. Unlike Justice Iacobucci, Justice LeBel was not concerned with the government's attempted interference in the democratic process. Instead, he voiced his support for potential interference, so long as the government's end goals were justifiable. LeBel's concern about the discrimination against smaller political actors and his willingness to support government interference in the democratic process in pursuit of certain end goals highlights the concurring opinion's roots in remedial egalitarianism.

[48] *Figueroa v. Canada (Attorney General) (2003)*, para 174.
[49] Ibid, para 176.

Libman v. Quebec (1997)

The Supreme Court heard the *Libman* case in the fall of 1997. Robert Libman, the leader of Quebec's provincial Equality Party, was challenging the constitutionality of sections 402, 403, 404, 406, 413, 414, 416, and 417 of appendix two of Quebec's *Referendum Act*. The government of Quebec designed the *Referendum Act* to limit the amount of money spent during referendum campaigns. It sought to do so by creating two national committees, one in favour of the referendum question and one opposed to it. Both camps were given an equal spending limit for the duration of the referendum campaign.[50] Under the *Referendum Act*, individuals or groups hoping to spend money and participate in the campaign had to formally join or affiliate themselves with the national committee supporting or opposing the referendum question. The legislation did not account for individuals like Robert Libman, who wanted to campaign as third party actors and chose not to support either side of the referendum campaign, which in this case was a national referendum on the Charlottetown Accord.[51] Libman argued that eight sub-sections of the *Referendum Act* violated his Charter rights, including his rights to freedom of expression and association, because it prevented him from spending money and advocating for his position during the referendum campaign.[52] In its defence, the government of Quebec argued that the legislation's goal was to promote a fairer referendum process by limiting the ability of the province's most affluent individuals to dominate the public discourse and unduly influence the referendum's results.[53] The Quebec Court of Appeal ruled in the government of Quebec's favour, but Libman chose to appeal the ruling to the Supreme Court of Canada.

[50] *Libman v. Quebec (Attorney General) (1997),* para 10.
[51] Ibid, para 2.
[52] Ibid.
[53] Ibid, para 41.

It was immediately evident that the *Libman* ruling was one of great importance. The Supreme Court issued a unanimous verdict, and the majority opinion was authored by the Court as a whole. The justices repeatedly emphasized the important role freedom of expression plays in a free and democratic society.[54] To underscore the Court's commitment to freedom of expression, the justices quoted Chief Justice Dickson's opinion in *Keegstra,* noting that the state "cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all."[55] The Supreme Court swiftly recognized that the *Referendum Act's* restrictions on Robert Libman's ability to actively participate in the referendum process violated his rights to freedom of expression and association.[56] The crucial question then became whether or not the legislation's infringements could be justified under section one, leading the Court to employ the *Oakes* test.

The Supreme Court began its section one analysis by expressing sympathy for the goals underlying the *Referendum Act*. They noted that the basic "objective of the Act at issue is to guarantee the democratic nature of referendums by promoting equality between the options submitted by the government and seeking to promote free and informed voting."[57] The Court argued that the *Referendum Act* was egalitarian insofar as it sought to "prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources."[58] It also sought to encourage voters to make an informed choice before casting their ballots, and foster confidence in the democratic process by ensuring that no one opinion would be drowned out by others.[59] The Supreme Court asserted that

[54] *Libman v. Quebec (Attorney General) (1997)*, para 28.
[55] Ibid, para 29.
[56] Ibid, para 35-6.
[57] Ibid, para 40.
[58] Ibid, para 41.
[59] Ibid, para 41.

the Act's goals were "highly laudable" and therefore concluded that the *Referendum Act* met the pressing and substantial aspect of the *Oakes* test.[60]

To encourage fairness in the referendum process, the Quebec legislature chose to limit the resources of the two major camps and prevent third party spending to avoid an imbalance of spending on either side of the debate. The Supreme Court agreed with the government of Quebec and the Lortie Commission [61] that restrictions were needed, noting that "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."[62] Hence, "to ensure the 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."[63] To make spending limits effective, the Supreme Court agreed with the government of Quebec that some restrictions on third party spending were also necessary.[64] Thus, the Supreme Court recognized that there was a clear rational connection between limits on third party spending and the legislature's objective of promoting greater fairness in the referendum process.[65]

While the Supreme Court felt that the government of Quebec's third party spending restrictions qualified as pressing and substantial and were rationally connected with the government's goals, the justices felt that the legislation in question could not be upheld because it was overly draconian and failed the minimal impairment test. Those individuals who chose not to be associated with

[60] *Libman v. Quebec (Attorney General) (1997),* para 42
[61] The Lortie Commission, otherwise known as the Royal Commission on Electoral Reform and Party Financing, was established to explore potential changes to Canada's election laws. One of the recommended changes was to introduce new spending limits that would restrict the ability of powerful actors to dominate the public discourse during election campaigns. The commission reported its recommended changes to the federal Cabinet in 1991.
[62] *Libman v. Quebec (Attorney General) (1997)*, para 47.
[63] Ibid.
[64] Ibid, para 48.
[65] Ibid, para 57.

either major camp were "allotted no money whatsoever to spend as they see fit in order to make their positions known."[66] By completely shutting out third party actors from the referendum process, the legislation in question violated the freedom of expression and association rights of third party actors, including Robert Libman.[67] The Supreme Court concluded by suggesting that less extreme restrictions on third party spending might enable similar legislation to meet the threshold of minimal impairment in the future, which set the stage for the *Harper* case in 2004.

When the Supreme Court struck down the *Referendum Act's* controversial provisions, those who advocated for the procedural libertarian line of judicial reasoning got the outcome they were hoping for. In a unanimous ruling, the Court declared that the government of Quebec's attempt to limit the ability of third party actors to participate in the democratic process was unconstitutional. However, the justices also indicated that less severe restrictions on third party actors could be justified under section one and would in fact be highly "laudable." The Court spent the vast majority of its ruling arguing that some spending restrictions were necessary to foster greater equity in the democratic process as a whole. If the government of Quebec produced more moderate legislation, the justices suggested that they were willing to limit the freedom of expression rights of wealthy groups and individuals to help empower those with fewer financial resources. This is very much a remedial egalitarian position. The procedural libertarian line of judicial reasoning, on the other hand, rejects the idea of limiting the rights of certain societal actors for the sake of producing greater social equity. Thus, while advocates of procedural libertarianism got the verdict they were hoping for, the Court indicated its sympathy for the remedial egalitarian position, which proved to be of great consequence in *Harper*. There was a clear sense in the *Libman* ruling that

[66] *Libman v. Quebec (Attorney General) (1997)*, para 76.
[67] Ibid, para 85.

the Supreme Court, despite the eventual verdict, was laying out a clear set of egalitarian principles for section three jurisprudence going forward.

Harper v. Canada (2004)

The *Harper* case, which had a number of parallels with *Libman*, reached the Supreme Court in 2004. Stephen Harper, then the head of the National Citizens Coalition, was challenging the constitutionality of section 350(1) of the *Canada Elections Act* of 2000, which placed limits on the ability of third party actors, including businesses, unions, interest groups, and individual citizens, to spend money during an election campaign. Under section 350(1), the government sought to limit third party spending to $3,000 in a single riding and $150,000 nationwide.[68] Harper asserted that the government's spending limits violated his freedom of expression, association, and democratic rights. A trial judge ruled in Harper's favour, but the government appealed the decision to the Supreme Court. The Supreme Court ultimately upheld the legislation in a six to three decision, with Justice Bastarache authoring the majority opinion and Chief Justice McLachlin authoring the dissent.

Chief Justice McLachlin's dissent was presented first, and she promptly signalled her opposition to the legislation. McLachlin was particularly concerned with the restrictive level of spending limits imposed by the government. She noted that section 350(1) of the *Canada Elections Act* "sets advertising spending limits for citizens – called third parties - at such low levels that they cannot effectively communicate with their fellow citizens."[69] By limiting third party spending to such a significant extent, McLachlin argued that the *Canada Elections Act* "effectively denies the right of an ordinary citizen to give meaningful and effective expression to her political views

[68] *Harper v. Canada (Attorney General) (2004)*, para 3.
[69] Ibid, para 2.

during a federal election campaign."[70] By extension, "the practical effect is that effective communication during the writ period is confined to registered political parties and their candidates."[71] Chief Justice McLachlin went on to allude to the parallels between *Libman* and *Harper*. In both cases, the legislation in question introduced third party spending limits that were so severe that third party actors were effectively denied participation in the democratic process. McLachlin concluded that because the *Canada Elections Act's* spending limits were so heavy-handed, the legislation should be considered unconstitutional.[72]

In justifying her opposition to the government's spending limits, McLachlin noted that the restrictions were so severe that an individual citizen would not be able to take out an advertisement in a national newspaper or even send out campaign literature to every household in a single constituency.[73] Thus, while a third party actor might be able to reach a select group of voters in a small pool of ridings, the spending limits made it impossible for third party groups to have an impact at the national level, giving an unfair advantage to political parties.[74] Chief Justice McLachlin argued that section 350(1) of the *Canada Elections Act* prevented third party actors from "effectively communicating their views on electoral issues to their fellow citizens," rendering the legislation "a serious incursion on free speech in the political realm."[75] In addition, McLachlin asserted that "the ability to engage in free speech in the public square means nothing if it does not include the ability to attempt to persuade one's fellow citizens through debate and discussion."[76]

[70] *Harper v. Canada (Attorney General) (2004)*, para 1.
[71] Ibid, para 2.
[72] Ibid.
[73] Ibid, para 4-5.
[74] Ibid, para 7.
[75] Ibid, para 9.
[76] Ibid, para 16.

Nonetheless, the government's legislation was doing exactly that: it prevented an open and vigorous debate by limiting "the diversity of perspectives heard and assessed by the electorate."[77]

Having established her overall opposition to the legislation, Chief Justice McLachlin went on to apply the *Oakes* test to section 350(1) of the *Canada Elections Act*. The Attorney General argued that the legislation's goals were threefold: to promote greater equality in the democratic process, foster informed citizenship, and enhance the public's confidence in the democratic process.[78] McLachlin felt that the goals articulated by the Attorney General met the pressing and substantial threshold and established a clear connection between third party spending limits and electoral fairness.[79] However, as in *Libman*, Chief Justice McLachlin argued that section 350(1) of the *Canada Elections Act* failed the minimal impairment and proportionality tests. She suggested that any benefits gained from the government's spending limits were outweighed by the "severe" restrictions the legislation imposed on the freedom of expression rights of Canadians.[80] The Chief Justice added that the government did not offer a "demonstration that limits this draconian are required to meet the perceived dangers of inequality," leading her to conclude that the means were not proportional to the effects.[81] While Chief Justice McLachlin advocated for the striking down of section 350(1) of the *Canada Elections Act*, she also indicated that she would be willing to entertain less restrictive spending limits going forward. The McLachlin-led dissenting opinion ultimately suggested that Harper's freedom of expression rights had been violated, but his freedom of association and democratic rights had not.

[77] *Harper v. Canada (Attorney General) (2004)*, para 19.
[78] Ibid, para 23.
[79] Ibid, para 27, 31.
[80] Ibid, para 35.
[81] Ibid, para 38.

Justice Bastarache began his majority opinion by laying out the basic responsibility faced by the Court. In essence, the Supreme Court was tasked with assessing whether or not the third party spending provisions in the *Canada Elections Act* of 2000 violated Harper's freedom of expression, freedom of association, or democratic rights.[82] Bastarache placed a great deal of emphasis on the implications of the *Libman* ruling. He noted that while the Supreme Court eventually struck down the limits on third party spending found in Quebec's *Referendum Act*, the Court also recognized that spending limits were "an essential means of promoting fairness in referenda and elections."[83] For Justice Bastarache, fairness meant adopting an egalitarian model of elections. The egalitarian model is "premised on the notion that individuals should have an equal opportunity to participate in the electoral process."[84] Under the egalitarian model, the primary obstacle to equal participation is wealth. Thus, to ameliorate inequality in spending power, strict spending limits are needed to prevent the wealthy "from controlling the electoral process to the detriment of others with less economic power."[85] Because third parties are an important vehicle through which the wealthy can exercise undue influence over an election campaign, a cap on third party spending is necessary. Justice Bastarache argued that by creating a financially level playing field for individuals to engage in the electoral discourse, voters become better informed, and "no one voice is overwhelmed by another."[86] According to Justice Bastarache, the electoral advertising regime established in the *Canada Elections Act* of 2000, including the strict spending limits on third parties, was the direct result of Parliament's response to the *Libman* ruling.[87]

[82] *Harper v. Canada (Attorney General) (2004)*, para 50.
[83] Ibid, para 61.
[84] Ibid, para 62.
[85] Ibid.
[86] Ibid.
[87] Ibid, para 63.

Both the majority and dissenting opinions agreed that section 350(1) of the *Canada Elections Act* violated Harper's right to freedom of expression.[88] They also agreed that the legislation did not violate Harper's right to freedom of association or his democratic rights.[89] However, the majority, led by Justice Bastarache, felt that the legislation could be saved by section one, while the dissenting opinion, led by Chief Justice McLachlin, did not. Bastarache predicated his section one analysis by making a point very much similar to McLachlin's. He argued that "spending limits must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters. Spending limits which are overly restrictive may undermine the informational component of the right to vote."[90] The crux of the disagreement, then, between Justice Bastarache and Chief Justice McLachlin was not about whether or not spending limits were necessary: it was about whether or not these particular spending limits were overly restrictive. McLachlin felt they were, while Bastarache felt they were not. The disagreement, therefore, was largely subjective in nature.

Justice Bastarache began his section one analysis by assessing whether or not the government could justify its decision to violate Harper's freedom of expression rights as pressing and substantial. The Attorney General presented three major reasons to justify the legislation's spending restrictions: to promote equality in the political discourse, protect the integrity of the political financing system, and maintain public confidence in the electoral process.[91] In Bastarache's judgement, all three objectives qualified as pressing and substantial. He also suggested that all three of the government's objectives could be linked with spending restrictions

[88] *Harper v. Canada (Attorney General) (2004)*, para 66.
[89] Ibid, para 67.
[90] Ibid, para 73.
[91] Ibid, para 101-3.

to serve as a rational connection.[92] In contrast with Chief Justice McLachlin's dissenting opinion, Justice Bastarache felt that the legislation met the threshold of minimal impairment. He noted that while Chief Justice McLachlin chose to focus on the restrictions on third party advertising inside the writ period, she failed to mention that third parties faced no spending restrictions outside of the writ period.[93] Bastarache argued that third party actors tend to be extremely well-organized, forming well before election campaigns, which suggests that they have ample opportunity to voice their opinions to the general public.[94] Furthermore, Justice Bastarache pointed out that third party organizations are allowed to spend an unlimited amount of money inside the writ period to address issues that are not directly associated with a single candidate or party.[95] Even when third parties do choose to address a partisan issue inside the writ period, they have $150,000 to spend on less expensive forms of advertising.[96] While Bastarache admitted that he could readily think of less impairing limits than the $150,000 threshold, he argued that it struck an appropriate balance between allowing third parties to get their messages across to voters and not overwhelming the voices of official candidates. Finally, Justice Bastarache concluded that section 350(1) of the *Canada Elections Act* met the standards of proportionality, as its salutary effects outweighed its deleterious effects.[97] Thus, the Bastarache-led majority upheld the government's electoral financing restrictions on third party actors.

Justice Bastarache's line of judicial reasoning was clearly grounded in the values of remedial egalitarianism. He advocated for the discrimination against powerful societal actors, in this case third party groups participating in election campaigns, for the sake of promoting greater social

[92] *Harper v. Canada (Attorney General) (2004),* para 104.
[93] Ibid, para 112.
[94] Ibid, para 112.
[95] Ibid, para 114.
[96] Ibid, para 115.
[97] Ibid, para 121.

equity in society as a whole. Bastarache argued that strict spending limits on third party actors were necessary to ensure that the wealthy were not able to dominate Canada's election process and drown out the voices of society's less affluent members. He also asserted that the third party spending limits found in section 350(1) of the *Canada Elections Act* was the government's direct response to the *Libman* ruling, and that the legislation therefore ought to be upheld. Conversely, Chief Justice McLachlin's line of judicial reasoning reflected the values of procedural libertarianism. McLachlin felt that the government was giving political parties an unfair advantage over Canadians who chose not to engage in the electoral process through political parties. By giving priority to political actors over individual citizens and third party interests, Chief Justice McLachlin felt that the government was violating the principle of procedural equality and limiting the diversity of public opinion. McLachlin ultimately concluded that section 350(1) of the *Canada Elections Act* should be invalidated because the limits imposed by the government were nearly as restrictive as those rejected by the Court in *Libman*.

Democratic Rights and Freedom of Expression: Conclusions

While scholars who have studied democratic rights cases involving freedom of expression tend to explain the judicial reasoning underlying the *Sauvé I, Sauvé II, Figueroa*, *Libman*, and *Harper* cases as either egalitarian or libertarian in character, this section of the essay has argued that academics need to place a greater emphasis on the interaction between multiple lines of judicial reasoning. In the five case studies examined thus far, the strategic interaction between the judicial philosophies of remedial egalitarianism and procedural libertarianism has played a decisive role in determining and explaining their ultimate outcomes. This section of the essay has also demonstrated that the remedial egalitarian and procedurally libertarian modes of judicial reasoning interact with each other in complex and often predictable ways. When the government tries to limit

freedom of expression by producing greater inequality, the favoured outcomes of the two sets of judicial reasoning tend to align, while they often lie in opposition to each other when the government attempts to limit freedom of expression for the sake of enhancing social equity. Thus, when it comes to freedom of expression cases in the field of democratic rights, the interaction between the remedial egalitarian and procedural libertarian modes of judicial reasoning tends to be predictable. However, as this essay shifts its focus toward electoral boundary litigation, it is also clear that the two forces can interact with each other in more moderate ways, which often produces compromise outcomes.

DEMOCRATIC RIGHTS, ELECTORAL BOUNDARIES, AND CHARTER LITIGATION

This second section of the paper will explore the issues of electoral redistricting and malapportionment as it relates to Charter litigation involving democratic rights. The issues of electoral redistricting and malapportionment have always been a source of great contention in Canadian politics. Throughout much of the nation's history, redistricting at both the federal and provincial levels was a very partisan affair: governments controlled the redistricting process and skewed the electoral map to their own advantage.[98] The redistricting process began to change in the 1950s, when Manitoba established the first independent electoral boundaries commission in Canada.[99] Several other provinces and the federal government quickly followed suit. However, the introduction of the Charter of Rights and Freedoms dramatically changed the landscape of the electoral boundary debate in Canadian politics. The Charter gave opponents of malapportionment a legal avenue through which to challenge the status quo, forcing governments to take a more even-

[98] John Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts,* (Montreal: McGill-Queen's University Press, 2001), 23.
[99] Ibid, 37.

handed approach.[100] Those Canadians that took advantage of Charter litigation to pursue malapportionment reform cited section three as the basis for their claims. Advocates for reform tend to take a procedurally libertarian perspective on redistricting, arguing that malapportionment is simply a case of governments imposing on the democratic rights of Canadians in pursuit of their own political agendas. Their objections tend to be two-fold: they reject significant deviation from a one-person one-vote framework and the imposition of regional quota systems. Canadians that have utilized Charter litigation to challenge deviations and quotas assert that section three provides an equal right to vote for all Canadians, and that malapportionment and quotas depart from the principle of procedural voter equality.[101]

Charter rulings dealing with malapportionment have come in two phases. In the first phase, appellate courts rejected provincial electoral boundary schemes, asserting that population disparities were too large, thereby failing to respect the notion of procedural voter equality. Phase one led to the creation of the *Dixon* standard, which called for limiting inter-riding population variance at twenty-five percent. The second phase of malapportionment litigation began as electoral boundary legislation passed in response to *Dixon* fell into dispute, as their regional quota systems fell under scrutiny. Regional quota systems from three different provinces were challenged, but all three pieces of legislation were upheld. The courts indicated a willingness to provide governments with a substantial degree of autonomy to pursue their remedial egalitarian goals, including through regional quotas, within an overall *Dixon* framework. This section of the paper will proceed in two major subsections. Both subsections will explore the most consequential

[100] Keith Archer, "Conflict and Confusion in Drawing Constituency Boundaries: The Case of Alberta," *Canadian Public Policy* vol.19 no.2 (1993): 177.
[101] Janet Hiebert, "Representation and the Charter: Should Rights Be Paramount?" in *Drawing Electoral Boundaries: Legislatures, Courts, and Electoral Values* eds. John Courtney et al., (Saskatoon: Fifth House Publishers, 1992), 4.

Charter litigation case in each of the two phases. It will examine the *Dixon* case from British Columbia for phase one and the *Carter* case from Saskatchewan for phase two. This essay will ultimately demonstrate that although courts were willing to impose the *Dixon* standard to limit inter-riding population variance in a gesture toward procedural equality, they were unwilling to strike down regional quota systems, which provided for a significant degree of remedial representation. Rather than relying on a strictly procedural libertarian or remedial egalitarian approach, Charter litigation cases dealing with malapportionment, when taken together, suggest that the courts have pursued a middle ground between the procedural libertarian and remedial egalitarian traditions.

Phase One: British Columbia – *Dixon (1986, 1989)*

Dixon was actually two separate Charter litigation cases, with the first installment reaching the Supreme Court of British Columbia in 1986. The B.C. Civil Liberties Association and its leader, John Dixon, launched the first ever Charter challenge to electoral redistricting in response to controversial legislation passed by Bill Vander Zalm's Social Credit government in 1984. The legislation, known as the *Constitution Amendment Act* of 1984, introduced a new electoral boundary commission. The Act was controversial, however, because it created several different classes of ridings, each with their own population quotas. The disparities created by the *Constitution Amendment Act* were quite severe: districts ranged from 5,500 voters in Atlin to over 61,000 voters in three Surrey districts, a disparity of eighty percent.[102] In launching his Charter challenge, John Dixon alleged that the legislation violated the spirit of section three of the Charter, which he suggested embodied a one-person one-vote philosophy. The purpose of the 1986 *Dixon*

[102] Norman Ruff, "The Right to Vote and Inequality in Voting Power in British Columbia: The Jurisprudence and Politics of the Dixon Case," in *Drawing Boundaries: Legislatures, Courts, and Electoral Values,* eds. John Courtney et al., (Saskatoon: Fifth House Publishers, 1992), 129.

case was to determine whether or not the *Constitution Amendment Act* was part of the province's constitution, and therefore not subject to Charter scrutiny. The province's Attorney General argued that the legislation was part of British Columbia's constitution, but Chief Justice McEachern ultimately ruled that it was not. This set the stage for a second *Dixon* case dealing with the merits of the legislation, which reached the B.C. Supreme Court in 1989.[103]

In the interim, the Vander Zalm government was running for re-election in the fall of 1986. If re-elected, the Premier pledged to pursue electoral boundary reform. The Social Credit won another majority, and the Premier appointed a Commission, led by Justice Thomas Fisher, tasked with formulating a proposal for a new boundary system.[104] Fisher was asked to be mindful of factors like historical and regional representation, geography, and community interests. Fisher's Report ultimately recommended capping inter-riding population variance at twenty-five percent, allowing for some flexibility at the individual riding level. One month after the Report was delivered to the Cabinet in January of 1989, round two of the *Dixon* hearings began.

By February of 1989, Beverly McLachlin had become the province's new Chief Justice, and it was McLachlin who authored the second *Dixon* ruling, which dealt with the merits of the *Constitution Amendment Act*. McLachlin was particularly struck by just how large inter-riding population variance was across the province. She noted that rural areas were significantly overrepresented in the legislature, while urban areas suffered as a result. In the most extreme example, "the vote of a citizen in Atlin is worth 12.4 times the vote of a citizen in Surrey-Newton."[105] While McLachlin indicated early on that such significant disparities between ridings were not constitutionally acceptable, she did not agree with Dixon, who argued that the Charter

[103] Ruff, 130.
[104] Ibid, 131.
[105] *Dixon v. British Columbia (Attorney General) (1989)*, 7.

provided for "absolute equality in voting power."[106] Instead, Chief Justice McLachlin asserted that the democratic rights provided for under section three of the Charter were about more than simple numeric calculations, and called for a "full and generous" interpretation of the democratic rights clause in her ruling.[107]

Chief Justice McLachlin's ruling in *Dixon* was consequential for two key reasons. First, it was the original phase one case to come before the courts, and set an important precedent for the future. Second, in her ruling McLachlin laid out a basic framework which would govern all subsequent decisions involving electoral boundaries. While she recognized the need for some flexibility for the sake of remedial representation, McLachlin felt that British Columbia's electoral boundaries under the *Constitution Amendment Act* strayed too far from the principles of representation by population. McLachlin began by noting that remedial representation was not without merit. She referenced the remedial representation advocated for by Sir John A. Macdonald, who in the 1860s called for accommodation based on social class, geography, and local interests.[108] However, while McLachlin agreed that factors other than equality in numbers should be considered, she also argued that "only those deviations which can be justified on the grounds that they contribute to better government for the populace as a whole" should be permitted.[109] This set a rather stringent standard in limiting the ability of governments to pursue remedial objectives, and from that perspective the Vander Zalm government's legislation was clearly vulnerable.

McLachlin went on to assert that while some forms of accommodation might be necessary, the ideals of representation by population should "be seen as the dominant principle underlying our

[106] *Dixon v. British Columbia (Attorney General) (1989)*, 10.
[107] Ibid, 13.
[108] Ibid, 29.
[109] Ibid, 31.

representative democracy."[110] Variance of over seventy percent, which was a commonplace under the Social Credit government's legislative framework, was simply unacceptable and violated the democratic rights of British Columbians. While the Attorney General enunciated important reasons why rural areas should be overrepresented in the legislature, such as poorer communication and media access, disparities of this scale simply could not be warranted. McLachlin concluded that "the factors relied upon by the Attorney General in support of deviation…falls far short of justifying deviations of the magnitude found in British Columbia."[111] While McLachlin noted that she had no doubt that the government's motives were pressing and substantial, they simply could not meet the standards of proportionality.

Despite the fact that McLachlin struck down the *Constitution Amendment Act* for straying too far from the ideals of representation by population, she was willing to accept some deviations for remedial purposes. McLachlin suggested that the findings of the Fisher Report could serve as a guide for electoral redistricting going forward.[112] She endorsed the Report's recommendations, which included putting a cap on inter-riding population variance at twenty-five percent from a provincial quotient. According to McLachlin, the Fisher Report's framework would allow for an amicable outcome: electoral boundary commissions would have flexibility to accommodate diversity without severely punishing urban voters.[113] The twenty-five percent threshold would later become known as the *Dixon* standard, and has been cited nationwide. After McLachlin's ruling, the Vander Zalm government, with some minor delays, implemented the vast majority of the Fisher Report's recommendations to comply with the Court's ruling.[114]

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[110] *Dixon v. British Columbia (Attorney General) (1989),* 28.
[111] Ibid, 41.
[112] Ibid, 61.
[113] Kent Roach, "Reapportionment in British Columbia," *University of British Columbia Law Review* vol.24 no.1 (1990): 80.
[114] Ruff, 140.

In her ruling, Chief Justice McLachlin pursued a moderately procedural libertarian approach. She struck down the *Constitution Amendment Act* on procedural libertarian grounds for straying too far from the ideals of representation by population. At the same time, she introduced the *Dixon* threshold, which placed a limit on how far governments and electoral boundary commissions could stray from absolute voter equality, promoting the procedural libertarian values of formal equality, standardization, and predictability. Nonetheless, McLachlin's ruling still allowed for a significant degree of remedial representation, suggesting that her ruling was not entirely procedural libertarian in character.

The spirit of Chief Justice McLachlin's ruling in *Dixon* was carried forward in the *MacKinnon* case in Prince Edward Island. When *MacKinnon* reached the province's Supreme Court in 1993, disparities in inter-riding population variance exceeded those found in British Columbia before *Dixon*. Justice DesRoches' relied heavily on McLachlin's ruling in *Dixon*, insisting that relative voter parity should be the government's main objective and that any deviation from relative equality needed to be limited and justified.[115] DesRoches agreed with McLachlin that the provincial government had a pressing and substantial reason for seeking to overrepresent rural communities. However, both DesRoches and McLachlin felt that the legislation in question in their respective provinces failed the proportionality aspect of the *Oakes* test.[116] Like McLachlin, DesRoches argued that a clear limit on inter-riding population variance was needed to preserve relative procedural equality in the province's electoral system, but that some flexibility was needed to allow for a limited degree of remedial representation.[117]

[115] *MacKinnon v. Prince Edward Island (1993)*, 221.
[116] Ibid, 259.
[117] Ibid, 227.

Phase Two: Saskatchewan – Carter (1991)

Carter was the first phase two case to reach the courts, meaning that it was the first time electoral boundary legislation that was passed in response to *Dixon* faced a Charter challenge. It is perhaps the most unique Charter case dealing with malapportionment in Canadian history, primarily because it was the only case to ever reach the Supreme Court. Unlike in British Columbia, Saskatchewan never experienced a phase one electoral boundary case: the province moved toward a more equitable electoral boundary regime before the landmark *Dixon* ruling. The New Democratic government of Allan Blakeney established an independent electoral boundaries commission in 1972, while also introducing a limit on inter-riding population variance of fifteen percent.[118] The cap applied to every riding across the province, with the exception of Saskatchewan's two northernmost constituencies.

Grant Devine's Progressive Conservatives defeated Allan Blakeney's New Democrats in the 1982 provincial election. Five years later, the Devine government introduced the *Electoral Boundaries Commission Act*, which established a new riding allocation system and altered the composition of the province's electoral boundaries commission. The Progressive Conservative legislation was much more restrictive than the legislation enacted by the government's predecessors. It specified that the province should have a total of sixty-six ridings: twenty-nine from urban areas, thirty-five from rural areas, and two from the north.[119] The commission was asked to divide the province's population by the total number of constituencies, which would produce a quotient. Variance from the province's quotient was capped at twenty-five percent in

[118] Robert G. Richards and Thomson Irvine, "Reference Re Provincial Electoral Boundaries: An Analysis," in *Drawing Boundaries: Legislatures, Courts, and Electoral Values,* eds. John Courtney et al., (Saskatoon: Fifth House Publishers, 1992), 49.
[119] Ibid, 50.

urban and rural constituencies and fifty percent in the north.[120] In line with the previous NDP government's legislation, the commission was asked to be mindful of population density, geography, and local interests. The Act's most surprising feature, however, was the fact that it failed to mention relative voter equality across the province as one of its major goals.

The Devine government's legislation was so controversial because it imposed regional quotas. Civil rights advocates felt that the twenty-five percent variance threshold established in *Dixon* was designed to allow electoral boundary commissions to pursue remedial goals in specific ridings or regions as they see fit. The legislation's opponents felt that regional quotas violated the spirit of the *Dixon* ruling and offered a new avenue through which governments could continue to overrepresent rural communities in provincial legislatures. Despite the controversy surrounding the new legislation, the Devine government appointed a commission to redraw the province's electoral boundaries in 1988.[121] The new districts proposed by the commission were controversial because they included substantial inter-riding population variance and underrepresented urban areas.[122] Immediately after the government passed the commission's recommended districts into law, the Society for the Advancement of Voter Equality challenged the validity of the redistribution scheme, alleging that its substantial disparities, while still technically within the *Dixon* threshold, violated the spirit of section three of the Charter by imposing regional quotas, which produced deviations that were unnecessarily large.[123] Faced with such stanch opposition, the Lieutenant Governor was asked to refer the *Electoral Boundaries Commission Act* to the Saskatchewan Court of Appeal as a reference case. The government asked the Court whether or

[120] Richards and Irvine, 50.
[121] Ibid.
[122] Ibid, 51.
[123] Ibid, 52.

not population disparities and regional quotas violated section three of the Charter and, if so, whether or not the legislation could be saved by section one.[124]

Despite the fact that the *Electoral Boundaries Commission Act* met the *Dixon* threshold, it was struck down by the Court of Appeal in a unanimous verdict. The justices felt that a twenty-five percent limit on inter-riding population variance was unnecessarily high for a relatively rural province like Saskatchewan, and that the government's quota system facilitated too large of a gap between the average population of rural and urban constituencies.[125] The Court ultimately concluded that the Devine government's legislation violated section three of the Charter and could not be saved by section one. Nonetheless, the Devine government chose to appeal the ruling to the Supreme Court of Canada. As scholars have compellingly argued, the Saskatchewan Court of Appeal's decision to reject an electoral boundary scheme that met the *Dixon* threshold could have led to the invalidation of almost every electoral map across the country.[126] Thus, intervenors were sent by the federal government, five provinces, and two territories, all to argue on behalf of the government of Saskatchewan.[127]

The Supreme Court's ruling, which was handed down by Justice McLachlin (as she was then), overturned the Court of Appeal's decision by a six to three margin.[128] McLachlin framed the debate over the meaning of section three and the right to vote by asking one key question: to what extent does the right to vote in Canada under section three allow for deviations from a purely one-person one-vote framework? According to Justice McLachlin, those who start from the perspective that the role of section three is to guarantee equality in voting power will support the view that only

[124] Richards and Irvine, 52.
[125] *Reference Re Electoral Boundaries Commission Act (Saskatchewan) (1991),* para 33.
[126] Richards and Irvine, 54.
[127] Hiebert, "Representation and the Charter," 4.
[128] Richards and Irvine, 54.

minimal deviation is permissible, while those who start from the perspective that the role of section three is to guarantee effective representation "see the right to vote as comprising of many factors, of which equality is but one."[129] The Saskatchewan Court of Appeal endorsed the former position, while McLachlin came out in support of the latter. Justice McLachlin noted that "it is my conclusion that the purpose of the right to vote enshrined in s.3 of the Charter is not equality of voting power…but the right to effective representation."[130]

In looking at the *Electoral Boundaries Commission Act* more specifically, Justice McLachlin suggested that the Devine government's legislation was defensible on its merits. She noted that inter-riding population variance in *Dixon*, which reached a twelve-to-one ratio, was simply too large to be justified on remedial grounds. The case in Saskatchewan was quite different: disparities were much smaller and fell within the *Dixon* threshold. They could therefore be justified on a diverse set of remedial factors. In a situation that was much more equitable than in British Columbia, Justice McLachlin noted that "factors like geography, community history…and minority representation need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic."[131] While she recognized that the government's quotas were meant to skew representation in favour of rural communities, McLachlin argued that the quotas were not especially problematic because they met the *Dixon* standard and could be justified on remedial grounds.

While Justice McLachlin felt that the Devine government's legislation was defensible on its merits, she also set an important precedent by calling for judicial restraint.[132] Because Saskatchewan's electoral boundaries were not excessively skewed, the Supreme Court, led by

[129] *Reference Re Provincial Electoral Boundaries (Saskatchewan) (1991),* 160.
[130] Ibid, 183.
[131] Ibid, 184.
[132] Roach, "Reapportionment in British Columbia," 200.

Justice McLachlin, decided to defer to the judgement of the provincial legislature. McLachlin reiterated her position in *Dixon*: "the courts ought not to interfere with the legislature's electoral map under s.3 of the Charter unless it appears that reasonable persons applying the appropriate principles…could not have set the electoral boundaries as they exist."[133] This flexibility essentially meant that while the courts should ensure electoral boundary regimes fall within the *Dixon* threshold, governments should also be given a certain degree of autonomy in deciding how much remedial representation should be provided for. Because Justice McLachlin interpreted the right to vote under section three of the Charter as guaranteeing effective representation, she concluded that the boundaries created under the *Electoral Boundaries Commission Act* did not violate the democratic rights of the people of Saskatchewan, meaning that a section one analysis was unnecessary.[134]

Justice McLachlin's ruling in *Carter* was grounded in a remedial egalitarian mode of judicial reasoning. She overtly rejected the procedural libertarian approach to section three jurisprudence, which focuses on equality in voting power, instead endorsing the remedial egalitarian approach, which places an emphasis on effective representation. For McLachlin, effective representation includes the enhancement of representation for disadvantaged communities, such as rural areas and regions with predominantly First Nations populations. In addition, while Justice McLachlin still advocated for a firm cap on inter-riding population variance, her willingness to defer to the judgement of the provincial legislature and allow the government to impose regional quotas, which undermines the effectiveness of *Dixon* threshold, suggests that the majority decision in *Carter* was very much in the remedial egalitarian tradition.

[133] *Reference Re Provincial Electoral Boundaries (Saskatchewan) (1991),* 189.
[134] Ibid, 197.

The precedent set by Chief Justice McLachlin's ruling in *Carter* set the stage for similar rulings at the provincial level in Alberta and Prince Edward Island. The government of Alberta sent two reference cases to the province's Court of Appeal, one in 1991 and the other in 1993.[135] In both cases, the Getty and Klein governments wanted the Court to assess the constitutionality of the province's electoral boundary system, which included regional quotas. While the Alberta Court of Appeal found the system to be quite "troubling," the Court upheld the legislation in both cases based on the precedent set by Justice McLachlin (as she was then) in *Carter*.[136] The Supreme Court of Prince Edward Island similarly relied on McLachlin's precedent to reject a challenge to the province's electoral boundary system. Despite the fact that the Callbeck government had eliminated the province's most extreme regional disparities in the aftermath of *MacKinnon*, the government chose to leave the provincial county system in place. The legislation was challenged by the city of Charlottetown in 1996. However, because the quota system's disparities now fell within the *Dixon* threshold, the Supreme Court of Prince Edward Island ultimately upheld the legislation.[137]

Democratic Rights and Representation: Conclusions

By the end of the malapportionment litigation decade of the 1990s, most advocates of remedial egalitarianism were content with recent developments. The *Dixon* threshold provided boundary commissions with a significant degree of flexibility in pursuing remedial representation, while the courts' willingness to uphold regional quotas allowed governments to pursue remedial policies even further. Nonetheless, many remedial egalitarian advocates were unsatisfied with the progress made in the 1990s. They were frustrated by the fact that first past the post electoral systems can

[135] See *Reference Re Electoral Boundaries Commission Act (Alberta) (1991). Reference Re Electoral Divisions Statutes Amendment (Alberta) (1993).*
[136] *Reference Re Electoral Boundaries Commission Act (Alberta) (1991),* para 30.
[137] See *Charlottetown (City) et al. v. Prince Edward Island et al. (1996).*

only really facilitate one form of remedial representation: geographical. Thus, many advocates of a remedial approach to representation have encouraged the abandonment of first past the post for an alternative electoral regime, such as proportional representation, to allow for remedial representation in other areas, such as gender, sexual orientation, religion, and ethnicity.

At the end of the 1990s, advocates of procedural libertarianism were somewhat less satisfied. While they lauded the creation of a national threshold to limit inter-riding population variance to foster procedural equality, many felt that the threshold was simply too high. In addition, most of them were frustrated by the courts' decision to permit governments to implement regional quotas, which essentially allowed them to continue to overrepresent rural areas at the expense of urban communities. Many advocates of procedural libertarianism, like their remedial egalitarian counterparts, would support a shift toward proportional representation, but for very different reasons. While proponents of remedial egalitarianism would support the adoption of proportional representation for ameliorative reasons, proponents of procedural libertarianism would do so in pursuit of greater procedural equality in the one-person one-vote tradition.

CONCLUSIONS

This essay has sought to build a unified theory through which to analyse section three Charter jurisprudence. In exploring democratic rights cases, it has argued that judicial decisions involving democratic rights reflect a tension between two distinct modes of judicial reasoning: remedial egalitarianism and procedural libertarianism. Both lines of judicial thought have played central roles in all thirteen of the Charter cases studied in this paper, suggesting that remedial egalitarianism and procedural libertarianism can be expected to play a major role in future judicial decisions involving the new frontiers of democratic rights litigation. The fact that multiple and consistent sets of reasoning have dominated judicial decisions involving democratic rights is not surprising. Through establishing multiple credible lines of judicial reasoning, justices provide

themselves with greater flexibility, permitting them to endorse one line of judicial reasoning in one case while still providing them with a chance to pursue an alternative avenue in the future.

The most crucial difference between the remedial egalitarian and procedural libertarian lines of judicial reasoning is their alternative visions of the meaning of equality. For those who support the former position, equality is grounded in equality of outcome. Conversely, those who advocate for the latter position emphasize the importance of procedural equality. In the first major section of this paper, which dealt with cases involving democratic rights and freedom of expression, the two modes of judicial reasoning either aligned or stood in direct opposition to each other, staking out their positions based on their differing interpretations of the notion of equality. *Sauvé I, Sauvé II,* and *Figueroa* were examples of relative alignment in priorities, while *Libman* and *Harper* were examples of conflict and dissent. In the second section of this paper, which dealt with cases involving democratic rights and questions of representation, the two lines of judicial reasoning were able to find a middle ground. The eight reference cases, when taken together, highlight the courts' desire to establish an overall framework of procedural equality while still allowing for flexibility for governments to pursue their remedial objectives.

Charter litigation involving democratic rights is by no means simply a question of history. Legal battles can be expected in the future, as provinces and the nation continue to grapple with pressing issues, such as the by-products of fixed election dates and the nature of Canada's first past the post electoral system. With fixed election dates now firmly in place at the federal level and in all of Canada's provinces, third party actors have, as Justice Bastarache predicted, taken advantage of their ability to spend an unlimited amount of money in the pre-writ period to promote their own causes and priorities. Governments may, in the future, seek to close that loophole by introducing limits on third party spending outside of the writ period, as the government has already done in

Ontario.[138] However, because Justice Bastarache allowed rather severe restrictions in *Harper* because of third parties' ability to spend an unlimited amount of money outside of the writ period, the same issues dealt with in *Libman* and *Harper* are likely to be re-litigated. In addition, many have questioned the very foundation of Canada's democratic system. As its detractors argue, the first past the post electoral regime now in place at the federal level and in all of Canada's provinces is by no means equal on a procedural level or based on the concept of equality of outcome. New litigation issues may arise as supporters of more "equitable" electoral regimes, such as various forms of proportional representation, may choose to pursue reform through legal channels. These are but two of the many issues that Canadians and Canada's judicial system will have to deal with in the years ahead.

Canada's experience in democratic rights litigation will also prove to be valuable abroad. The questions Germany faces, for example, about the minimum threshold for representation in the Bundestag parallels Canada's own experience in dealing with minimum thresholds in *Figueroa*. In addition, similarities can be drawn between Canada's experience with malapportionment litigation in the late twentieth century and ongoing struggles in the United States over gerrymandering. While research in other nations is beyond the scope of this paper, the judicial philosophies of remedial egalitarianism and procedural libertarianism will likely characterize legal debates over democratic rights in those nations as well. Just as Canada's Supreme Court considers legal precedent in other nations in reaching their rulings, so too do courts in countries around the world. Canada's experience with democratic rights litigation can offer important lessons for those who ground their studies in comparative constitutionalism.

[138] Government of Ontario, *Election Finances Act,* 2016.

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