Partisan Manipulation of the Democratic Process and the Comparative Law of Democracy

by

Michael Pal

A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science, Faculty of Law, University of Toronto

©Copyright by Michael Pal 2014
Partisan Manipulation of the Democratic Process and the Comparative Law of Democracy

Michael Pal
Faculty of Law, University of Toronto
Doctor of Juridical Science, 2014

Abstract

This dissertation argues for institutionally focused judicial oversight of the law of democracy in order to minimize partisan manipulation of the democratic process. Elected representatives have incentives to distort for partisan gain campaign finance, political party funding, electoral boundaries, and the other rules shaping democratic political competition. While representatives are elected to act in the best interests of voters, they can entrench themselves and reduce their electoral accountability by altering the rules that structure elections and democratic politics. In other words, political representation is beset by a principal-agent problem. I trace the implications of the principal-agent problem for judicial review of the comparative law of democracy. I argue that leading accounts of judicial review of the law of democracy have failed to account for the presence of electoral management bodies (EMBs), such as election commissions and redistricting commissions, and the role played by majoritarian constitutional structures. If the goal is to reduce partisan self-dealing then judicial oversight must be institutionally sensitive, because the risk of partisan self-dealing varies depending on the type and characteristics of the institution whose actions are under review. I argue that courts should show different degrees of deference based on the risk that the institution is likely to have distorted the democratic process. EMBs are likely to be independent and impartial and the risk of partisan self-dealing by these institutions is therefore
reduced. To the extent that they are independent and impartial, then these institutions are entitled to deference. Courts must be aware, however, of the variation in institutional design of EMBs, which range from independent and impartial to partisan and captured. Where the EMB has been captured by partisan interests, then deference is not warranted. Where it is the decisions of legislatures and not EMBs that are under review, then courts should engage in vigilant oversight because of the incentives elected representatives possess to manipulate the democratic process. I develop doctrine to aid courts in limiting partisan self-dealing and assessing the proper degree of deference to grant, including a test to assess the independence and impartiality of EMBs. Where legislative action is under scrutiny, I argue that motive-based judicial review is a way forward for courts to prevent partisan self-dealing. The majoritarian democracies of Canada, Australia, India, and the United States are considered in depth in order to make these claims.
Acknowledgements

A dissertation is a solitary task, but one that can only be achieved with the support of many. I would like to thank my supervisor, Sujit Choudhry, and the members of my doctoral committee, David Dyzenhaus and Sam Issacharoff. All provided unflagging support for the project, challenged me to hone my ideas, and kindly allowed me to benefit from their experience. Sujit has been a mentor throughout many years. I have gained a tremendous amount from watching his scholarly approach and his emphasis on connecting theory and practice, and have been fortunate to have his encouragement to write in ways that cross disciplinary boundaries. Sam’s big-picture view of the field of the law of democracy enabled me to situate my work within a quickly evolving discipline and to push the project in the most fruitful directions. David’s emphasis on the theoretical grounding for the work and his careful reading brought out the best in me. All three offer scholarly models to emulate and I am very thankful for the time they have spent with me and this project. I would also like to thank my external reviewer, Keith Ewing, and my “internal external”, Ian Lee, for their very close reading of the work and probing questions in the Oral Defence.

All of the Faculty and staff in the Graduate Program, including Jutta Brunnée, Mariana Mota Prado, Judith McCormack, Archana Sridhar, Whitney Ambeault, and Julia Hall were unfailingly kind and I will always appreciate their efforts. Thanks as well to my colleagues in the program for making my time as a doctoral candidate so enjoyable. Particular mention goes to Michael Nesbitt, Eddie Clark, David
Sandomierski, and Nick Sage for their kind engagement with the ideas contained in the dissertation. I sincerely hope that I was able to return the favour.

Last but certainly not least, a heartfelt thanks to my family. I owe deep gratitude to my parents, Amar Pal and Eva Eros, and my brother, David Pal, for all their support. My wife, Nyranne Martin, has been with me at each step of the way and been a constant source of encouragement and inspiration, even as our family grew over the course of the writing of this dissertation with the birth of our daughter, Clara. I will be eternally grateful for her faith in me and would not have been able to complete this project without it.
# Partisan Manipulation of the Democratic Process and the Comparative Law of Democracy

Michael Pal

## Table of Contents

### Chapter 1:

*Introduction: Partisan Manipulation of the Democratic Process and the Comparative Law of Democracy*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I  Introduction</td>
<td>1</td>
</tr>
<tr>
<td>II Outline of the Chapter and the Dissertation</td>
<td>11</td>
</tr>
<tr>
<td>III Political Representation and the Principal-Agent Problem</td>
<td>14</td>
</tr>
<tr>
<td>a  Implication for the Comparative Law of Democracy</td>
<td>14</td>
</tr>
<tr>
<td>b  The Principal-Agent Problem of Political Representation</td>
<td>15</td>
</tr>
<tr>
<td>IV Majoritarian Democratic Structures</td>
<td>23</td>
</tr>
<tr>
<td>a  Lijphart’s Typology of Majoritarian and Consensual Democracies</td>
<td>25</td>
</tr>
<tr>
<td>b  The Implications of Majoritarian Structures</td>
<td>29</td>
</tr>
<tr>
<td>V  Judicial Review of the Law of Democracy</td>
<td>36</td>
</tr>
<tr>
<td>a  Judicial Failure to Check Partisan Self-Dealing</td>
<td>36</td>
</tr>
<tr>
<td>b  Objections to Judicial Review of the Law of Democracy</td>
<td>41</td>
</tr>
<tr>
<td>i  Critique #1: The Democratic Legitimacy of Judicial Review in General</td>
<td>43</td>
</tr>
<tr>
<td>ii Critique #2: Deference on the Law of Democracy</td>
<td>48</td>
</tr>
<tr>
<td>VI Conclusion</td>
<td>56</td>
</tr>
</tbody>
</table>

### Chapter 2:

*Electoral Management Bodies and Judicial Oversight of the Law of Democracy*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I  Introduction</td>
<td>58</td>
</tr>
<tr>
<td>II Electoral Management Bodies and the Law of Democracy</td>
<td>64</td>
</tr>
<tr>
<td>a  The Role of Electoral Management Bodies</td>
<td>64</td>
</tr>
<tr>
<td>b  Why Have EMBs been Ignored?</td>
<td>71</td>
</tr>
<tr>
<td>III Patterns of EMBs</td>
<td>79</td>
</tr>
<tr>
<td>IV EMBs and Judicial Review</td>
<td>84</td>
</tr>
<tr>
<td>V  Assessing the Independence and Impartiality of EMBs</td>
<td>97</td>
</tr>
<tr>
<td>a  Non-Partisan Outsiders</td>
<td>100</td>
</tr>
<tr>
<td>b  Absence of Constraints</td>
<td>111</td>
</tr>
<tr>
<td>c  Ultimate Authority</td>
<td>114</td>
</tr>
<tr>
<td>d  Internal Procedures</td>
<td>121</td>
</tr>
<tr>
<td>e  EMB Behaviour</td>
<td>127</td>
</tr>
<tr>
<td>VI Conclusion</td>
<td>131</td>
</tr>
</tbody>
</table>

### Chapter 3:

*Calibrating Deference: Case Studies on Redistricting Commissions and Election Commissions*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I  Introduction</td>
<td>133</td>
</tr>
<tr>
<td>II Redistricting Commissions</td>
<td>135</td>
</tr>
<tr>
<td>a  Canadian Electoral Boundary Commissions: <em>Carter, Raîche</em>, and Competing and Competing Approaches to Deference</td>
<td>135</td>
</tr>
</tbody>
</table>
Chapter 4: Motive-Based Judicial Review and Improper Partisan Purposes

I Introduction
II Judicial Review of Legislative Action on the Law of Democracy
   a Improper Partisan Purposes
      i Types of Election Laws as Classified by Motive
      ii Coming to Terms with Improper Motives
   b Motive Analysis and Improper Purposes in Existing Constitutional Doctrine
   c Objections to Motive-Based Analysis
III Judicial Oversight of Partisan Rule-Making: Figueroa v Canada
   a The Background
   b Re-Reading the Majority Decision: Individual Participation, the Egalitarian Approach, or Partisan Self-Dealing
      i Meaningful Individual Participation
      ii The Egalitarian Model
      iii Partisan Motives and Effects
   IV Partisan Voter Registration Rules: Rowe v Electoral Commissioner
      a The Political and Legal Background to Rowe
      b The High Court Decision
   V Doctrine to Prevent Self-Dealing
      a The Doctrine of Non-Retrogression
      b Proportionality Analysis: Skepticism About Motives
      c Democratic Accountability in Majoritarian Systems: Anti-Majoritarianism
   VI Conclusion

Chapter 5: Conclusion

I Institutions and the Law of Democracy
II Implications for Future Research
   a Partisanship in Consensual and Transitional Democracies
   b EMBs as a Fourth Branch of Government
   c The Right to Impartial Election Administration
   d The Law and Politics of the New Voter Suppression
III Conclusion

Bibliography
Chapter 1: Introduction – Partisan Manipulation of the Democratic Process and the Comparative Law of Democracy

I. Introduction

This dissertation seeks to make a contribution to the comparative law of democracy. The law of democracy refers to the laws, rules, institutions, and processes that structure the political system. Included under the rubric of the law of democracy are voting rights, campaign finance, political speech, redistricting and apportionment, and the choice of electoral system, among others. The law of democracy has grown as a field of scholarship over the last ten to fifteen years with the scholarly debate being most fully developed in the United States. The field-defining question in the United States has been how to prevent partisan self-dealing, an understanding driven initially by the constitutional theory of proceduralist John Hart Ely and then by the structural or political competition approach of Samuel Issacharoff and Richard Pildes. Consideration of the law of democracy outside of the United States has been heavily influenced by the American debate, given the

---

much greater degree of attention paid to the field there. As a result, the comparative law of democracy has so far lacked field creation building blocks sensitive to the difficulties in generalizing from the American model and the particularities of other patterns of democracy.

This dissertation seeks to fill this gap by providing a series of organizing principles for the comparative law of democracy focused on the nature and performance of the institutions that manage the democratic process. I argue that the central issue identified by Ely and developed by structural theorists in the United States - the need to prevent partisan self-dealing by elected representatives that distorts the democratic process - must also be considered a core concern for other democracies. This insight, however, must be calibrated for the different set of institutional arrangements prevalent in democracies other than the United States. The core of my argument is that judicial review in the comparative law of democracy must be institutionally focused on the bodies that manage the democratic process and the relationship between them.

The considerable influence of the American model of the law of democracy must be juxtaposed against its relative unsuitability as a case from which to generalize about democracies in general, given institutional differences. There are a number of institutional particularities of the democratic experience in the United States that have shaped American scholarship, but that are less applicable elsewhere. The American scholarship has viewed the law of democracy as a clash between courts and legislatures. This is an appropriate model there, as the prevailing pattern is of courts confronted with legislative action that, for example,
gerrymanders an electoral map or entrenches incumbents through campaign finance legislation. State legislatures and Congress control the democratic process and it is their actions that come under scrutiny by courts. The American experience of clashes between courts and legislatures, however, is unrepresentative of democracies more generally. The American model is an ill fit because in most democracies institutions collectively known as electoral management bodies (EMBs), such as election commissions and redistricting commissions, rather than directly self-interested legislatures, administer vast portions of the democratic process. Theorizing about judicial review, election administration, and election law that does not take EMBs into account is misaligned from the institutional reality of most democracies.

The relationship between judicial review and the legislature in most democracies also plays out on different terrain outside of the United States, with its long-standing strong form judicial review. Especially in systems previously characterized by parliamentary sovereignty, the introduction of rights-protecting instruments containing guarantees of the right to vote, freedom of political expression, and free and fair elections have altered the balance between parliaments and courts by bringing judicial rights protection more to the forefront.\textsuperscript{4} The Canadian \textit{Charter of Rights and Freedoms}, the United Kingdom’s incorporation of the \textit{Human Rights Act} and the \textit{European Convention on Human Rights},\textsuperscript{5} the post-


\textsuperscript{5} Judges in the United Kingdom, of course, do not have the authority to strike down legislation on the basis of the norms embodied in these documents.
Independence Indian Constitution, and South Africa’s post-Apartheid Constitution all grant expansive protection of democratic rights. These new constitutional documents were accompanied by increased judicial involvement in interpreting and guaranteeing democratic rights and holding governments to account. Even in the absence of constitutional change or an entrenched bill of rights, shifting citizen expectations in Australia forced courts to reconcile modern conceptions of democratic rights with traditional doctrines of parliamentary sovereignty. Courts in these countries have behaved uncertainly when democratic rights are at stake. Deferential approaches built on parliamentary sovereignty compete in high courts with robust interpretations of the new rights protecting documents.

With this background in mind, I seek to make several distinct contributions in this dissertation. First, I argue that the concern with partisan self-dealing that manipulates the democratic process identified in the American literature must similarly lie at the heart of a comparative understanding of the law of democracy. This argument challenges traditional notions of parliamentary sovereignty, deference by courts on electoral matters to legislatures, and the separation of powers where the law of democracy is at issue. It is also at odds with judicial reasoning and scholarship that minimize the extent of the problem posed by partisan self-dealing.

The risk of partisan self-dealing stems from structural reasons related to representative democracy and political behaviour and therefore exists independently of the particulars of any one democracy, even if shaped by local political conditions. Partisan manipulation of the democratic process exists
wherever voters select representatives to act on their behalf while those same representatives design the very regulatory regime that governs their own selection. The existence of self-regulation in combination with democratic competition for state power provides incentives for political actors to manipulate election laws to facilitate self-interested outcomes, such as partisan gain at the expense of their electoral competitors.\(^6\)

The common problem across representative democracies is that the political process cannot be trusted to resolve disputes over how to ensure a fair democratic process, because of partisan self-dealing. Courts have had to confront this problem in specific instances where the political process has failed to check self-dealing, but the results on the whole have been unsatisfying in the absence of the necessary organizing principles. Courts in Canada, the United States, Australia, and India have all repeatedly failed to prevent self-dealing or to articulate coherent and persuasive doctrines to minimize it. They have not fully acknowledged that self-dealing legislatures should be seen as entitled to little deference from courts.

I argue that a principal-agent model is the preferable theoretical basis for understanding self-dealing in the law of democracy. Representation creates an agency problem.\(^7\) The principal, in this case the voter, elects a representative to defend his best interests. The principal is faced with the problem of how to ensure

---

\(^6\) The problem of self-regulation by elected representatives unites the myriad different subject-matter that forms the law of democracy, such as redistricting, campaign finance, political speech and choice of electoral system. Colin Feasby, “Freedom of Expression and the Law of the Democratic Process” (2005) 29 SCLR (2d) at 246 and “Constitutional Questions About Canada’s New Political Finance Regime” (2007) 45 Osgoode Hall LJ 3 at 539. The problem of self-regulation also separates the law of democracy from other parts of public law, where the same incentives do not exist, thereby reducing the fit between theories generated for constitutional law generally with the specifics of the law of democracy.

\(^7\) Michael J Klarman, “Majoritarian Judicial Review: The Entrenchment Problem” (1997) 85 Geo LJ 491 at 498 refers to the “‘agency problem’ of representative government”.

5
that the representative, or agent, acts in the principal’s best interests and not in the private interests of the representative herself. The agency relationship results in agency costs whenever the interests of the principal are not being followed. This principal-agent problem is exacerbated in the case of the law of democracy by self-regulation. Unlike some other agency relationships, the one between voters and representatives allows the agent/representative to set the rules under which agents will be chosen in the future. Because of self-regulation, the agent may manipulate those rules to ensure his continued selection as agent. A principal-agent understanding of the law of democracy is a powerful one because it provides a framework for understanding political behaviour.

Second, I argue that constitutional structures are also relevant, in addition to political behaviour defined on a principal-agent basis. Constitutional structure can exacerbate or dampen the problems caused by the agency relationship. I will focus in this dissertation on a group of countries that have been classified as having majoritarian constitutional structures. Majoritarian constitutional structures, along with the principal-agent problem, go a long way in explaining why the political process cannot function to ensure fair terms of democratic competition. Dispersed power structures, such as federalism, bicameralism, or cabinet power sharing are likely to check certain kinds of partisan behaviour. Conversely, concentrations of political and legislative power are likely to facilitate manipulation of the democratic process. Majoritarianism is defined by Arend Lijphart as a political system that concentrates power in the hands of a majority (or perhaps a plurality which is given

---

8 I leave the task of understanding partisan self-dealing in non-majoritarian systems for another project.
a legislative majority), rather than allocating it more broadly.\(^9\) The paradigmatic majoritarian system is Westminster democracy.\(^10\) Majoritarian democracies provide few limits on the powers of legislative majorities, which decreases checks on partisan self-dealing. While incentives to engage in partisan manipulation are likely to be present for political actors in all democracies as there is benefit to be gained by altering the rules governing contests for political power, constitutional structures provide opportunities for them to act.

The primary focus of the dissertation will be on Canada, India, Australia, and the United States, all of which are constitutional systems with majoritarian features. The United States is distinguished by its presidentialism and checks on and balances against concentrated political power, but maintains significant majoritarian features. The United Kingdom functions as an institutional model, particularly in this chapter's consideration of majoritarian democratic institutions, though case law on the United Kingdom is beyond the scope of this dissertation. An enduring theme will be that appropriate responses to partisan self-dealing in the democracies under study here must acknowledge the impact of a majoritarian constitutional structure to be effective.

Third, I aim to shift the institutional focus of the comparative literature and to provide a richer theory of institutional design incorporating the widespread use of EMBs. I argue that while courts should show little deference to legislatures, as the

---

10 I do not deal with the law of democracy in the United Kingdom in any great detail in this thesis. The United Kingdom, however, plays an important role as the background case from which the other main democracies that I investigate either descend (Canada, Australia, India) or were shaped in reaction to (the United States), as well as the template of a majoritarian democratic system. I discuss majoritarian systems extensively in this chapter.
risk of self-dealing is high, EMBs are entitled to deference as long as they are independent and impartial. This approach is institutionally focused in obliging courts to recognize EMBs, appreciate the differences between EMBs and legislatures, and then take into account variations in the design of EMBs.

The tendency in the United States has been to vest courts exercising the power of constitutional judicial review with primary oversight of the law of democracy. The courts are extensively involved in a host of issues that in other countries are left to administrative institutions. The American scholarship accordingly focuses on the law of democracy as a choice between permitting decision-making by self-dealing legislatures or courts ill-equipped to balance the multiple competing policy factors present in regulating democracy. Redistricting is the prime example, as in the United States legislature-designed districts typically give rise to a protracted legal battle governed by constitutional and statutory rules ultimately interpreted, applied, and enforced by the courts.11

In contrast to the United States, most democracies have instead adopted a different institutional mix that results in fewer direct clashes between legislatures and courts. The American prescription of greater judicial involvement is not readily transferable, because of this alternative institutional division of labour. In comparison to the United States, other democracies have generally adopted more numerous and more robust EMBs to oversee the democratic process and reduce the

---

scope of activity available to legislatures and executives. The two main examples of EMBs are election commissions and redistricting commissions. While EMBs are the subject of growing academic interest, the comparative literature on the law of democracy has only recently recognized the importance of these administrative institutions and still largely treats them as peripheral when making claims about judicial review. The American case has been taken as the paradigmatic one, rather than an exception. As a consequence, theories of judicial review of the law of democracy have largely failed to appreciate the impact of EMBs.

Discounting the role of EMBs is a significant mistake. EMBs typically play a large role in the impartial administration of elections. The Australian Elections Commission, the Election Commission of India, the United Kingdom’s Electoral Commission, and Elections Canada, for example, have significant powers, such as enforcing campaign finance legislation and election period regulation. Electoral boundary commissions in Canada, the United Kingdom, and Australia temper tendencies toward partisan excess and incumbent protection. Rather than having legislators carve up their own districts for maximum personal or partisan advantage, redistricting commissions apply traditional districting principles.

Independent and non-partisan election and redistricting commissions take power

---

away from elected representatives who have direct incentives to manipulate the law of democracy, or from bureaucracies acting on their commands, thereby reducing opportunities for partisan distortion.

This institutional landscape has not been adequately integrated into theories of judicial review of the comparative law of democracy, particularly in the ongoing search for the proper level of deference for courts to show. Most theoretical accounts of the law of democracy proceed as if courts should adopt a general posture of deference to respect parliamentary sovereignty and the separation of powers, or vigorous oversight to combat self-dealing by legislatures. Investigating the legitimacy of judicial review of the law of democracy requires a more institutionally sophisticated assessment.

If EMBs are present, and operate independently and impartially, there will be less justification for judicial interference than if self-dealing legislatures were the decision-making body. When reviewing the decisions of EMBs, I will argue that the focus of judicial attention should be on evaluating the independence and impartiality of the institution to determine what level of deference is required. Where it is the actions of the political branches that are under review, or where the EMB has been captured by partisans, then intense review will be appropriate. Where the EMB is independent and impartial, then deference will be warranted. This approach supplies a limiting principle to prevent overly intrusive judicial review where the EMB is independent and impartial, but also empowers courts to combat partisan self-dealing.

13 See, for example, Hasen, The Supreme Court and Election Law; Manfredi and Rush, Judging Democracy; and Orr, Law of Politics, ibid.
Fourth, I seek to expand the doctrinal tools available to courts to reduce partisan self-dealing. If legislatures are engaging in self-dealing, or likely to do so, then the judiciary needs the appropriate doctrinal tools to check partisanship. A common theme running through the dissertation is how courts should come to terms with improper, partisan motives for exercises of state power. I will argue that motive-based judicial review is a way forward for courts to check partisan self-dealing. For example, proportionality tests designed to establish whether a limitation of a right is justifiable are commonly used in democracies, yet there has been relatively little analysis of the ways that they can be used to hinder partisan self-dealing. Proportionality tests have great potential to check self-dealing because of their ability to flush out improper motives. I develop how proportionality tests and other doctrinal tools can be used to reduce partisan self-dealing.

II. Outline of the Chapter and the Dissertation

In the remainder of this introductory chapter, I turn in Section III to my claim that partisan manipulation of the democratic process must be addressed in the comparative law of democracy. I argue that the danger of partisan manipulation is present in all democracies because of the principal-agent problem of representation. In Section IV, I investigate the underlying constitutional and political structures that facilitate partisan manipulation. I use Arend Lijphart’s classification of democracies along majoritarian and consensual dimensions to outline the importance of constitutional structure in facilitating or impeding self-dealing. I explore the consequences of majoritarian democratic structures in Canada, Australia, India, and
the United States. I point to majoritarian constitutional structures as shaping how and when partisan manipulation occurs, thereby generating specific majoritarian democratic pathologies. As majoritarian democracies require courts to play an important role in checking partisan self-dealing, Section V examines the failure of courts to do so effectively and then considers objections to judicial review of the law of democracy.

Chapter 2 accounts for the presence of EMBs in democracies and the consequences for judicial review. The chapter first details the prevalence of EMBs and offers some reasons why their importance has been ignored or downplayed in the law of democracy and political science literature. I then argue for organizing principles for judicial review that respond to the need for vigorous oversight of partisanship, but deference where self-dealing is less of a risk. While scrutinizing legislative behaviour closely, courts should defer to EMBs to the extent that these electoral institutions are independent and impartial. If a decision is made by an independent and impartial EMB, there is no risk of partisan self-dealing. I develop a test for independence and impartiality that allows courts to calibrate what degree of deference is appropriate, with reference to specific examples drawn from the United States, Canada, Australia, and India. To the extent that the EMB is independent and impartial, robust judicial intervention will be inappropriate.

Chapter 3 develops the argument in Chapter 2 by applying it to cases across multiple democracies and both major types of EMBs, redistricting and election commissions. I look at cases involving redistricting commissions in Canada and the United States, and election commissions in India and Canada. Collectively, these
cases demonstrate the need for organizing principles, the failures of current judicial approaches, and the common underlying challenges across democracies despite widely varying histories, political cultures, and partisan dynamics.

In Chapter 4, I assess how courts should respond to partisan self-dealing in those instances where the actions of the political branches, rather EMBs, are under review. While EMBs manage large swathes of the democratic process, courts will still be faced with instances of partisan law making by legislatures, even if this clash between courts and legislatures is a less frequent occurrence than envisioned by the literature assuming the American model. Little deference is owed to legislatures by courts on the law of democracy because of the principal-agent problem. I argue that judicial review of the law of democracy should be focused on assessing whether the motives that animate electoral rules are proper. The idea that courts should look at improper motives or purposes is controversial, though I argue it is necessary to check partisan self-dealing. I look in-depth at two cases, *Figueroa v Canada (AG)*\(^{14}\) and *Rowe v Electoral Commissioner*,\(^{15}\) that demonstrate the value of looking at improper motives. I then outline several doctrines capable of limiting self-dealing that I extract from these cases: 1) non-retrogression; 2) skeptical scrutiny of improper partisan motives through proportionality tests, and 3) anti-majoritarianism.

I turn now to address the principal-agent problem at the heart of the law of democracy.

\(^{14}\) 2003 SCC 37.
\(^{15}\) [2010] HCA 46.
III. Political Representation as a Principal-Agent Problem

a) Implications for the Comparative Law of Democracy

While partisan self-dealing has proven to be an appropriate concern in the American context, with gerrymandering as the prime example, is it just as apt a focus in the comparative law of democracy? In this section, I argue that partisan self-dealing must be addressed across democracies and all areas of the law of democracy. The concern with partisan self-dealing identified in the structural approach in the American literature is appropriate in the comparative law of democracy because of the principal-agent problem. Across democracies, the relationship between voters and their elected representatives should be understood as a principal-agent one.

In a principal-agent relationship the agent may have different goals than the principal and act in the agent’s own interests, rather than those of the principal that selected him. Viewing the relationship between voters and politicians as a principal-agent one highlights the potential for elected representatives to act against the interests of voters. Election laws can determine who forms government, so representatives will have incentives to alter them for partisan gain. Where it will further their partisan interests, elected representatives may manipulate election laws to entrench themselves in government, to insulate themselves from accountability to voters, and/or to harm their political competitors. This partisan self-dealing comes at the expense of the interests voters possess in upholding free and fair elections and the accountability of their representatives. The implication of understanding the law of democracy as a principal-agent problem is that courts or
EMBs must act to ensure a fair democratic process, as the political system itself cannot be trusted to do so.

I will now outline the nature of a principal-agent relationship in greater detail.

b) The Principal-Agent Problem of Political Representation

An agency relationship generally arises where one party, the principal, contracts with another, the agent, to act on behalf of the principal. Some argue that a principal-agent relationship exists whenever there is a cooperative relationship or organization. Agency costs arise when the agent acts in her own interests, rather than those of the principal. Where the interests of the principal align with those of the agent, then agency costs will be eliminated. Democratic politics can be viewed as presenting a principal-agent problem. Voters are situated as the principals in this model, with elected representatives as their agents. A principal-agent approach to democracy recognizes that representatives may not always serve the interests of voters and, indeed, may have strong incentives to stray from the wishes of their

---


constituents. As I will argue throughout this dissertation, representatives may seek to further their own partisan interests by manipulating the democratic process, thereby reducing democratic accountability.

Viewing the relationship between voters and those they elect this way deviates from some traditional understandings of representation. Hannah Pitkin classically described two models of representation: the delegate and the trustee.\(^\text{19}\) Delegates represent exactly the views of their constituents, while trustees exercise their own judgment in service of the public good. Whether serving as delegates or trustees in Pitkin’s formulation, representatives act in the best interests of their constituents. The difference between the delegate and the trustee is the alternative definition of what constitutes the voters’ “best interests”. There is no room in these ideal-type categories for understanding how or when the interests of representatives will deviate from those they purport to represent.

More recent scholarship in political science understands representative democracy as posing a principal-agent conundrum. If representatives follow their own private or partisan interests, then voters need mechanisms to discipline representatives or to provide incentives for them to adopt the voters’ preferences. Elections are the primary vehicle for doing so. Elections in the principal-agent model reduce agency costs by: \(^\text{20}\) 1) allowing principals/voters to sanction badly performing representatives by deciding freely among alternatives through

\(\text{---}
\)


competitive elections (the sanction model); and 2) allowing principals/voters to select representatives who are likely to share their views (called in the literature “good types”) and therefore to act in their interests (the selection model). In the sanction model, voters reduce the agency costs of representation by providing external incentives for agents to conform to the interests of principals - act in our interests or be turfed from office. In the selection model, voters reduce agency costs by choosing representatives who share their views already and are therefore internally motivated to achieve the ends voters prioritize.

The self-regulation by representatives over the terms that govern their selection, however, undermines the effectiveness of elections in sanctioning poor performers or in choosing good types and, therefore, increases agency costs. Elected representatives are directly self-interested in the laws that govern elections, as electoral rules may determine who wins competitions for state power. Allowing them to set these rules invites manipulation for partisan ends.


23 The selection model presumes a certain degree of homogeneity in voters, as diverse views or interests will make it difficult for a representative to share those of her constituents.

24 Given the potentially outcome determinative consequences of the choice of electoral rules, William H Riker posited that all institutions that distribute political results unequally will be unstable, as political
principals and agents are very likely to deviate on election law, as agents prefer options that maximize their political fortunes at the probable expense of competitive elections. The ability of voters to sanction or select the best representatives is undermined if agents have both the incentive and the opportunity to manipulate the agent-selection process.

The principal-agent problem of political representation has been appreciated more in some of the country-specific literatures than others. While not explicitly conceived of in principal-agent terms, the American literature has engaged extensively with the problem of partisan attempts to diminish electoral competition. The debate between structural theorists supporting judicial or administrative guarantees of the background rules for fair politics, and rights theorists more sanguine about self-regulation and content with traditional doctrinal approaches, centers on the consequences of the principal-agent problem. Recent Canadian law of democracy literature engages with self-dealing by elected actors will seek to modify such an institution to their own advantage: “Implications from the Disequilibrium of Majority Rule for the Study of Institutions” (1980) 774(2) APSR 432.


representatives\textsuperscript{28} as well as its initial focus on the debate between egalitarians and libertarians.\textsuperscript{29} In Australia, the focus has been on enforcing democratic rights in the absence of an entrenched bill of rights, the legitimacy of proportionality analysis, and the particular content of controversial election laws.\textsuperscript{30} In the United Kingdom, Keith Ewing has notably drawn attention to the incumbent protecting effects of


electoral regulation, though self-dealing has not been field defining there as it has in the United States. Partisan self-dealing has been generally ignored in India.

The principal-agent problem should be understood as relevant in all representative democracies, as it underlies the general relationship between voters and those elected on their behalf. It is not restricted to any one democracy. The claim that self-interested manipulation of the democratic process is a common and recurring tendency in democracies is one that finds much purchase in empirical political science, particularly on the issue of choice of electoral system. Each type of electoral system carries institutional biases that reward certain groups above others, so there are incentives for partisans to adopt systems likely to result in favourable outcomes for them. Substantial empirical evidence from the rational choice school of political science indicates that self-interest is the guiding preoccupation of political actors in deciding among electoral systems or choosing whether or not to initiate electoral reform. The governing party that made the selection of an electoral system from among the alternatives tends to be best served


32 See, for example, the special edition of the Election LJ, supra note 12, where partisan self-dealing is not a focus.


by the new method of electing representatives. Uncertainty regarding future events may hinder their ability to successfully devise a system that actually maximizes benefits to them, but it is the maximization of their electoral chances that guides the choice. Country case studies on democracies in North America, Asia, Europe, Latin America, and Africa among others support the thesis that political actors frequently manipulate the electoral rules of the game to ensure self-serving ends. Parties seek to maximize their ratio of votes to seats given the strategic scenario that they find themselves in when electoral system change is on the table.

Other political science approaches also identify self-dealing on choice of electoral system. Political scientists from another school, historical institutionalism, have argued that the rational choice approach ignores history and context and therefore reaches mistaken conclusions about why particular electoral systems are

---


36 Dennis Pilon, “The 2005 and 2009 Referenda on Voting System Change in British Columbia” (2010) 4(2-3) CPSR 73 at 74. Pilon’s analysis does not fit within the rational choice paradigm, but reaches similar conclusions and shares some assumptions.


chosen at specific times.\textsuperscript{41} Cultural modernization theorist Matthew Shugart argues the rational choice model ignores the role of norms in evaluating the choice and performance of electoral systems\textsuperscript{42} and fails to apply the necessary detailed contextual analysis.\textsuperscript{43} While these competing schools of thought challenge the idea that partisan manipulation is the sole factor to consider, both accept that strategic calculation by elites remains a key ingredient.\textsuperscript{44}

Partisan self-dealing is also not limited to a particular dimension of the law of democracy. Gerrymandering may be the quintessential example in the United States with plentiful historical corroboration in other democracies, but the principal-agent problem exists across the whole range of design choices under the law of democracy. Whenever a rule shapes the agent selection process, agents will potentially have incentives to manipulate it for partisan ends. This feature unifies the disparate types of regulation that constitute the law of democracy.\textsuperscript{45} Not all electoral regulation will be the result of partisan self-dealing, but it is an ongoing risk across the law of democracy.

\textsuperscript{44} Shugart, “Inherent and Contingent Factors” \textit{ibid} at 10; Ahmed, \textit{supra} note 41 at 1066; Rahat and Hazan, \textit{supra} note 41 at 483-5, 488-90; and Renwick, \textit{supra} note 41 at 10.
The combination of self-regulation by elected representatives over the law of democracy and the divergence of the interests of elected agents from voting principals results in significant agency costs. These features - self-regulation and divergence of interests - are present in representative democracies in general and across all areas of the law of democracy. The principal-agent model of elections suggests that some institution outside of the elected branches will need to act to reduce agency costs generated by partisan self-dealing. As discussed later in this dissertation, courts (Section V of this chapter) and EMBs (Chapter 2) should be envisioned as playing that role.

IV. Majoritarian Democratic Structures

The previous section argued that partisan self-dealing will be a live risk across democracies because of the principal-agent problem. How partisanship operates, however, will differ according to the institutional makeup of democracies. Judicial review of the law of democracy must be institutionally focused to take into account the type of democracy that the courts are overseeing. This dissertation focuses on majoritarian democracies. In this section, I argue that the majoritarian features of the democracies under study have implications both for how partisan self-dealing operates and how courts and EMBs can minimize it.

A general lesson that can be extracted from the structural approach of Samuel Issacharoff and Richard Pildes is that courts must account for political circumstances and constitutional structure if jurisprudence is to resolve the dilemmas posed by the principal-agent problem. Issacharoff and Pildes can be read,
for example, as encouraging American courts to incorporate the reality of two-party political competition and alternation of power between Democrats and Republicans. Sujit Choudhry highlights the need to account for constitutional structure and political circumstances in dominant party democracies, such as South Africa, where the African National Congress has governed since the end of Apartheid. In his view, the South African courts should therefore incorporate into their jurisprudence the need to check the excesses of the dominant party including manipulation of election laws, legislative procedures, and capture of independent institutions. Choudhry's article takes the basic premise that manipulation of the democratic process is a harm that must be minimized in democracies from the structural approach. He expands on the implications of this insight given South African political realities and the political structure established by its constitution and institutions. Choudhry can be read as demonstrating that in dominant party democracies manipulation of the democratic process will operate differently than in countries with true two-party competition.

What is the nature of the political circumstances and constitutional structures that should be taken into account in evaluating the law of democracy in Canada, Australia, India, and the United States? I advance here three claims: 1) that the political systems and constitutional structures of these countries display the pathologies of majoritarian democracies; 2) that majoritarianism enables partisan

46 “Politics as Markets”, supra note 3.
48 See especially ibid at 56-7.
49 The United States has less in common with other former British colonies that have variants of the Westminster system in place, but there is a sufficient overlap to classify it in this group.
self-dealing because it provides few checks on the power of legislative majorities and executives; and 3) that it is incumbent on courts and EMBs to check the partisan excesses particular to majoritarian constitutional structures.

That the countries under study display majoritarian pathologies leading to partisan self-dealing on the law of democracy is evident from an analysis of Arend Lijphart’s leading characterization of democratic forms of governance, which is the subject of the next section. The consensual elements identified by Lijphart that could potentially check majority dominance, such as federalism and bicameralism, pose only minor barriers to legislative majorities intent on manipulating the democratic process in most instances. We should therefore have little expectation in majoritarian democracies that the political process alone will be able to limit partisan self-dealing.

a) Lijphart’s Typology of Majoritarian and Consensual Democracies

Lijphart’s work identifies majoritarian and consensual patterns of government. Majoritarian democracy institutionalizes rule by a majority (or

---

50 The United States is of course the exception among this group as a presidential rather than parliamentary democracy. As a result it has more checks on legislative majorities.

51 As is discussed later in this chapter, judicial review is an exception, as are EMBs, though they are not of primary concern to Lijphart.

electoral plurality elevated to a legislative majority through the electoral system) and concentrates power in its hands. Lijphart defines majoritarian democracy as competitive, adversarial and exclusive.53 The Westminster system is the exemplar of majoritarian democracy.54 In contrast, the consensual model relies upon power-sharing, inclusiveness, and compromise to constrain majorities.55 Switzerland and Belgium are defined as ideal-type consensual democracies with their proportional electoral systems and power sharing coalition governments. In later work, Lijphart uses the term “consociational” to describe consensual systems with diverse populations.56

Lijphart evaluates democracies along two main axes - the executive-parties dimension and the federal-unitary dimension. On the executive-parties dimension, majoritarian systems concentrate power in a single-party executive, exhibit executive dominance over the legislature, have two-party alternation in government, possess plurality or majoritarian electoral systems such as single member plurality (SMP, also known as First Past the Post or FPTP), and are characterized by pluralistic interest group competition. In contrast, consensual systems disperse the power of the executive among many parties or institutions, have equal or legislature-dominated executive-legislative relations, multi-party

53 Lijphart, Patterns of Democracy, ibid at 2. See generally at 9-30.
54 Id at 10-21.
55 Id at 31-47.
56 There is a long-standing debate between Lijphart and Donald Horowitz whether consociationalism is the optimal approach for divided societies. See, generally, Sujit Choudhry, “Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies” in Sujit Choudhry, ed, Constitutional Design for Divided Societies: Integration or Accommodation? (Oxford: Oxford University Press, 2008) 3 at 15-26. It is not my intention to engage in this debate here.
systems, proportional representation (PR) electoral systems, and institutionalized roles for groups such as trade unions or business.

On the federal-unitary dimension, majoritarian democracies are typically unitary and centralized, unicameral, allow amendment of the constitution by majority legislative agreement, and have no judicial review. Consensual systems along this dimension are federal and decentralized, bicameral, require super-majorities to amend the constitution, have strong judicial review, and an independent central bank. Lijphart’s categories have been criticized for failing to satisfactorily integrate whether a system is presidential, and methodologically for their operationalization of the executive-parties and federal-unitary dimensions, but remain the most influential in the political science literature.

In Lijphart’s formulation, those democracies descended from the Westminster system have strong majoritarian tendencies, though like all democracies they have some combination of majoritarian and consensual features. Lijphart’s describes the United Kingdom as the epitome of majoritarian government. Under Lijphart’s scheme, federal and bicameral Canada and Australia are mixed majoritarian-consensual democracies, though largely falling on the majoritarian side of the ledger. As a relatively new democracy, India’s democratic

---

57 The final majoritarian feature listed by Lijphart, having a dependent central bank, is irrelevant to the law of democracy so I exclude it here.
58 See the discussions of how various countries fit into the typology and the need to account for presidentialism in Nils-Christian Bormann, “Patterns of Democracy and Its Critics” (2010) 2 Living Reviews in Democracy.
60 Lijphart, Patterns of Democracy, supra note 9 at 10-21. The United Kingdom generally has one-party cabinets. The 2010 Conservative-Liberal Democratic coalition government is an interruption in this pattern.
61 The unelected Canadian Senate lacks democratic legitimacy and generally defers to the lower house of Parliament, thereby rendering largely moot the consensual check provided by bicameralism. In contrast, the Australian Senate is elected by single-transferable vote (STV), a highly proportional electoral system.
institutions have been in a process of evolution.\textsuperscript{62} India arguably veers closer to the consensual side than the other Westminster descendants,\textsuperscript{63} but its constitution and government derive from British colonial rule and it remains mainly majoritarian.\textsuperscript{64} Presidential systems, like the United States, do not exhibit the same executive dominance of the legislature due to the separation of powers, but can also be classified as mainly majoritarian systems.

Overall, on the executive-parties dimension, these democracies largely display the signs of majoritarianism derived from their Westminster heritages, epitomized by one-party executives and SMP electoral systems. On the federal-

\begin{flushleft}
\textsuperscript{62} Alistair McMillan calls India a “deviant democracy” for the extent to which it confounds political science models of democratization and democratic consolidation that have otherwise broad applicability: “Deviant Democratization in India” (2008) 15(4) Democratization 733.

\textsuperscript{63} India was traditionally understood as a variant of the British majoritarian model. Arend Lijphart makes a full-throated defence of the idea that India is consociational rather than majoritarian, however, in his attempt to explain how India’s democracy has persevered in the face of linguistic, ethnic, and religious divisions: “The Puzzle of Indian Democracy: A Consociational Interpretation” (1996) 90 (2) APSR 258 at 258-259. Consociational theory would predict that majoritarian institutions cannot bridge these divides, so there is much at stake for Lijphart in making this argument. Lijphart’s claim about India has attracted extensive criticism. Choudhry, “Constitutional Design in Divided Societies”, supra note 58 at 20 calls Lijphart’s classification of India as consociational as “controversial”. Paul R Brass argues that India is not consociational: “Ethnic Conflict in Multiethnic Societies: The Consociational Solution and Its Critics” in Ethnicity and Nationalism: Theory and Comparison (London: Sage, 1991) at 333-348. Steven Ian Wilkinson and Katherine Adeney argue that Lijphart has an incorrect view of Indian history, as there was greater consociationalism under British rule prior to independence, rather than after: Wilkinson, “India, Consociational Theory, and Ethnic Violence” (2000) 40 (5) Asian Survey 767-791 and Adeney, “Constitutional Centering: Nation Formation and Consociational Federalism in India and Pakistan” (2002) 40(3) Commonwealth and Comparative Politics 25. Wilkinson further claims that movement toward consociationalism since the 1960s has exacerbated rather than diminished ethnic conflict. McMillan, “Deviant Democratization”, supra note 64 at 743 concludes that Lijphart’s claim that India is consociational “does not live up to empirical scrutiny” and that India adopted the “majoritarian Westminster model”.

\textsuperscript{64} India is characterized by executive dominance. Subash K Kashyap, “Executive-Legislature Interface in the Indian Polity” (2004) 10 (2-3) The Journal of Legislative Studies 278 at 289-290 and throughout details the relative decline of the Lok Sabha and prime ministerial disregard for the legislature after Nehru. See Taibur Rahman, Parliamentary Control and Government Accountability in South Asia: A Comparative Analysis of Bangladesh, India and Sri Lanka (New York: Routledge, 2008). Rahman writes of South Asian parliaments generally that, “…the executive usually dominates the legislative outputs” even if “the executive in fact is not in control of all vital areas of public administration…” at 5. Still, he writes, there is a “prevailing imbalance of power between the executive and legislative branches” and there has been a “steady decline in the ability of the legislature to fulfill its prime functions of legislation and oversight of the executive… [which] coupled with [sic] the rise of disciplined political parties, meant that the balance of power in most parliaments shifted decisively in favor of the executive” at 6.
\end{flushleft}
unitary dimension, however, these democracies possess consensual elements, namely federalism, bicameralism, and judicial review. In the next section, I consider the implications of the particular mix of majoritarian and consensual structures in these countries for the law of democracy.

b) The Implications of Majoritarian Structures

The implications of the majoritarian pattern of government for the law of democracy have not been fully considered. Majoritarian concentrations of power facilitate partisan manipulation because there is an absence of institutional checks on self-dealing by the elected representatives in the majority. The majoritarian and consensual features of a democracy provide the specific constitutional structure and political circumstances within which the principal-agent problem manifests. The constitutional structures in the democracies under study permit majorities to operate with relative impunity. The majoritarian pathologies exhibited in the United Kingdom, Canada, Australia, India mean that a governing majority may function nearly unfettered by the objections of minority interests in the absence of particular political circumstances, such as minority or coalition governments in parliamentary systems. As a result, there is often little or no limit on elected representatives’ role on redistricting, campaign finance, party funding, and political speech from consensual structures. The types of consensual features that exist in majoritarian democracies tend to only minimally impede partisan manipulation because they generally cluster on the federal-unitary dimension, not the executive-parties.

65 In the United States, divided government can protect minority interests.
dimension. The cases discussed in Chapters 3 and 4 demonstrate how futile resistance by minority parties has been in preventing partisan self-dealing by legislative majorities in majoritarian systems.

On Lijphart’s executive-parties dimension, proportional representation, formal power-sharing, multi-party governments, and the supremacy of the legislature over the executive would all limit majoritarian concentrations of power and, hence, partisan manipulation by majorities. Majoritarian democracies such as Canada, Australia, the United States, and India, however, do not possess these consensual features. While the institutional mix, political culture and party system of each democracy will vary, a similar story of constitutional structures enabling self-dealing can be told across majoritarian democracies. If a legislative majority acting under the directions of the executive according to party discipline is inclined to pass an incumbent protecting campaign finance amendment, there are few impediments.

Consensual limits on majoritarianism in these democracies, such as federalism, bicameralism, and constitutional amendment procedures that require the consent of sub-national units, only restrict majority power in specific, limited circumstances. Federalism, bicameralism (where the upper house represents the regions or sub-units) and the amending formula are all consensual elements along the federal-unitary dimension that guard against government behaviour that discriminates against specific regions of the country. They constrain opportunities for partisan manipulation along regional lines by fettering majorities in the lower
house as well as the executive, through the requirement of support in a second legislative body or among the national sub-units.

These consensual features, however, do not generally check partisan abuses of national level election laws. For example, while the Canadian government may be dissuaded by federalism from redistributing seats in the House of Commons in ways that harm a particular region,\textsuperscript{66} the federal government is not hindered from passing partisan tainted laws on campaign finance,\textsuperscript{67} political party funding,\textsuperscript{68} or political expression.\textsuperscript{69} In the United States, the presidential veto provides an additional opportunity to curb legislative majorities when different political parties hold the presidency and Congress.

Federalism can provide important constraints on federal interference with state-level elections, as in the United States. The United States Constitution devolves election administration primarily to the states, with the sub-national unit controlling local, state, and even congressional election administration.\textsuperscript{70} Some features of election administration exist at the national level\textsuperscript{71} and the federal \textit{Voting}
Rights Act applies to both state and national elections. By and large, however, the states retain control over election administration. The division of powers around election administration prevents federal interference in local elections. It provides a check on the federal government using election administration for partisan ends, as it is highly unlikely that one party will control the branches of the federal government as well as all the states. Federalism does not, however, limit self-dealing through manipulation of federal election law by Congress or the President.

An example of unchecked federal power comes from the use of the emergency powers existing in s. 356 of the Indian Constitution. Section 356 permits the Indian federal government to dissolve state legislatures and executives and to assume their powers in times of emergency where constitutional governance has broken down. The Indian federal government has abused this emergency power for partisan ends, by dismissing state governments from rival political parties.


Article 356 applies “in case of failure of constitutional machinery in State”.

courts have since reined in this federal power, but the history of s. 356 demonstrates the possibility of unchecked federal power being used to manipulate state democratic processes for partisan reasons. The constraint on majoritarian behaviour that remains to be discussed is of course the courts. Lijphart lists judicial review as one of the five consensual factors that may check majoritarianism. Judicial review is one consensual feature that has the potential to limit self-dealing. In majoritarian democracies, the courts should be understood as playing a special role in checking majoritarian pathologies that would distort the democratic process. The role of courts is necessitated by the combination of majoritarian constitutional structure, partisan political behaviour, and self-regulation over the law of democracy. Given the low likelihood that the political process will be able to resolve disputes about partisan election laws where the legislative majority is simply able to outvote its competitors, courts are one of the few options by which to minimize partisan manipulation. A central role of courts on the law of democracy should be seen as minimizing agency costs generated by partisan self-dealing.

Courts hold out the promise of restricting self-dealing because unlike legislatures and executives, they do not have a direct self-interest in the rules of the electoral game. This is why representation reinforcing constitutional theories and structural theories of the law of democracy have advocated robust roles for

---

76 Lijphart, Patterns of Democracy, supra note 9 at 4.
77 Judicial elections as occur in the United States are one obvious exception.
78 Ely, supra note 2.
79 Issacharoff and Pildes, “Politics as Markets”, supra note 3.
courts to break up self-interested lockups of the democratic process.\textsuperscript{80} It is possible for courts to act as partisans, as the United States Supreme Court was widely accused of being in \textit{Bush v Gore}.\textsuperscript{81} Yet in most democracies, the judiciary is reliably less partisan than the legislature,\textsuperscript{82} though the United States may be at one extreme with relatively more partisan judges at some levels.\textsuperscript{83}

It is necessary to note at this juncture that courts are not the only alternative to self-dealing legislatures and executives. EMBs, such as redistricting and election commissions, are the subject of Chapters 2 and 3. These institutions may provide independent and impartial administration of electoral rules. EMBs have the virtue of being impartial and independent in most instances. Either courts or EMBs may limit self-dealing. The key consideration is that the rules of the electoral game should not be determined by those most directly self-interested in its outcome.

Lijphart’s typology ignores the role of EMBs. Kenneth Mori McElwain has criticized scholars of elections for focusing on macro-level rules and institutions, but

\textsuperscript{80} The other institutions that may take self-dealing out of the law of democracy are redistricting and election commissions, which are the subject of Chapters 2-3.


\textsuperscript{82} The Canadian Supreme Court recently decided \textit{Opitz v Wrzesnewskyj} 2012 SCC 55, which resolved a disputed riding-level result from the 2011 election. The four-Justice majority ruling in favour of the Conservative candidate consisted of two Liberal and two Conservative appointees. The stakes were admittedly of a much lower order of magnitude than in \textit{Bush}. More broadly than simply partisan affiliation, the evidence from Canadian studies of judicial policy attitudes indicates significant deviation among Supreme Court judges from the ideologies of the Prime Minister and party that appointed them. See CL Ostberg & Matthew E Wetstein, \textit{Attitudinal Decision Making in the Supreme Court of Canada} (Vancouver: University of British Columbia Press, 2007) and Benjamin Alarie and Andrew Green, “Supreme Court of Canada Appointments” (2009) 49 Osgoode Hall LJ 1 at 14 and FN 50.

ignoring micro-level rules, such as election laws.\textsuperscript{84} These micro-level rules are more often the subject of partisan gamesmanship than a macro-level change such as a move from SMP to PR.\textsuperscript{85} I would argue that Lijphart’s typology ignores a micro-level institution, EMBs, of central importance to the law of democracy. Lijphart identifies courts as one consensual feature that limits majoritarianism, but EMBs must be recognized as well. EMBs displace the jurisdiction of legislatures and executives over aspects of the democratic process. To the extent that they operate at arms-length from elected representatives and have no partisan agenda of their own, EMBs are likely to restrict partisan self-dealing in the areas under their control. They should therefore be acknowledged, along with courts, as key institutions capable of minimizing partisan self-dealing in majoritarian democracies.

I do not wish to argue that non-majoritarian systems are preferable to majoritarian ones, or that PR is superior to FPTP. All democratic forms of government necessarily involve tradeoffs in adopting one set of institutions or constitutional structures over others. Majoritarian democracies create direct lines of accountability between voters and their elected representatives while permitting relatively rapid government reactions to changing circumstances, in contrast with power-sharing regimes that require greater degrees of consensus to arrive at decisions. The tradeoffs involved in the institutional choice of the majoritarian form of government along the executive-party dimension have been well documented. What have been ignored are the opportunities that these different types of democratic systems create for manipulation of the democratic process. Majoritarian

\textsuperscript{84} McElwain, \textit{supra} note 37 at 33.

\textsuperscript{85} \textit{Ibid.}
systems will provide a different set of institutional constraints, but also an alternative set of incentives, for political actors. Consensual democracies defined by proportional electoral systems and multi-party politics leading to coalition governments may be susceptible to oligopolistic behaviour by coalitions seeking to harm the other parties in the legislature or small parties without elected members.86

V. Judicial Review of the Law of Democracy

While judicial review is not the only institutional option for reducing agency costs, it remains a necessary component. Courts in the democracies that I will study in this dissertation either have not come to terms with the need to check partisan manipulation or have failed to do so in an adequate way. Courts in democracies with majoritarian pathologies should include political circumstances and institutional design in their deliberations, while viewing their role as blunting majoritarian abuses. I discuss in detail proposals for specific doctrines to check self-dealing in future chapters. In this section I consider, first, how courts have failed to minimize partisan self-dealing and, second, address the central objections to judicial review of the law of democracy.

a) Judicial Failure to Check Partisan Self-Dealing

Courts across democracies have often floundered when faced with partisan manipulation. They have often reached incorrect results, because they failed to see

86 A full examination of partisan manipulation in consensual systems is beyond the scope of the present dissertation, but is an important topic for future study. I discuss potential avenues for research on consensual democracies in Chapter 5, which concludes this dissertation.
the existence of self-dealing or to understand the harm to democratic accountability caused by partisan abuse. They have at other times reached the proper outcome, but been unwilling to address partisanship head-on, with the result being unpersuasive reasoning that obscures the reality that the court is checking partisan self-dealing.

The United States Supreme Court has not adopted the structural rationales articulated by competition theorists. Where the Court has accepted self-dealing as a problem, it has struggled to translate this insight into practical doctrine. The Court has recognized partisan gerrymandering as unconstitutional, but is internally divided on what the proper test should be, and has yet to actually hold that partisan gerrymandering was committed. The Court also failed to acknowledge the partisan dimensions of a voter identification (“ID”) scheme purportedly implemented to deter fraud, but more plausibly understood as an attempt to disenfranchise voters. Recent decisions from lower courts on partisan implementation of voter ID and early voting schemes in the states do show some way forward for how American courts can combat partisan legislation.

---

87 Rave, supra note 11 at 3, FN 18. Rave points out that Issacharoff’s approach to gerrymandering in “Gerrymandering and Political Cartels” supra note 3 was rejected by Souter J in Vieth v Jubilirer 541 US 267 (2004) 350, FN 5.
89 Vieth, supra note 89 and League of United Latin American Citizens (LULAC) v Perry, 548 US 399, 414 (2006).
90 Ronald A Klain, “Success Changes Nothing: The 2006 Election Results and the Undiminished Need for a Progressive Response to Political Gerrymandering” (2007) 1 Harv L & Pol’y Rev 75 at 78. The United States Supreme Court’s most recent case on alleged partisan gerrymandering is Perry v Perez, 132 S Ct 934 (2012).
91 Crawford v Marion County Election Board, 553 US 181 (2008).
92 A district court judge in Wisconsin held the state’s voter ID law to be unconstitutional. The judge found the claim that voter fraud was a pressing state interest justifying the restrictive ID rules to be unsupportable: (“…because virtually no voter impersonation occurs in Wisconsin and it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future, this particular state interest has very little weight” at page 11). Frank v Walker (2014) United States District Court, Eastern District of Wisconsin, Case No. 12-CV-00185. Available at: http://media.cmgdigital.com/shared/news/documents/2014/04/29/Wisconsin_voter_ID_ruling.pdf. Last
The Supreme Court of Canada has fared no better in developing necessary doctrine. When faced with an obvious partisan gerrymander in its first case under the Charter’s guarantee of the right to vote, Reference re Provincial Electoral Boundaries, the Canadian Court ignored the problem, and therefore failed to advance doctrine that could guide it when presented with future instances of self-dealing. In Harper v Canada, the Court upheld very low limits on third party (i.e. interest group) election spending, despite the monopolization of the election process by political parties at the expense of other participants, which troubled the dissenting Justices. Perhaps the most obvious instance of incumbent protection before the Court occurred in Figueroa v Canada (AG). Cartel-like
behaviour by the large Canadian political parties\textsuperscript{101} led to passage of rules that discriminated against small and new parties by raising barriers to entry into the political market. The Court recognized the harm as a violation of the right to vote, but framed its reasoning in terms of the negative impact on a right to individual participation, rather than as a constitutional interest in fair electoral competition. The Court’s skeptical analysis at the rational connection stage of the proportionality test suggests it was aware of the partisan implications of the impugned law.

Reasoning justifying the result through the need to prevent cartel-like behaviour by the leading parties would have been preferable. I consider Figueroa in greater detail in Chapter 4.

In Australia, there is no entrenched right to vote,\textsuperscript{102} but elected representatives must be “directly chosen by the people” (s. 7 and s. 24 of the Constitution). The High Court has notably used this textual anchor to protect political expression\textsuperscript{103} and prevent the disenfranchisement of felons,\textsuperscript{104} but not to guarantee voter equality in redistricting.\textsuperscript{105} The High Court, however, has failed to

\begin{thebibliography}{99}
\footnotesize
\item \textsuperscript{101} MacIvor, “Cartels”, \textit{supra} note 28.
\item \textsuperscript{102} \textit{R v Pearson; Ex parte Sipka} (1983) 152 CLR 254; Anthony Gray, “The Guaranteed Right to Vote in Australia” (2007) QUTL 7(2) 178 at 178; Graeme Orr and George Williams, “The People’s Choice: The Prisoner Franchise and the Constitutional Protection of Voting rights in Australia” (2009) 8(2) Election LJ 123 at 124. Several Justices of the High Court have stated that abridging the universal franchise for Australian citizens would violate ss 7 and/or 24 of the Constitution, which guarantee that elected representatives be “directly chosen” by voters, even in the absence of a right to vote: \textit{McGinty v Western Australia} (1996) 186 CLR 140 per Toohey J at 201 and per Gaudron J at 221-2; \textit{Langer v Commonwealth} (1996) 186 CLR 302 per Gummow J at 287 and per McHugh J at 342.
\item \textsuperscript{104} \textit{Roach v Electoral Commissioner} [2007] HCA 43.
\item \textsuperscript{105} \textit{A-G (Commonwealth); Ex rel McKinlay v Commonwealth} (1975) 135 CLR 1; \textit{McGinty, supra} note 105. For comparison of the Australian, American and Canadian redistricting and apportionment cases see
\end{thebibliography}
acknowledge or account for partisan self-dealing stemming from the principal-agent problem. In *Rowe v Electoral Commissioner*, the Court ruled that imposition of an attenuated window for voter registration was unconstitutional. The effect of the law making it more difficult to register was to harm the opposition Labour Party, which benefitted from support from those groups less likely to be able to register under the new rules, namely citizens who had come of age to vote, immigrants who had become citizens, and those who had moved, including students. The Court properly struck down the law, but did not acknowledge its partisan motivations and effects. I also deal with this case in Chapter 4.

The Supreme Court of India has been equally culpable of failing to develop doctrine to address partisan self-dealing. In 1989, Congress Prime Minister Rajiv Gandhi captured the Election Commission of India (ECI) just prior to an election. A single Chief Election Commissioner traditionally ran the ECI and the individual in place at the time had been appointed by a previous government run by a different party. Rajiv Gandhi appointed two additional commissioners who formed a voting majority on the commission able to defeat any decisions of the Chief that were hostile to the Congress government, in a bid to have the election administered favourably for his political party.

Despite this partisan move, Gandhi lost the subsequent election and the new Janata Dal-led government removed the commissioners. In *Dhanoa v Union of*...
India, the Supreme Court upheld the removal on the grounds of unfettered Presidential discretion, but its reasoning is unpersuasive. The Court hinted at but failed to engage with the blatant partisan capture of the ECI by the Congress Party that precipitated the dispute. Preserving the independence of the ECI was an alternative and more persuasive basis from which to justify the removal of the two partisan appointees.

These cases form but a few of the prominent examples of judicial unwillingness to limit partisan self-dealing in established, majoritarian democracies. They illustrate the consistent degree of failure by leading constitutional or high courts to come to terms with partisan manipulation of the democratic process. I turn now to address why robust judicial oversight of the democratic process is a legitimate and appropriate response to the principal-agent problem by considering and rejecting the main arguments against judicial review of the law of democracy. If politics cannot reasonably be expected to oversee itself, then judicial involvement will be required (leaving aside the role of EMBs for the moment).

b) Objections to Judicial Review of the Law of Democracy

While my analysis of the principal-agent problem and majoritarian constitutional structures suggests an important role for courts, there are longstanding objections to judicial review of the law of democracy. I argue in this section that these critiques are misguided. Objections to judicial review of the law of democracy must be placed in the context of rapidly expanding involvement by

---

107 1991 AIR 1745; 1991 SCR (3) 159.
courts in the political process. Ran Hirschl identifies “legal disputes over election procedures” as a growing portion of the docket of courts globally, and “electoral processes and outcomes” as the first illustrative case of his argument for the ongoing judicialization of mega-politics. Hirschl concludes that “[a]rguably, the most overtly political area [of judicialization] is the judicialization of the democratic process itself.”

There are two main types of objections to judicial review of the law of democracy. First are general objections to the democratic legitimacy of judicial review of legislative action, which emerge from debates in the United States about the counter-majoritarian difficulty, in Canada between opponents and proponents of Charter dialogue, in the United Kingdom over European human

---

108 “Bush v Gore as Global Trend”, supra note 81 at 205; see also at 192 for reference to “electoral disputes”.
110 Ibid.
rights instruments, in Australia about parliamentary supremacy and proportionality analysis, and in India most forcefully through the debate about the “basic structure” doctrine. Case law engaging judicial review of the law of democracy is frequently used in these debates, given their clear political consequences. Second are arguments that claim deference should be accorded by courts specifically on the law of democracy because of its unavoidably political nature. Both the general and the specific critiques fail to distinguish the uniqueness of the law of democracy as a subject of judicial review. Neither of the two types of critiques adequately accounts for the principal-agent problem, self-regulation by elected representatives, and majoritarian constitutional structures, which collectively provide incentives and opportunities for partisan self-dealing.

i) Critique #1: The Democratic Legitimacy of Judicial Review in General

---


Jeremy Waldron presents the general critiques that form what he calls the core of the case against judicial review of legislation on constitutional grounds.\footnote{“Core of the Case”, \emph{supra} note 111. Waldron makes related arguments in other work, which he cites in FN 14 of the “Core of the Case”: \emph{Law and Disagreement} (Oxford: Oxford University Press, 1999) at 10-17, 211-312; “Deliberation, Disagreement and Voting” in Harold Hongju Koh and Ronald C Slye eds, \emph{Deliberative Democracy and Human Rights} (New Haven: Yale University Press, 2007) 210; “Judicial Power and Popular Sovereignty” in Mark A Graber and Michael Perhac, eds, \emph{Marbury Versus Madison: Documents and Commentary} (Washington, DC: CQ Press, 2002) 181; and “A Rights-Based Critique of Constitutional Rights” (1993) 13 Oxford J Legal Stud 18. I focus on the “Core of the Case” because Waldron himself attempts in the article to state his argument as abstractly as possible and removed from particular examples. This allows application of his argument to the specific context of the law of democracy, whereas his other work is often concerned with concrete applications of judicial review and parliamentary sovereignty in other contexts. The article “boil[s] down the normative argument to its bare bones so that we can look directly at judicial review and see what it is premised on” (“Core of the Case” at 1351).}

Put briefly, he first argues that there is no reason to believe that courts will better protect rights than legislatures. In his view, rights-protection is not the exclusive domain of courts.\footnote{There is a body of literature on “coordinate construction” that emphasizes the role of legislatures in constitutional interpretation. See for example, Tushnet, \emph{Taking the Constitution Away from the Courts}, \emph{supra} note 114 and Kramer, \emph{The People Themselves}, \emph{supra} note 114 and “Foreword: We the Court” (2001) 115 Harv L Rev 4. Hogg, Thornton and Wright, \emph{supra} note 114 at FN 110 summarize the revival of this idea from its early roots in American thought and consider its application in Canada.} Legislators may be oriented toward protecting rights through deliberation structured by fair procedures, just as courts are said to be by proponents of judicial review. Second, he claims that judicial review overruling the decisions of democratically elected representatives of the people is illegitimate. Rather than allowing citizens and their elected and hence accountable representatives to deliberate on fundamental issues of moral disagreement, judicial review resolves disputes through majority voting by an elite few lawyers.\footnote{Waldron, “Core of the Case”, \emph{supra} note 111.}

Whatever the general merit of these arguments in the debates on the legitimacy of judicial review writ large, they should be seen as having less traction in the law of democracy where oversight is necessary to combat self-dealing by elected representatives. Waldron’s first argument that legislatures may also be oriented to
rights protection, and perhaps more so than courts, turns on several assumptions that he states explicitly. Waldron assumes the society he contemplates has “democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage”.\(^{122}\) He states we should assume the “legislature is a large deliberative body”\(^{123}\) and that legislators consider the “interests and opinions of their constituents” as well as “interests and opinions throughout society as a whole.”\(^{124}\) He also assumes that there is a general commitment to rights protection by state officials, including elected representatives.\(^{125}\) His conclusion is that, “If these assumptions hold, the case for consigning... [moral] disagreements to judicial tribunals for final settlement is weak and unconvincing, and there is no need for decisions about rights made by legislatures to be second-guessed by courts.”\(^{126}\)

Waldron’s argument on the relative merits of legislators turns on the functioning of the legislature as a deliberative, rights-protecting body. Yet it is precisely the public-minded performance of the legislature that cannot be assumed on the law of democracy. The principal-agent problem indicates that legislators may pursue partisan rather than public interests when given the power to regulate elections in which they have a direct stake. Constitutional structures that do not prevent self-dealing further undermine Waldron’s assumptions. Majoritarian systems provide the power to harm the democratic rights of minorities inside or

\(^{122}\) Ibid at 1360.
\(^{123}\) Id.
\(^{124}\) Id at 1361.
\(^{125}\) Id at 1360-61.
\(^{126}\) Id at 1360.
outside of the legislature. For example, a majority in the legislature may
disenfranchise a group of citizens because they are likely to vote for the minority
political party. Waldron might respond that this particular example violates his
condition of universal adult suffrage, but he has no similar response with regard to
gerrymandering, or party funding or campaign finance regimes that favour one set
of partisans. By taking a properly functioning legislature as given, Waldron assumes
away the entire problem of partisan self-dealing. Where the legislature cannot
reasonably be assumed to be acting in the public interest, then the courts have a
legitimate role to play in limiting self-dealing.

Waldron does briefly address the issue of the interests of legislators
deviating from those of their constituents.127 He rejects, however, that “entrenched
interest in the status quo” will prevent altruistic behaviour by the legislature.128 He
provides the example of the move in New Zealand from an SMP to a more
proportional mixed-member (MMP) system as a public-minded move by legislators.
The use of this single example, however, cannot do the heavy lifting that he implies
it does. There is a mass of political science literature across a range of
methodologies and approaches indicating that choice of electoral system in
democracies is guided by partisan self-interest.129 As long as judges can be
reasonably expected to behave in a less partisan fashion than legislators, then courts

127 Id at 1362, FN 48.
128 Id.
129 Waldron’s argument on the basis of this one particular example ignores the general principal-agent
problem in representation and the evidence that choice of electoral system is a paradigmatic case of
partisan self-dealing in most instances: Boix, supra note 34; Benoit, supra note 34; Andrews and Jackman,
supra note 34; Ahmed, supra note 41 at 1066; Shugart, “Inherent and Continent Factors” supra note 42 at
10; Rahat and Hazan, supra note 41 at 483-85, 488-90; Renwick, supra note 41 at 10.
are likely to be a preferable alternative to legislatures in protecting democratic rights.

Waldron’s second argument is that judicial review is less legitimate than decision-making by elected representatives who reflect majority preferences and are accountable to voters. This is a perennial topic of debate and I will not attempt to summarize the full panoply of arguments here. Like Waldron’s first argument, whatever the force of the claim that judicial review is illegitimate is diminished on the law of democracy. Ran Hirschl, who is somewhat skeptical of judicial control of politics, acknowledges that, “...oversight of the procedural aspects of the democratic process - judicial monitoring of electoral procedures and regulations…. - falls within the mandate of most constitutional courts.”130 He accepts that “...the applicability of the counter-majoritarian critique is questionable when judicial activism is aimed primarily at promoting fundamental democratic governing principles such as free, open, and equal political participation and representation.”131 In other words, it is the role of the courts to ensure a functioning democratic process. Without judicial oversight, legislatures are likely to take actions that diminish the ability of voters to hold them to account for reasons that are private-oriented and partisan rather than public-minded ones fitting with a deliberative ethos. Gerrymandering, for example, entrenches incumbents by making them accountable only to electorates that are favourably disposed to them. The courts have a special role here in ensuring a fair

130 “Judicialization of Mega-Politics”, supra note 109 at 99.
131 “Bush v Gore as a Global Trend”, supra note 81 at 213.
political process, which John Hart Ely of course emphasized. One cannot presume that elected representatives can be held to account by voters, when those same individuals possess the authority to undermine democratic competition and therefore entrench themselves against shifting democratic preferences in the electorate.

**ii) Critique #2: Deference on the Law of Democracy**

Apart from general critiques of judicial review, there are also arguments that on matters engaging the law of democracy, the opinions of legislatures and not the courts should be paramount. These specific critiques of judicial review of the law of democracy are descendants of traditional “political questions” doctrines. Political questions doctrines render non-justiciable any matter improperly placed before the courts because of its political nature. Cowper and Sossin define the term to mean: “A question which arises in litigation and which by express or implied constitutional principle is excluded from judicial determination and left for resolution by other organs of government.”

The United States Supreme Court in *Baker v Carr* listed six separate instances of non-justiciable political questions. The Canadian Supreme Court early on in the *Charter*-era rejected the idea of non-justiciable

---


political questions though analysis of its actual decision-making suggests “the Court clearly operates with a political questions doctrine in mind” even if there is no set of rules to apply. The application of political questions doctrines globally has decreased, however, in recent years.

Even if not excluded from judicial consideration by a political questions doctrine, the law of democracy has often been treated as a sub-set of constitutional law where courts owe the legislature an especially high level of deference, which amounts to a form of “political questions doctrine light”. Members of the Supreme Court of Canada, for example, have held on several occasions that courts should adopt a highly deferential posture toward Parliament because of the political nature of election law. The substance of this position is that election laws are within the purview of Parliament and courts risk transgressing the separation of powers by interfering with the value judgments made by elected representatives in an area of their particular expertise. These Justices do not argue for a true political questions doctrine, but their position flows from a concern with election laws as so political as to confound judicial oversight. While considering as justiciable the matters before them pertaining to election law, these interpretations adopt such a deferential standard as to permit nearly any government action.

135 Operation Dismantle v the Queen [1985] 1 SCR 441.
136 Cowper and Sossin, supra note 133 at 345.
137 Hirschl points out the decline of political questions doctrines as a contributing factor to the judicialization of politics in “Bush v Gore as a Global Trend”, supra note 81 at 193-96.
138 Harper, supra note 97 at para 87; R v Bryan 2007 SCC 12 at para 9 per Bastarache J and at paras 58-59 per Fish J; Sauvé v Canada (Chief Electoral Officer) [2002] 3 SCR 519 (“Sauvé No. 2”) per Gonthier J dissenting at paras 97-98.
139 Manfredi and Rush, Judging Democracy, supra note 12 at 125 summarize the critiques of structural theory in the academic literature, which parallel deferential judicial approaches to election law.
A leading illustration of this deferential standard can be found in Harper, where the Court upheld spending limits on third parties (i.e. interest groups) during the run-up to an election. Justice Bastarache wrote for the majority that, “[g]iven the right of Parliament to choose Canada’s electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference.” He continued, stating that the “electoral system…reflects a political choice, the details of which are better left to Parliament.”

There are similar sentiments expressed in R v Bryan, which involved a penalty imposed on a citizen for prematurely transmitting election results from Eastern Canada before the closing of the polls in the West in contravention of the Elections Act. The policy rationale for the prohibition was that voters in the West of the country, and especially British Columbia, would be deterred from voting or compelled to vote differently than they would have otherwise if they received news of election results from time zones in the East. The case turned on whether the prohibition was a legitimate attempt to ensure informational equality among voters or an unjustified intrusion on freedom of political expression.

Writing for the majority, Justice Bastarache held that, “courts ought to take a natural attitude of deference toward Parliament when dealing with election

---

140 Harper, supra note 97 at para 87.
141 Id; Jamie Cameron, “Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on Vancouver Sun and Harper” (2005) 17 NJCL 71 at 74 argues that this approach “abandoned the requirement that limits on the Charter’s guarantees be justified by evidence”.
142 Supra note 138.
143 Canada Elections Act, 2000, c 9, s 329.
laws.” Justice Fish put it even more starkly: "We must be particularly careful not to usurp Parliament’s role in determining the rules of the electoral game most appropriate for Canada as whole.” He continued to state bluntly that, “when Parliament prefers, the courts defer - except where the Constitution otherwise dictates.” While Justice Fish qualified his statements by claiming deference does not equate to “diminished constitutional vigilance”, his far less searching review of the evidence in Bryan than the minority indicates that he did apply a lower standard under the proportionality analysis in s. 1. In his minimal impairment analysis for example, Justice Fish recognizes the onus under s. 1 is with the government, but in effect reverses it by finding fault in the claimant for “not [having] identified a reasonable and more minimalist alternative to the limitation”. Justice Gonthier’s dissent in Sauvé No. 2 on prisoners’ voting rights also reasoned that deference is appropriate wherever there are competing social or political philosophies, which is likely to be the case whenever the law of democracy is at issue, because democracy is a contested topic with no agreed upon definition.

In the jurisprudence on the law of democracy of the High Court of Australia, there have been similarly deferential approaches. The High Court upheld the

---

144 Bryan, supra note 138 at para 9; Christopher D Bredt and Margot Finlay, “R v Bryan: The Supreme Court and the Electoral Process” (2008) 42 SCLR (2d) 63 discuss why this is an inappropriate approach when core expression is at stake at 82-83.
145 Bryan, ibid at para 58.
146 Id at para 59.
148 Bryan, id at para 65.
149 Sauvé No. 2, supra note 138 at paras 99-108.
provisions of a law that imposed registration requirements on political parties without seats in Parliament in *Mulholland v Australian Electoral Commission*. The Australian legislation required that to be registered parties without a seat had to have at least 500 members and registration brought with it funding and administrative advantages. The majority concluded that the freedom to engage in political communication did not grant candidates from unregistered parties the right to have their party affiliations listed on the ballot. The Court was primarily concerned with the existence of fraudulent parties. Gleeson C.J. opined in the case that, "A notable feature of our system of representative and responsible government is how little of the detail of that [electoral] system is to be found in the Constitution, and how much is left to be filled in by Parliament." He held that the Constitution "leaves substantial room for parliamentary choice" on electoral matters. He warned that, "Judicial review of legislative action, for the purpose of deciding whether it conforms to the limitations on power imposed by the Constitution, does

---


152 The “no overlap” provision also required members not to be members of any other party.

153 These include listing party affiliation on the ballot for the House and “above the line” listing for the Senate ballot. *Mulholland, supra* note 151 at paras 132-137. For elections to the Senate, “above the line” party listing allowed a voter to opt to support all candidates running for a particular party with a single checkmark, rather than having to go through the ballot and select the party’s candidates individually. Above the line party listing was therefore a legitimate advantage for parties who had it.

154 The current leading case is *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See also the earlier *Australian Capital Television, supra* note 105.

155 Justice Kirby did acknowledge that “heightened scrutiny” was appropriate to protect minorities and prevent partisanship when reviewing election laws: *Mulholland, supra* note 151 at paras 264, 270-273.

156 *Mulholland, ibid* at para 8.

157 *Id at* para 16.
not involve the substitution of the opinions of judges for those of legislators upon contestable issues of policy.”\textsuperscript{158}

The High Court of Australia also expresses deferential sentiments in \textit{Rowe v Electoral Commissioner},\textsuperscript{159} which is investigated in-depth in Chapter 4. In that case, the Howard government restricted the timeframe prior to the election in which voters could register and hence be eligible to vote. The High Court struck down the provisions of the law relating to registration for resulting in the effective disenfranchisement of voters who did not register in time. In dissent, Kiefel J. held that the majority’s interpretation betrayed the “intention expressed in the Constitution: that Parliament be free to legislate in this area from time to time.”\textsuperscript{160} Heyne J. also in dissent in \textit{Rowe} viewed all that was not specified in detail in the Constitution as left “to the Parliament to undertake the processes of development.”\textsuperscript{161} Crennan J. held that Parliament can operate constitutionally “within a broad range of alternatives” in choosing details about electoral matters.\textsuperscript{162} Even French C.J., writing for the majority in \textit{Rowe} that struck down the provisions, wrote that, “It must be accepted, in considering the validity of the impugned laws, that Parliament has a considerable discretion as to the means which it chooses to regulate elections...”.\textsuperscript{163}

The American jurisprudence on redistricting also provides a number of statements on the need for deference to the state legislatures that are charged with

\begin{itemize}
\item \textsuperscript{158} \textit{Id} at para 34.
\item \textsuperscript{159} \textit{Supra} note 15.
\item \textsuperscript{160} \textit{Ibid} at para 423.
\item \textsuperscript{161} \textit{Id} at para 203.
\item \textsuperscript{162} \textit{Id} at para 325.
\item \textsuperscript{163} \textit{Id} at para 29.
\end{itemize}
the task. The classic sentiment expressing the need for deference in the American jurisprudence comes from Frankfurter J. in *Colegrove v Green*\(^{164}\) that “courts ought not to enter [the] political thicket”. More recently in *Vieth v Jubelirer*,\(^ {165}\) the United State Supreme Court rejected a claim of partisan gerrymandering, despite Pennsylvania’s “nakedly partisan map.”\(^ {166}\) The state lost two seats in the House of Representatives in the reapportionment following the 2000 Census and the Republicans controlling the state legislature and governorship took it upon themselves to “retaliate against the Democratic Party” for alleged gerrymandering in other states.\(^ {167}\) Kennedy J. began his concurring opinion by stating: “A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process. The Court is correct to refrain from directing this substantial intrusion into the Nation’s political life.”\(^ {168}\) He was not attuned to the distorting effect of gerrymandering on the American Nation’s ability to hold its elected leaders to account.

In *LULAC v Perry*\(^ {169}\) the 2003 redistricting in Texas was challenged as a partisan gerrymander. The redistricting plan was in fact a re-redistricting. A Republican occupied the governorship and the party held a majority in the state upper house prior to the 2002 elections, which were conducted under a recently

\(164\) 328 US 549, 556 (1946).
\(165\) 124 S Ct 1769 (2004).
\(166\) Issacharoff and Karlan, “Where to Draw the Line?,” supra note 11 at 554-555.
\(167\) Ibid at 554.
\(168\) Justice Kennedy did cast the deciding vote, however, to leave the door open to partisan gerrymandering claims if a judicially discoverable and manageable standard could be found, as required by *Baker v Carr*, supra note 136 at 217.
\(169\) Supra note 89.
implemented map, but then gained control of the lower house as well in that vote. The map used in 2002 was then altered a scant year later by the newly empowered Republicans.\textsuperscript{170} Scalia J. in dissent reiterated his long-standing argument that partisan gerrymandering is non-justiciable, the ultimate form of deference to legislatures by the courts.

Collectively, the concerns of the Justices adopting deferential approaches are two-fold, and representative of those expressed by other courts inclined toward parliamentary or legislative supremacy on the law of democracy: 1) that judicial review of election law risks violating the separation of powers and 2) that courts have less expertise than legislatures on the law of democracy. The separation of powers objection is a serious one. Courts could intrude too greatly into the legitimate policy making realm if they conceived of their role as establishing the “right” policy.\textsuperscript{171} If courts view their role as minimizing agency costs, however, then this involves limiting the impact of self-dealing rather than making the policy choices that are more generally tasked to elected representatives. My argument in Chapters 2 through 4 will show doctrinally how courts can provide robust oversight without trampling on the separation of powers.

The second concern that the legislature has greater knowledge about election law is probably correct. Elected representatives can be expected to know intimately the ins and outs of how the political process operates, including the law.


that shapes it. The possession of superior knowledge relative to courts, however, does not mean that legislatures should be given free rein. On the contrary, the principal-agent problem indicates that this knowledge may be misused. An interventionist approach is necessary, in contrast to the deferential approach advocated by the courts and Justices cited above.

In conclusion, the general and specific critiques of judicial review of the law of democracy fail to account for or ignore the weight of the principal-agent problem in the law of democracy. Self-dealing facilitated by majoritarian structures represents an ongoing threat when democratic rights are engaged. The responsibility to prevent self-dealing that taints the democratic process does not arise to the same extent with respect to other rights. In other words, agency costs are not generated when representatives choose a particular health care law as an option, but it is when they set campaign funding rules. Whatever the proper degree of deference for courts to show elected representatives in general, a lesser degree of deference is appropriate on the law of democracy.

VI. Conclusion

In this introductory chapter, I have argued that partisan manipulation of the political process stems from the principal-agent problem lurking at the heart of representative democracy. Elected representatives as agents generate agency costs when they act counter to the interests of the voters as principals that selected them.

172 The notable exceptions here would be the rights of unpopular minorities. Ely, supra note 2 famously hives off the political process and minority rights as instances where democratic politics breaks down if there is a cohesive legislative majority and a discrete and insular minority.
Partisan self-dealing is not limited to a specific portion of the law of democracy or a single country. Incentives and opportunities for self-dealing exist wherever there is representative democracy. Majoritarian democracies exhibit particular kinds of democratic pathologies, which are the product of their underlying constitutional structures in combination with partisan behaviour and self-regulation over the law of democracy. The consensual elements of these democracies mainly inhabit the federal-unitary and not the executive-parties dimension. Because majorities can rule by outvoting minorities, partisan self-dealing remains a serious risk over areas such as campaign finance, political party funding, political expression, and the regulation of interest groups. In majoritarian democracies, the courts have a special role to play in limiting agency costs through regulating partisan self-dealing.

Legislatures are entitled to little deference by courts on the law of democracy, because of the risk of self-dealing.

Chapter 2 continues the focus on institutions begun here by considering in depth the role of EMBs. Chapter 2 assesses how judicial review should proceed where EMBs administer the democratic process. I argue that courts should be deferential to EMBs, to the extent that the particular EMB is independent and impartial. Where EMBs cannot meet these criteria, deference is inappropriate because they are likely to reproduce the partisan pathologies of the legislature.
Chapter 2:

Electoral Management Bodies and Judicial Oversight of the Law of Democracy

I. Introduction

The previous chapter addressed the principal-agent problem created by political representation, the tendency of majoritarian democracies to facilitate partisan distortion, and the subsequent need for oversight of the law of democracy by courts. This chapter focuses on EMBs. I seek here to shift the institutional emphasis of current accounts of judicial oversight of the law of democracy by providing a richer theory of institutional design that integrates EMBs.¹ This chapter considers the consequences of the ongoing risk of partisan self-dealing by elected representatives on how we should view the role of EMBs and judicial oversight of these institutions. The chapter draws a distinction between EMBs and legislatures. It argues that judicial oversight should proceed differently when it is the actions of EMBs, as opposed to those of the legislature, which are under review. In contrast to legislatures, which must be subject to intense oversight by courts due to the principal-agent problem outlined in Chapter 1, EMBs are entitled to deference from courts in my argument to the extent that they are independent and impartial.

The two central types of EMBs are redistricting commissions and election commissions. Redistricting commissions remove the power over designing electoral district boundaries from self-interested legislators, thereby seeking to prevent gerrymandering. Election commissions administer the electoral process by ensuring that campaign finance rules are adhered to and that fraud does not occur in voter registration or the counting of ballots, among other duties. The design of EMBs in established democracies ranges from those that are independent and impartial to those that are dependent on government discretion and populated by partisans. The American Federal Election Commission (FEC), for example, has a limited mandate, partisan appointments of three Democrats and three Republicans as commissioners, and resulting tendencies toward gridlock and inefficacy. In contrast, Elections Canada, the Australian Electoral Commission, the United...
Kingdom’s Election Commission, the Election Commission of India, and the Independent Electoral Commission of South Africa have broad oversight powers over political parties, candidates, and elections, and are largely staffed by non-partisans given significant independence from government.

A full assessment of the role of EMBs in the law of democracy and how they should be integrated into judicial review has been absent from the comparative and country-specific literature. The presence of EMBs must be accounted for in theories
of judicial review for a number of reasons. First, assessments of the law of
democracy are descriptively inaccurate if EMBs are excluded, as they are an
institutional feature of most democracies. While there is a range of institutional
forms, independent election and redistricting commissions are increasingly
replacing electoral oversight by legislatures or executives. EMBs are part of the
“new institutionalism” as a solution for managing the democratic process through
non-partisan bodies designed to check self-dealing.\textsuperscript{10} They are likely to grow in
importance in the coming years.

Second, critics such as Jeremy Waldron challenge the legitimacy of judicial
review of the law of democracy when courts overrule elected representatives, as
discussed in Chapter 1. I argued in Chapter 1 that the law of democracy raises
special circumstances for judicial review that legitimate the need for oversight of
legislatures by the courts. The clash between courts and legislatures, however, will
be less prevalent where EMBs have authority to administer elections or
redistricting. Courts will often be reviewing the actions of EMBs rather than
legislatures. This institutional interaction alters traditional critiques of judicial
review. For example, if independent, non-partisan commissions have the power to
alter electoral boundaries, as is the case in Canada, the United Kingdom, and
Australia, then judicial oversight will be of districts produced by these bodies.
Elected representative set only the legislation dictating which principles must be
applied by commissions. Clashes between courts and legislatures on redistricting
will generally be confined to this relatively narrow area of the commission’s

\textsuperscript{10} Tokaji, \textit{ibid}; Hasen, “New Institutionalism”, \textit{ibid}; Gerken and Kang, \textit{ibid}. 
authorizing legislation, unless partisans have captured the EMB. Where redistricting commissions operate at arms-length and without favouritism, the proponents and opponents of constitutional oversight by courts on the law of democracy are actually fighting over a relatively small piece of turf.

Third, judicial review of action by EMBs should proceed differently than oversight of legislative behaviour. The risk of ignoring EMBs is that theories of judicial review developed to address cases of judicial oversight of legislative action are unlikely to be appropriate where EMBs and not legislatures are the responsible institution. If self-dealing by elected representatives is a central problem for the law of democracy, then independent and impartial EMBs reduce opportunities for partisan election administration and gerrymandering. Courts must be vigorous in policing the constitutionality of election laws passed by elected representatives with incentives to entrench their partisan allies, as I argued in Chapter 1, but there is less justification to do so if self-dealing is less of a risk. The focus of judicial review therefore should shift from minimizing the agency costs of self-dealing to ensuring that EMBs actually operate in an independent and impartial manner. To the extent that EMBs are independent and impartial, they are entitled to deference by courts as self-dealing is not a live risk.

In this chapter, I evaluate the role of EMBs and incorporate these institutions into an approach to judicial oversight of the law of democracy. In Section II, I outline the functions of EMBs in democracies and consider at greater length why they have been seen as institutions of secondary interest in the literature. In Section III, I consider the different institutional forms taken by EMBs. Section IV assesses judicial
oversight of the law of democracy in majoritarian democracies given the prevalence of EMBs and the risk of self-dealing by elected representatives. I argue that courts should show greater deference to the decisions of independent and impartial EMBs than to those of legislatures, because there is less risk that EMBs are engaging in self-dealing. This conclusion provides a limiting principle to judicial intervention in the democratic process. Courts should be deferential to rules generated by impartial and independent EMBs even as they robustly police partisan manipulation by legislatures or by EMBs that have been captured by partisans.

In Section V, I advance an approach to assessing the independence and impartiality of EMBs. In this account, EMBs are “super-agents” designed to minimize the agency costs of representation for voters. Courts should seek to minimize agency costs generated by elected representatives, but when reviewing the actions of EMBs should aim to decrease what can be called “super-agency costs”, i.e. capture of the agency by partisans or other private interests. I argue that in assessing the independence and impartiality of EMBs, courts should look at whether\(^\text{11}\): 1) appointees are non-partisan outsiders; 2) there is an absence of constraints on the EMB imposed by the legislature; 3) the EMB has ultimate authority to act within its sphere of authority; 4) the EMB is characterized by fair internal procedures; and 5) whether the EMB exhibits partisan behaviour despite institutional indicia to the contrary. Chapter 3 applies the analysis in this chapter to

\(^{11}\) I adapt this test, as discussed in Section V, from John Courtney’s work on redistricting commissions in Commissioned Ridings: Designing Canada’s Electoral Districts (Montreal: McGill-Queen’s University Press, 2001) at 105-20.
II. Electoral Management Bodies and the Law of Democracy

a) The Role of Electoral Management Bodies

What role do EMBs play in democracies? Institutions such as election and redistricting commissions circumscribe the authority of elected representatives by assuming powers previously within the ambit of the political branches. They are part of the self-restraining state as they limit the scope of action for elected representatives on the law of democracy. The need for institutions to fulfill this function flows out of the likelihood that elected representatives with incentives to manipulate the democratic process for partisan ends will engage in self-dealing facilitated by majoritarian concentrations of power. By limiting the authority of elected representatives, EMBs curtail the extent of self-dealing that can occur.

EMBs can be understood as institutions of electoral governance. Electoral governance is defined as, “the...set of activities that creates and maintains the broad institutional framework in which voting and electoral competition take place.” Shaheen Mozaffar and Andreas Schedler's definition of electoral governance, of which EMBs are an integral institutional part, involves three main types of activity: rule making, rule application, and rule adjudication. The two main sorts of EMBs,
electoral commissions and redistricting commissions, are institutions that carry out different functions along these three lines of activity.

Election commissions generally have the power to interpret and apply legislation governing election administration, campaign finance, political party registration, voter registration and management of interest group participation in elections. Election commissions apply legislation or the rules that they generate on their own to the entities that they regulate, such as political parties, candidates, and interest groups. The American FEC for instance applies federal campaign finance legislation to political parties and interest groups, though its authority is limited to this specific area rather than encompassing the broader grant of power possessed by most other national election commissions. Election commissions may also have the power to make rules. The Election Commission of India (ECI) possesses broad plenary power to ensure fair elections wherever there is no legislative provision to the contrary.\(^\text{15}\) Elections Canada is granted authority in its governing statute to not only interpret the Canada Elections Act, but to “adapt any provision of [the] Act” during or immediately after the election period in loosely defined circumstances.\(^\text{16}\) Election commissions engage in rule adjudication when they conduct formal legal processes of decision-making, as with the adversarial hearings conducted by the FEC regarding whether entities have complied with campaign finance rules.

Redistricting commissions carry out a distinct, narrower envelope of functions. They interpret rules set out in statutes defining their creation, membership, purpose, procedures, and the principles they are to balance in

\(^{15}\) Paramaguru v Tamil Nadu 2006 (2) CTC 241 at para 19.

\(^{16}\) Canada Elections Act, SC 2000, c 9, s 17 (1).
deciding upon an electoral map. Redistricting commissions must apply these statutory commands, particularly those regarding redistricting principles. In this way they carry out a rule application function. Redistricting commissions that conduct extensive public hearings, as for example in Canada and Australian, incorporate this input into their decision-making. They hear from the public regarding where boundaries should be drawn and determine how districts will be designed. While they decide among competing claims, redistricting commissions as a general matter cannot be said to perform a rule adjudication function.

Redistricting commissions generally do not engage in rule making, though there are exceptions. Redistricting commissions may be given so much discretion in balancing the competing redistricting criteria set out in legislation that they have de facto rule making power, but generally their role will be to interpret and apply legislative rules.

EMBs can be understood as being granted a specific kind of authority. In Taking Rights Seriously, Ronald Dworkin argued that two types of discretion may be granted to a decision-making body. Strong discretion is the ability of a body to choose the rules that it will apply, while weak discretion involves the authority to make decisions within rules set by an entity higher up the decision-making hierarchy. Generally both types of EMBs have weak form discretion. They interpret and apply rules set out in statutes that direct to what ends their authority should be

---


exercised, as the United Kingdom’s Election Commission does with the Political Parties, Elections and Referendums Act (2000) or Australian redistricting commissions do in balancing the factors established in the Commonwealth Electoral Act 1918.\(^{19}\)

There are some exceptions to the norm of weak form discretion for EMBs, such as the ECI’s plenary powers and Elections Canada’s power to “adapt any provision”, which verge on rule making authority and strong form discretion. The powers granted to redistricting commissions may also be so extensive and the statutory language so vague that the institution moves toward strong discretion. For instance, boundary commissions in the United Kingdom were previously given no upper limit on the amount of deviation permitted from representation by population in their enabling statute, merely the command to balance the broad criteria of population equality, regional representation, and the geographic manageability of a district.\(^{20}\) Typically, however, EMBs will have weak form discretion.

Election and redistricting commissions are institutional responses to overlapping problems of institutional capture. Election commissions respond to the problems caused when electoral governance is left within the hands of elected representatives, who are in a conflict of interest, or bureaucrats operating under the political direction of the governing party. Partisan election administration increases the risk of fraudulent elections, the interpretation of electoral rules to favour the

---

\(^{19}\) Orr, Law of Politics, supra note 5 at 31, 39-44.
\(^{20}\) House of Commons (Redistribution of Seats) Act (1944) (7 & 8 Geo.6. c.41); Political Parties, Elections and Referendums Act 2000 c 41; The Parliamentary Voting System and Constituencies Act 2011 c 1, s 11 will introduce a 5 per cent threshold.
governing party, or, in short, the undermining of the democratic process. Election commissions react by moving control over election administration outside of the legislature to an institution that does not have the same troubling incentives.

Redistricting commissions, in parallel fashion, are institutional reactions to the risk of partisan capture of district design in countries with electoral systems that require electoral boundaries to be drawn. The design of electoral districts is traditionally a task of legislatures in democracies. Elected representatives are again in a conflict of interest when they set the boundary lines that determine which set of voters candidates must face at election-time. Gerrymandering may take the form of partisan gerrymandering, incumbent protection, racial vote dilution, or a number of other types.21 These are tactics in service of the same goal, which is enhancing the electoral prospects of the representatives carrying out the gerrymander while diminishing those of their political opponents.22 Redistricting commissions remove

---

21 There is a small segment of scholars that argues gerrymandering is acceptable: see Nathaniel Persily, Reply, “In Defence of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders” (2002) 116 Harv L Rev 649 (arguing sorting voters into like-minded groups aids representation and cannot be said to harm the competitiveness of elections); Richard L Hasen, The Supreme Court and Election Law: Judging Equality from Baker v Carr to Bush v Gore (New York: NYU Press, 2003) at 149-53 (who questions the impact of gerrymandering on political competition). Political scientists have sought to trace the incumbency advantage and some have found it is less problematic than commonly understood: Stephen Ansolabehere and James M Snyder, “The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000” (2002) 1(3) Election LJ 315 (finding that redistricting among other factors does not affect the incumbency advantage); Stephen Ansolabehere, James M Snyder Jr and Charles Stewart III, “Candidate Positioning in US House Elections” (2001) 45(1) AJPS (gerrymandering does not lead to increased polarization within the House of Representatives); Gary W Cox and Jonathan N Katz, Eldbridge Gerry’s Salamander: The Electoral Consequences of the Reapportionment Revolution (Cambridge: Cambridge University Press, 2002) (tying increasing incumbency advantage to the reapportionment cases of the 1960s).

22 James A Gardner, “How to Do Things with Boundaries: Redistricting and the Construction of Politics” (2012) 11(4) Election LJ 399 details the United States Supreme Court’s failure to agree on a manageable standard by which to assess partisan gerrymandering: 402-05. See Perry v Perez, 132 S Ct 934 (2012); LULAC v Perry, 548 US 399 (2006); and Vieth v Jubelirer, 541 US 267 (2004). Gardner discusses the fundamental importance of redistricting at 401: “Redistricting, in a sense, involves nothing more than the placement of district boundaries, yet where those boundaries fall can have a potentially profound effect on political life within the district and in the legislature.” John Courtney calls electoral districts the “building blocks” of democracy in Commissioned Ridings, supra note 11 at 4.
the opportunity for gerrymandering by denying elected representatives power over electoral boundaries, if the commission is independent and impartial.

While election and redistricting commissions carry out different functions, the role of both types of EMBs is to limit opportunities for self-dealing and partisan abuses by elected representatives. This function is especially necessary in majoritarian democracies with concentrated executive power, executive dominance over the legislature through party discipline, and few checks and balances. At a fundamental level, both EMBs are reactions to the principal-agent problem that underlies democratic representation. Electoral commissions and redistricting commissions can be seen as reducing agency costs by limiting the scope of action for representatives/agents on the law of democracy, thereby circumscribing the opportunities to manipulate the democratic process. For instance, gerrymandering causes harm because it limits the ability of voters to select representatives of their choice and entrenches incumbents against electoral competition. Gerrymandering in other words creates agency costs. Redistricting commissions prevent these costs from being generated if they are sufficiently independent and impartial that gerrymandering is eliminated, as is the case in Canada, the United Kingdom, and Australia.

---

23 D Theodore Rave’s “Politicians as Fiduciaries” (2013) 126 Harv L Rev 671 has recently engaged in a principal-agent analysis for redistricting. The agency problem is a long-standing theme in the literature on the law of democracy and elections. See the citations in Chapter 1.

24 Bruce E Cain, “Redistricting Commissions: A Better Political Buffer?” (2012) 121 Yale LJ 1808 at 1824 for example describes the recently imposed California citizens redistricting commission as an “effort to squeeze every ounce of incumbent and legislative influence out of redistricting”.

25 Courtney, Commissioned Ridings, supra note 11.

On a principal-agent view of the law of democracy, EMBs should be seen as “super-agents” acting on behalf of voters to reduce agency costs. Daniel Ortiz and Samuel Issacharoff have applied principal-agent analysis to the role of political parties, corporations, and unions in the election law context. They argue that these organizations are mediating “super-agents” between voters and elected representatives. They use the term to denote a principal-agent relationship where the super-agent acts as a secondary agent for the principal. Anticipating the potential for agency costs stemming from goal conflict, the role of the super-agent (the EMB) is to check the behaviour of the primary agent (the elected representative) that was initially engaged by the principal (the voter). EMBs fit comfortably within this framework. That gerrymandering or electoral fraud will occur are predictable outcomes if legislatures and executives possess control over redistricting, electoral administration, and other facets of electoral governance. That power is devolved from the legislature or executive to an independent body is an entirely appropriate response, through institutional design, to the problem of partisan self-dealing. EMBs are super-agents designed to prevent these agency costs from occurring. As I will argue in Section V, viewing EMBs as super-agents

---


29 Ibid.

30 Rave’s article, supra note 23, positions redistricting commissions as potential solutions to the principal-agent problem in drawing electoral boundaries. His analysis is restricted to redistricting and the United States, rather than looking at election commissions or at democracies comparatively.
designed to limit the agency costs generated by self-dealing partisans has implications for judicial review of the law of democracy.

b) Why Have EMBs been Ignored?

The need to integrate EMBs into theories of judicial review has been largely ignored in the law of democracy literature. There are a number of reasons for this gap. First, the majority of scholarship on the law of democracy stems from the United States. The disproportionate focus on the American case, where EMBs are less prevalent and less powerful than in other democracies, contributes to the diminished presence of EMBs in the literature. American scholarship has rightly focused on the clash between courts, legislatures, and executives, as court oversight of electoral rules emanating from the political branches has defined the law of democracy in the United States. In most democracies, however, it is not just the three traditional branches of government but also EMBs that regulate the democratic process.31 Election commissions and redistricting commissions play much greater roles in Canada, the United Kingdom, Australia, and India than they do in the United States.32

---

31 On redistricting, for example, Nicholas O Stephanopoulos argues the American approach largely directed by the political branches rather than EMBs results in higher partisan bias and reduced public confidence among other effects: “Our Electoral Exceptionalism” (2013) 80 U Chi L Rev 769. Tokaji, supra note 10 at 127 argues decentralization and partisanship characterize American election administration.

32 They also play an important role in democratic transitions, though transitional democracies are beyond the scope of this present dissertation. Robert A Pastor, “The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research” (1999) 6(4) Democratization 1; Elklit and Reynolds, supra note 8; Jonathan Hartlyn, Jennifer McCoy and Thomas M Mustillo, “Explaining the Quality of Elections in Contemporary Latin America” (2008) 41(1) Comparative Political Studies 73. There is a debate, particularly in the Latin American literature, whether independent non-partisan election commissions perform better than dependent, partisan ones: Guillermo Rosas, “Trust in Elections and the Institutional Design of Electoral Authorities: Evidence from Latin America” (2010) 29 Electoral Studies 74; Federico Estévez, Eric Magar, and Guillermo Rosas, “Partisanship in Non-Partisan Electoral Agencies
The American FEC has been widely criticized for its partisan membership, narrow mandate, and lack of effectiveness in regulating its core area of competence, campaign finance.\textsuperscript{33} Redistricting, conducted at the state level for both state and congressional districts, is generally done by legislatures. To be sure, an increasing number of states have moved toward arms-length commissions,\textsuperscript{34} with 12 states having taken power away from the legislature, while still others use commissions if the political branches cannot agree on a map. But the reality is most commissions replicate the divisions present in legislatures by appointing partisans to the redistricting body. Even the much-lauded independent Arizona commission has been the site of partisan contestation in the wake of the Governor’s removal of the head of the commission because of the partisan implications of the proposed electoral map.\textsuperscript{35} One exception appears to the independent and impartial Iowa commission.\textsuperscript{36}

The comparative weakness and partisanship of American EMBs and, subsequently, their relatively lesser importance than in other countries means


\textsuperscript{36} The Iowa commission functions independently and impartially like British or Canadian ones according to Mackenzie, supra note 34 at 255, but Cain, supra note 24 at 1813-1815 is less enthusiastic about its independence and lumps it into the category of advisory commission.
theories of the law of democracy and judicial review developed there have generally proceeded as if EMBs were a non-existent or, at best, secondary concern. Richard Hasen’s detailed proposals for judicial review of election law, for example, do not address how EMBs shape American democracy or how judicial review should proceed when the action under review did not emanate from Congress or a state legislature. While there has been a plethora of recent research on the growth of state redistricting commissions, this literature seeks generally to understand descriptively how commissions operate and come into being, to justify their use, to investigate the normative merits of various criteria applied by them in setting electoral boundaries, or to ask whether commissions are constitutionally required. There are some skeptics of the use of independent commissions as

37 There have been a few notable exceptions in the American literature that have anticipated the need to integrate redistricting commissions, one type of EMB, into judicial review without fully elaborating it: see Samuel Issacharoff, “Gerrymandering and Political Cartels” (2002) 116 Harv L Rev 593 who argues for the need to take redistricting out of the hands of elected officials at 641-45, and who writes at 647-48: “A strategy of reinforcing political competition by taking the process of redistricting out of the hands of partisan officials offers the prospect of realizing our constitutional values.”; Elmendorf, “Electoral Commissions and Electoral Reform”, supra note 9 at 434-40 discussing constitutional adjudication; Rave, supra note 23 argues that courts should strictly scrutinize redistricting conducted by political incumbents but be more lenient toward electoral maps produced by neutral districting institutions.

38 Hasen, The Supreme Court and Election Law, supra note 21.


41 Jeffery C Kubin, “Note: The Case for Redistricting Commissions” (1997) 75 Tex L Rev 837 (finding courts do defer to commission-made plans); Issacharoff, “Gerrymandering”, supra note 37 (arguing for taking redistricting out of political hands); Mosich, supra note 39 at 210-11.


well. More broadly, some have looked at how electoral reform ideas could be generated outside of legislatures, how to design independent institutions, or how effective EMBs are. These contributions do not engage in detail with how to integrate the role of EMBs into judicial review. The assumption that the real action in the law of democracy is the conflict between courts and legislatures limits the comparative reach of theories generated with the American case in mind, as it downplays the central role of EMBs globally. In developing a comparative theory of judicial oversight of the law of democracy, one must take into account the role of EMBs in order to be relevant to democracies outside the United States.

The blame for not fully considering the role of EMBs cannot be placed entirely on the focus on the American case. None of the major theories of judicial review of the law of democracy in the country-specific literature outside of the United States fully integrates EMBs as an institution. Many leading assessments of the law of democracy in Canada do not devote any serious attention to EMBs, despite the significant roles of Elections Canada and its provincial counterparts, and

---

45 Elmendorf, “Election Commissions”, supra note 9; Kang, ibid.
46 Hasen, “Beyond the Margin”, supra note 3.
47 Stephanopoulos, “Territorial Community”, supra note 42.
48 See the notable exceptions listed in footnote 37.
federal and provincial electoral boundaries commissions. Australian accounts of the law of democracy focus, like the American literature, on the relationship between courts and legislatures in reviewing election laws, despite the long-standing presence in that country of EMBs. The idea that EMBs might alter the calculus of how judicial review is to proceed as compared to court oversight of legislative action has generally not filtered into the literature in these countries.

Second, EMBs are relatively recent institutional inventions even in long-standing democracies. The United States created the FEC in 1975, Australia’s Electoral Commission emerged in its current form in 1984, Elections Canada began its work in 1974, and the United Kingdom adopted a central, independent electoral administrative body only in 2000, with election administration having previously been carried out by a government department. The ECI is older, as it was created by the post-independence Indian constitution.

Redistricting commissions generally have slightly older provenance outside of the United States, with Australia’s commissions emerging in the wave of democratic reform in the early

---

50 Literature focused particularly on redistricting, where boundary commissions have replaced legislatures, also do not seek to integrate them into judicial review. See Mark Carter, “Ambiguous Constitutional Standards and the Right to Vote” (2011) 5(2) JPPL 309; Levy, “Regulating Impartiality”, supra note 17; and Nicholas Aroney, “Democracy, Community, and Federalism in Electoral Apportionment Cases: The United States, Canada and Australia in Comparative Perspective” (2008) 58(1) UTLJ 421.


52 Lopez-Pintor, supra note 1.


54 Constitution of India, Article 324.
1900s, Canada adopting them federally in 1964, and the United Kingdom opting for independent commissions in 1944, but these institutions were developed long after the initial founding of these states as democracies. In India, boundary delimitation commissions have been used since independence.

Third, election administration in established democracies has generally been viewed as non-controversial, thereby diminishing interest in EMBs. Where election administration proceeds without incident, scholarly attention has been focused elsewhere. Events like those surrounding Bush v Gore have often been treated as exceptions to a general rule of elections untainted by fraud and lacking obvious corruption. Allegations in the United States of voter suppression in the 2012 presidential election and of partisan minded voter identification schemes have changed this impression to some extent. In Canada, recent claims of electoral fraud, such as the recent “robocalls” scandal, allegations of biased or otherwise

---

55 Juriansz and Opeskin, supra note 27; Orr, Law of Politics, supra note 5 at 31-36.
56 Courtney, Commissioned Ridings, supra note 11.
57 House of Commons (Redistribution of Seats) Act 1944 (7 & 8 Geo 6 c 41).
59 Pastor, supra note 32 at 6.
improper redistricting, disputed election results, or partisan motivated amendments to the role of Elections Canada, have the potential to galvanize interest in the institutions that manage elections. Absent catalyzing events of this sort, however, EMBs have frequently been ignored.

Fourth, the lack of attention paid to EMBs in the law of democracy literature parallels the traditional focus of political science literature on democratization. Modernization theories looked to culture, religion, economic development, or class


63 Most electoral boundary commissions in Canada create districts that are predominantly urban or rural. Saskatchewan’s federal ridings were an exception as its cities had been carved up and aggregated into mixed urban-rural ridings from 1966-2012. This diluted urban voting power and resulted in partisan gains for the Conservative Party, with their rural electoral base, at the expense of the left-leaning New Democratic Party (NDP). The NDP won no seats in Saskatchewan in the four most recent elections despite significant support in the province in 2004 (23 per cent), 2006 (24 per cent), 2008 (26 per cent) and 2011 (32 per cent). The Liberal Party won one seat in the province and the Conservatives the other 13 over this time period. The 2002 Commission had wanted to move to urban-only ridings, but backed down in the face of public controversy. The 2012 Commission proposed moving to several urban-only ridings. The governing Conservative Party vehemently opposed the changes at the hearings into the Saskatchewan boundaries before the House of Commons Standing Committee on Procedure and House Affairs and launched robocalls to change public opinion on the subject. The Conservatives in particular attacked commissioner John Courtney, a leading expert on electoral boundaries. Jennifer Ditchburn, “Independent Commissioner Denigrated Saskatchewan Riding Boundary Process: Tory”, Ottawa Citizen, April 16, 2013. Available at: http://www.ottawacitizen.com/news/national/Independent+commissioner+denigrated+Saskatchewan+riding/8249941/story.html. Last accessed May 29, 2014. Federal Electoral Boundaries Commission for the Province of Saskatchewan, Report of the Federal Electoral Boundary Commission for the Province of Saskatchewan 2012. Available at: http://www.redecoupage-federal-redistribution.ca/sk/now/reports/sask-report_e.pdf. Last accessed May 29, 2014. The Report discusses the 2002 controversy at 3, public feedback at 6-8, and the reasons for moving to urban-only ridings at 9.

64 Opitz v Wrezewskyj, 2012 SCC 55 involved allegations of improper election administration at the polls in a riding in Etobicoke. Opitz was the first case on a disputed election decided by the Supreme Court since 1942. See Andrew Geddis, “Resolving Disputed Elections in Canada and New Zealand” (2013) [unpublished].

structure as potential determinants of democratization.\textsuperscript{66} Election administration was not seen as a central concern in consolidating democracy. Even in the literature focusing on institutions, EMBs have not been seen as foundational bedrocks of democracy in the ways that other features have, such as the proportionality of the electoral system.\textsuperscript{67} Robert Pastor critiques Lijphart’s typology of democratic systems as majoritarian or consensual, for example, as not being concerned with election administration as a potential variable in developing functioning democracies.\textsuperscript{68} A more recent body of scholarship on democratization has sprung up in response, which emphasizes the role of EMBs in building trust in democracy and in maintaining democratic legitimacy.\textsuperscript{69} The literature on the law of democracy in established democracies has not kept up with this new direction in the political science study of democratization.

Fifth, EMBs operate outside of the traditional constitutional law focus on the relationship between legislatures, executives, and courts under the separation of powers. EMBs instead occupy a relatively unique role as intermediate bodies\textsuperscript{70} operating between these three institutions. EMBs are by definition distinct from legislatures, but do not take the regular form of bureaucratic or administrative agencies. If independent and impartial they are not policy arms of the executive,

\textsuperscript{66} Pastor, \textit{supra} note 32 at 3-6.
\textsuperscript{67} \textit{Ibid} at 6.
\textsuperscript{68} \textit{Id}.
\textsuperscript{70} Pildes, “Constitutionalization”, \textit{supra} note 42 at 78.
even if they are technically creatures of the executive authorized by statute. They generate rules, like securities commissions do, but differ from these bodies because the target of their regulation is the government itself. The recognition of the unique role played by EMBs has been slow, however, despite their importance.

III. Patterns of EMBs

Given the important role of EMBs as super-agents reducing the agency costs of representation, their lack of integration into the literature on judicial oversight of the law of democracy is a serious oversight. In this section, I consider the spread of EMBs globally, detail how prevalent they have become, and consider the range of options for institutional design of EMBs, in order in Section IV to be able to integrate these patterns into a theory of judicial oversight of the law of democracy.

Permanent and independent EMBs are the emerging global norm in established democracies. In a comparative study of 87 democracies, Lisa Handley and Bernard Grofman found that 60 engage in redistricting, with the others having no need to do so because of their proportional representation electoral systems. Democracies with first past the post, mixed member proportional, alternative vote, two round systems, and block voting all require redistricting.\(^1\) Of these 60, 43 (73 per cent) assign redistricting to an EMB, with 22 creating boundary commissions for that specific task and 21 using the election commission to do so.\(^2\) Only 14 permit

\(^1\) Lisa Handley, “A Comparative Survey of Structures and Criteria for Boundary Delimitation” in Handley and Grofman 265, supra note 58 at 267.

\(^2\) Ibid at 268-269.
the legislature to control redistricting,\textsuperscript{73} with the executive in control in the other
countries. The United States and France are the only two with single-member
districts in which the legislature plays the “dominant role”.\textsuperscript{74} Italy, South Korea,
Kyrgistan, and Panama allow the legislature to design districts, though these are mixed-member systems with multiple representatives per constituency so
redistricting is less consequential.\textsuperscript{75} The remaining are list PR systems where boundaries rarely need to be adjusted.

The more recent waves of democratization have brought awareness of the importance of independent and impartial election administration to consolidating
democratic transitions. In 1974, there were only 39 democracies,\textsuperscript{76} but depending on the method of categorization there are now close to 148 after the
democratization of the 1970s, decolonization, and the third-wave of democratization in the 1990s.\textsuperscript{77} Globally, 53 per cent of democracies administer elections through independent EMBs, 27 per cent operate through government supervised by an independent body, and 20 per cent have elections run by the executive.\textsuperscript{78}

The literature has developed two systems of classification for EMBs, though having been designed with election commissions in mind they are arguably less applicable to redistricting commissions. In the first typology, the type of decision-maker that staffs the institution determines the classification of the EMB. EMBs

\begin{flushleft}
\textsuperscript{73} Id at 269.
\textsuperscript{74} Ibid. Stephanopoulos, “Electoral Exceptionalism”, supra note 31 explores redistricting practices globally and concludes the United States is an outlier.
\textsuperscript{75} Handley, id.
\textsuperscript{77} Lopez-Pintor, supra note 1 at 25 uses 148 as the number as of the year 2000.
\textsuperscript{78} Id at 26.
\end{flushleft}
follow a “governmental approach”, “judicial approach”, “multi-party approach”, or “expert approach”. These approaches entail electoral management by, respectively, civil servants, judges, partisan appointees by parties, or an agreed list of experts. The second typology classifies EMBs as either “permanent, independent national election commissions”, “decentralized”, or “the government ministry”. For example, the Australian, Indian, and Canadian election authorities would be “permanent and independent” as they function distinct from the government of the day and exist in perpetuity, rather than being constituted with each election. A decentralized system would distribute authority among constituent units of a federation or administrative division, as the United States does with each state having responsibility for designing federal legislative districts. The government ministry approach was typified by the United Kingdom prior to 2000, where election administration was run as a branch of the civil service.

New democracies in Latin America, Africa, and Asia have often constitutionally mandated the existence and independence of EMBs, especially national election commissions. These constitutions have recognized the capacity of EMBs to build trust in the electoral system and expand the legitimacy of new democracies. Costa Rica, Venezuela, and others in Latin America go so far as to enshrine EMBs as a constitutional “fourth branch of government” on par with the

---

79 Id at 20; Kelly, supra note 5 at 28.
80 Lopez-Pintor, id at 20.
81 Id.
82 Rosas, supra note 32 at 75 (“…among political elites elections are judged more trustworthy where EMBs enjoy formal autonomy”, though the results are not as clear for citizen trust); Pastor, supra note 32 at 5 (“The character, competence, and composition of…EMBs… can determine whether an election is a source of peaceful change or a cause for serious instability.”); Lehoucq, supra note 69 at 31 (“Commissions strengthened confidence in electoral democracy.”)
traditional three branches of the executive, legislature, and judiciary.\textsuperscript{83} The South African Constitution mandates the existence, composition, and functions of the national Electoral Commission. The Constitution requires that there be free and fair elections (s. 19(2)) and imposes upon the Electoral Commission the constitutional duty to ensure they occur (s. 190 (1) (b)). The goal of independent EMBs of this type is to “limit sudden change by executive action or ordinary legislative processes”.\textsuperscript{84} That in constituting themselves democratic states would choose to limit the power of the executive or legislature to alter electoral institutions or the rules governing elections fits within the broader pattern of the “self-restraining state”.\textsuperscript{85} The self-restraining state restricts in advance the scope of behaviour available to elected representatives, on the assumption that they will have incentives to alter the ground rules of electoral competition in their favour.

Democracies with constitutions drafted prior to the third wave of democratization generally do not constitutionalize election administration.\textsuperscript{86} The Election Commission of India is entrenched in the Constitution,\textsuperscript{87} but those in the United Kingdom, the United States, Canada and Australia exist by virtue of statute.


\textsuperscript{84} Lopez-Pintor, \textit{ibid} at 20.

\textsuperscript{85} Schedler \textit{et al}, \textit{Self-Restraining State, supra} note 12.

\textsuperscript{86} Latin America is the exception to this pattern. See Lopez-Pintor, \textit{supra} note 1 at 20 and detailing the use of commissions in Latin American at 17, 27-28, including a “strong tradition” of independent commissions at 21; Lehoucq, \textit{supra} note 69 at 30 arguing Latin America has been a model but is unrecognized for its pioneering use of independent commissions. See Hartlyn \textit{et al}, \textit{supra} note 32 for a measurement of the effectiveness of election commissions in Latin America in ensuring free and fair elections.

\textsuperscript{87} Constitution of India, Article 324.
Neither Canada, the United States, Australia nor the United Kingdom have explicit constitutional guarantees of free and fair election administration or of independent and impartial electoral institutions. The United States and Australia lack even formal guarantees of the right to vote, reflecting an earlier time when the franchise was restricted. While democracy is well established in all of these countries and their elections are generally free of outright electoral fraud, their constitutional structures furnish potential scope for interference with EMBs for partisan ends.\(^8^8\)

The legal position of EMBs is somewhat uncertain in countries that constitutionally do not grant them status as a fourth branch of government\(^8^9\) or guarantee their independence. EMBs remain in principle accountable to the executive or the legislature as a whole, even as they operate independently of and often in conflict with elected representatives. They are neither “an integrated part of a single executive whole, nor….a headless fourth branch of government unaccountable to the executive.”\(^9^0\)

Conflict between the executive or legislature and EMBs is likely in democracies where there are majoritarian concentrations of power and an absence of any constitutional guarantee of independence for EMBs. EMBs are specifically designed to have the ability to take actions counter to the wishes of elected representatives, even as those representatives retain ultimate control over them.

\(^8^8\) Whether a statutory rather than constitutional grant of authority has an impact on the independence of a commission may depend on the ease of constitutional amendment or frequency of statutory amendments to the commission’s enabling legislation.

\(^8^9\) Sossin, “The Ambivalence of Administrative Justice” and “The Puzzle of Independence” at 8 and Wyman, “Independence of Tribunals” at 100, all supra note 83.

\(^9^0\) Sossin, “The Puzzle of Independence” \textit{ibid} at 8 uses this phrase to describe independent institutions generally, but it applies to EMBs more specifically as well. Wyman, “Independence of Tribunals”, \textit{id} at 100 states administrative tribunals are “not….a fourth branch”.

83
Governments empowered with single-party legislative majorities and concentrated executive power can use the levers of the state to change the ground rules of elections. The majoritarian tendencies of democracies in the Westminster tradition mean that single party control of the legislature and executive is the norm, with divided government in the United States or minority or coalition government in the others as possible but intermittent checks. Under these circumstances, EMBs attempting to check partisan politics from influencing the democratic process will be obvious targets for elected representatives seeking to enhance their electoral prospects. The most extreme version of conflict between elected representatives and EMBs would be attempts to capture an independent agency.

IV. EMBs and Judicial Review

Viewing EMBs as central institutions in the democratic process, with an important role to play in checking executive and legislative self-dealing, has implications for judicial review of the law of democracy. In this section, I advance an approach to judicial oversight that is institutionally focused. I argue that courts should approach judicial oversight differently depending on the institution whose actions they are reviewing. The institutional focus is relevant in two ways, by distinguishing between: 1) EMBs and the political branches; and 2) different types of EMBs, ranging from the independent and impartial to the partisan and the captured. In Section IV I first address why judicial review should proceed differently if it is the decision of an EMB under review and then consider in Section V how courts should assess variations in the institutional design of EMBs. The major claim
here is about how much deference should be allocated by courts to institutions whose actions they are reviewing on the law of democracy. In summary, the greater the likelihood of self-dealing by the institution, then the less deference that is appropriate in my argument. If the risk of self-dealing is low, then a high degree of deference will be justified.

I argued in Chapter 1 that courts have a special role to play in majoritarian democracies in overseeing self-dealing by elected representatives. The primary justification for robust judicial oversight on the law of democracy is that self-dealing is likely to occur because of perverse incentives for elected representatives and constitutional structures that concentrate power in legislative majorities. If self-dealing is a risk, then the challenge is to craft judicial doctrine that prevents partisan manipulation without fostering excessive judicial intrusion into the legitimate workings of the political branches. Critics of structural theories of the law of democracy have alleged that approach provides no limiting principle to divide legitimate judicial oversight from illegitimate interference by courts in politics. Setting the proper scope for judicial oversight has been framed as a central issue.

The role of EMBs in checking majoritarian impulses to manipulate the democratic process suggests a limiting principle that significantly circumscribes the role of courts given the institutional makeup of most democracies. The prevalence of EMBs means that much activity overseen by courts emanates not from the

---

91 Hasen, The Supreme Court and Election Law, supra note 21 at 5, 146, 151, 154; Manfredi and Rush, Judging Democracy, supra note 49 at 125. Hasen advocates deference to the political branches on contested issues of political equality (at 101-37), not on the basis of the institution whose actions are under review. See his analysis of Issacharoff’s critique of legislative districting at 149-53. The presence or utility of redistricting commissions does not factor into the analysis, let alone the integration of this type of EMB into his framework for judicial review.
legislature, but from bodies such as election commissions or substitutes for legislative decision-making such as redistricting commissions. Where EMBs are independent and non-partisan, there is comparatively less risk that rules promulgated or interpreted by these institutions will be oriented to achieving partisan ends. In comparison to legislatures and executives, EMBs lack the requisite motivation. The implication is that without a reason to be on guard for self-dealing, courts should show much greater deference to EMBs than they do to legislatures and executives where the law of democracy is concerned.\textsuperscript{92} Robust oversight of possible self-dealing by legislatures and executives should be balanced by deferential treatment of EMBs, thereby limiting the exercise of judicial power and focusing it where it is needed.\textsuperscript{93}

For instance, a court is justified in skeptically probing the partisan motives behind an electoral map generated by a legislature and the effect of those boundaries on political competition. The history of democratic politics suggests strongly that gerrymandering of some sort is very likely to occur when redistricting

\textsuperscript{92} \textit{Reference re Electoral Boundaries Commission Act} (1991) 86 DLR (4th) (ABCA) at para 79: a lesser “level of deference is appropriate when the author of the boundary is some [institution]….not insulated from partisan interference.” See Stephanopoulos, “Electoral Exceptionalism”, \textit{supra} note 31 at 783, who quotes this passage. He also argues at 785 that courts in countries using redistricting commissions typically grant extensive deference to these bodies. Cain argues that courts in the United States should defer to the “reasonably imperfect” maps produced by commissions, \textit{supra} note 24 at 1813.

\textsuperscript{93} That the level of deference or scrutiny should be institutionally based finds some favour as a general matter in analysis of the American First Amendment jurisprudence among scholars who argue that the institutional location from which the speech emanates should be relevant. See Adam Winkler, “Fatal in Theory and Strict in Fact: Empirical Analysis of Strict Scrutiny in the Federal Courts” (2006) 59(3) Vand L Rev 793 at 816 and FN 109; Frederick Schauer, “Towards an Institutional First Amendment” (2005) 89 Minn L Rev 1256 and “Principles, Institutions, and the First Amendment” (1998) 112 Harv L Rev 84; and Frederick Schauer & Richard H Pildes, “Electoral Exceptionalism and the First Amendment” (1999) 77 Tex L Rev 1903.
is in the hands of elected representatives. An electoral map produced by a non-
partisan electoral boundaries commission insulated from partisan interference,
however, should be entitled to greater deference because there is less reason to
suspect that the decision-makers have acted to achieve partisan ends. Without the
likelihood of a conflict of interest, courts should only reluctantly overrule the
decisions of EMBs.

Judicial review of the law of democracy in this account must be
institutionally focused. In overseeing the law of democracy, courts should calibrate
their constitutional inquiries to the likelihood that partisans have captured the
institution that is making or interpreting rules shaping the law of democracy. A
sliding scale should be employed to determine what degree of scrutiny for partisan
manipulation is appropriate, given the likelihood that the institution is involved in
self-dealing. Courts should be vigilant in searching for partisan distortion in all areas
of election law generated by the legislature or executive, because the likelihood of
self-dealing is high. Searching review of this type would deter elected
representatives from manipulating the democratic process.

94 For Canada, see Courtney, Commissioned Ridings, supra note 11 at 20 (“Nine federal decennial
redistributions were carried out between 1872 and 1952. Without exception each was carefully managed by
the government of the day…The great majority…were partisan and blatantly self-serving affairs.”); John C
21(4) CJP 675 at 686; Elections Canada, A History of the Vote in Canada, 2nd ed (Ottawa: Office of the
Chief Electoral Office of Canada, 2007); and Norman Ward, “The Basis of Representation in the House of
Commons” (1949) 15(4) CJPS 477. For Australia, see Orr, Law of Politics, supra note 5 at 31-39 on
redistricting; Juriansz and Opeskin, supra note 27; Orr and Levy, supra note 27. For the United Kingdom,
see Rossiter, et al supra note 26 and Johnston et al, supra note 26. For India, see McMillan,
“Delimitation”, supra note 58. Gerrymandering of course remains an ongoing challenge in the United
States.
95 Rave goes so far as to argue that the underlying risk of self-dealing and evidence of an improper motive
may be enough for a court to find that a law is unconstitutional even in the absence of conclusive proof of
partisan advantage: “Political Fiduciaries”, supra note 23.
A more deferential standard would apply to assessments of the constitutionality of rules governing the democratic process produced by EMBs. Justice Stone’s famous footnote number four in *United States v Carolene Products* proposed “exacting judicial scrutiny” for all rules affecting rights fundamental to the “political process”. Justice Stone's call for exacting scrutiny is a preferable approach to courts assessing the law of democracy under doctrine designed to address other constitutional areas where the risk of self-dealing is lesser or non-existent. Yet given the institutional array in democracies today, requiring strict scrutiny of all aspects of the democratic process is overbroad. EMBs are less likely than legislatures or executives to engage in self-dealing or to artificially restrict political competition. Constitutional interpretation of democratic rights has been concerned with the type of right affected or the nature of harm. Constitutional doctrine should also take into account the institution from which the state action under review emerged, because the justification for deference will vary depending on whether it is a law passed by the legislature or a decision of an independent and

---

96 Interestingly, Mackenzie, *supra* note 34 finds in his interviews with federal judges on redistricting that they suggest greater deference is appropriate for commissions because there is less chance of self-dealing at 11: “And this fact is borne out by both my quantitative analysis of court cases as well as my interviews of judges, where many suggest that independent commissions might be subject to lesser standards of review simply because they operate less like a legislature - less out of self-interest.”

97 304 U.S. 144 (1938); Rave remakes Justice Stone’s point in “Political Fiduciaries”, *supra* note 23 at 46-47.

98 Carolene Products, *ibid*, footnote number 4.

impartial EMB. An institutionally focused approach to judicial review of the law of democracy therefore would shift the spotlight to the degree to which EMBs are independent and impartial.

To return to the theoretical concerns about the legitimacy of judicial review considered in Chapter 1, an argument for deference to EMBs addresses some of the criticisms raised by skeptics. If courts are required to show deference to EMBs, then this reduces the scope for judicial involvement in setting the rules structuring politics to where it is most appropriate: where the political system has broken down and there is no impartial and independent intervening institution or super-agent. This responds to the concern that judicial involvement violates the separation of powers, which is expressed by both the general critics of judicial review and those who doubt specifically the legitimacy of judicial oversight of the law of democracy. Arch adherents to the principle of parliamentary sovereignty will not be fully satisfied by this argument, as there remains a role for courts to engage in robust oversight where legislative action is at issue or the EMB has been captured by partisans. Yet the imposition of a doctrine of deference toward EMBs does meaningfully circumscribe judicial oversight.

It would be EMBs rather than elected representatives who are entitled to deference in the model I propose. This flips arguments like Waldron’s - that courts

---

100 Rave, supra note 23 makes a similar point in arguing for lesser scrutiny where redistricting is carried out by fair procedures within the legislature at 728-29 (“But if the legislature could show that the districting decisions were made through some neutral process that could cleanse the taint of self-dealing, searching review of the outcomes by courts would be unnecessary.”) or by a neutral redistricting institution at 732 (“When reviewing a districting decision made by a commission, the court should focus primarily on the independence of the commissioners and the fairness of the process.”) Comparing judicial review of redistricting to corporate law’s use of the business judgment rule, he argues “As long as the directors were truly independence, were adequately informed, and used fair procedures, courts apply the deferential business judgment rule to their substantive decision.”
are no better than legislatures at protecting rights and are less democratically legitimate because they are unelected - on their heads. Yet deference to EMBs satisfies some of the criteria Waldron himself prioritizes. To the extent that they are independent and impartial, EMBs can be expected to be respectful of democratic rights and to be public rather than private regarding. If they are not, then deference will not be warranted.

Canadian, Australian, and American courts, among others, have expressed the view that even if justiciable, deference to elected representatives on matters involving the law of democracy is appropriate because of their significant expertise in political matters. As detailed in Chapter 1, this deferential approach has led to judicial “hands-off” and a wide latitude for the political branches to manipulate electoral law. Expertise, however, should be a secondary concern in comparison to independence and impartiality. Politicians can use their expert knowledge about elections to manipulate the process just as easily as they can to ensure a level playing field. Even if we take expertise to be an important consideration, EMBs are likely to have highly relevant and detailed knowledge in their areas of jurisdiction that at least rivals those of politicians. Election commissions, for example, typically have deep knowledge of the technical functioning of rules on contribution limits and the like.

We should not romanticize EMBs. They are undoubtedly less reflective of the population than a large legislative body, are not accountable directly to voters through elections, and tend not to deliberate in public. They may be captured by partisans, private interests of other sorts, or the desire for institutional self-
preservation and empire building, just as any administrative body might. Their expertise and authority can be used in service of problematic ends, just as with legislatures. Yet a doctrine of deference to EMBs, but not legislatures, responds to the goal of setting identifiable limits to judicial oversight while checking partisan self-dealing. In Waldron’s ideal world of deliberative, representative, public minded, and accountable legislators, EMBs would be unnecessary except to carry out technical aspects of the wishes of the political branches. The principal-agent problem, however, dictates that super-agents are needed to enforce the interest of voters in being able to hold their representatives accountable.

Although I do not attempt to integrate domestic administrative law doctrines into my analysis in this dissertation, my account also has some resonance and contrasting points with existing administrative law. EMBs have not previously been a focus of the extensive administrative law scholarship on differing standards of review. Calibrating the appropriate degree of deference owed by a court to an EMB, however, resonates with traditional debates in administrative law. Administrative law varies extensively across countries, but all attempt to wrestle with the dilemma of how much deference courts should show to administrative bodies.101

In Canada, the Dunsmuir two-part test establishes categories to determine whether administrative decisions are reviewed on a non-deferential correctness standard or on a deferential reasonableness basis.102 The Chevron103 doctrine in the

---

101 See Janina Boughey, “Administrative Law: The Next Frontier for Comparative Law” (2013) 62(1) Int and Comp L Q 55 arguing that the real differences that exist between countries (65-70) do not preclude a comparative approach to administrative law (95) and that how much deference courts should grant to administrative bodies is a recurring theme in all countries (91-94).

102 Dunsmuir v New Brunswick, [2008] 1 SCR 190; Paul Daly, “Dunsmuir’s Flaws Exposed: Recent Decisions on Standard of Review” (2012) 58 McGill LJ 483 and “The Unfortunate Triumph of Form over
United States also establishes a two-part test where if the Congressional intent is unclear or ambiguous, the courts review whether the administrative agency’s statutory interpretation was “permissible”, which amounts to deference on a reasonableness standard.\textsuperscript{104} In Australia, administrative law is heavily informed by the separation of powers and comparative institutional strengths.\textsuperscript{105} Courts zealously guard their traditional expertise by granting no deference to administrative bodies’ interpretation of statutes, but give great leeway on policy-making on the view that this is not a role for the courts.\textsuperscript{106} Courts in the United Kingdom do not grant deference on interpretations of law, though they take a

\textsuperscript{104} Cass R Sunstein, “\textit{Chevron Step Zero}” (2006) 92 Va L Rev 187 at 191. The United States Supreme Court has muddied the waters on when the \textit{Chevron} test applies at all to some types of cases, but it remains the foundational case: Sunstein at 191-92. An “anomaly” exists in American administrative law because courts have required deference to administrative bodies’ interpretation of statutes but not to their policy decisions, despite courts presumably having expertise in statutory interpretation but not policy-making. See Robert C Dolehide, “A Comparative ‘Hard Look’ at \textit{Chevron}: What the United Kingdom and Australia Reveal About American Administrative Law” (2010) 88(6) Tex L Rev 1381 at 1383: “The American anomaly is that courts give substantial deference to agencies’ interpretations of law but grant far less deference to agencies’ policy decision” and at 1381 citing Stephen Breyer, “Judicial Review of Questions of Law and Policy” (1986) 38 Admin L Rev 363 at 364-65.

\textsuperscript{105} Dolehide, \textit{ibid} at 1389-90.

variable approach on issues of policy,\textsuperscript{107} with levels ranging from the very
deferential \textit{Wednesbury}\textsuperscript{108} reasonableness to more searching levels of scrutiny.\textsuperscript{109}
The United Kingdom model, like Australia’s, seeks to uphold the separation of
powers, with courts keeping the executive within its statutorily permitted authority
on an assumption of parliamentary sovereignty.\textsuperscript{110}

Looking into whether the administrative body operates in a non-partisan
fashion, however, is a different inquiry than focusing on the expertise of the body or
the existence of a privative clause, as have often been relevant under Canadian
administrative law, or the intent of Congress in the United States under \textit{Chevron}. The
separation of powers concerns typical of jurisprudence in Australia and the United
Kingdom are also less directly of concern with EMBs, as the legislature cannot be
presumed to have used its power legitimately given the principal-agent problem
where the law of democracy is at play. Whatever the level of deference granted to
bodies in a given country under administrative law, EMBs should be viewed as a
distinct type of institution where deference is tied to independence and impartiality
rather than to other factors otherwise relevant to judicial review of administrative
decisions.\textsuperscript{111}

Ted Rave has recently argued in the American context that redistricting
commissions deserve deference from courts because they respond to the principal-

\textsuperscript{107} \textit{Ibid} at 1390-91; \textit{Anisminic Ltd v Foreign Compensation Committee}, [1969] 2 AC 147 (HL).
\textsuperscript{108} \textit{Associated Provincial Picture Houses Ltd v Wednesbury Corp} [1948] 1 KB 223 (CA).
\textsuperscript{109} Dolehide, supra note 104 at 1391 calls \textit{Wednesbury} reasonableness “a low threshold”.
\textsuperscript{110} \textit{Ibid}, though Dolehide at 1393 remarks that the fused legislative/executive function in the United
Kingdom and Australia’s parliamentary democracies means the powers are actually less separated than in the
United States.
\textsuperscript{111} If an EMB acted outside of its mandate, administrative law doctrines of \textit{ultra vires} would presumably
still apply. An election commission with no statutory power to enforce campaign finance laws, for
example, would not be justified in attempting to do so.
agent problem underlying redistricting. Rave asserts that when overseeing the work of a redistricting commission, courts should look to assess the independence of the commission, having regard for such factors as:

...how commissioners are appointed, who is eligible to be a commissioner, whether commissioners are barred from seeking public office or lobbying positions after their tenure, whether the commission was provided with sufficient funding and information, and whether commissioners are otherwise beholden to incumbents or political parties. Courts should also evaluate the fairness of the commission’s procedures, considering transparency and faithfulness to its own rules.

For assessing the degree of deference, Rave endorses a “flexible inquiry” concerned with “procedural criteria”.

Recognizing the conflict of interest in allowing elected representatives to determine election laws and electoral maps is a necessary first step, but there is more to be done as the analysis of deference needs to be extended. Rave’s analysis is particular to the United States rather than comparative, does not address whether the principal-agent problem applies across democracies, or how the theory of deference to independent and impartial EMBs might play out with different sets of institutions than those existing in the United States. Rave also does not incorporate the prevalent type of EMB, namely the election commission, into his analysis.

I would argue more detail is needed on the relevant factors to apply in assessing independence and impartiality. Deference is not warranted to EMBs like redistricting commissions simply by virtue of their taking power away from

---

112 Rave, supra note 23 at 676: “At its core, the conflict of interest faced by incumbent legislators in redistricting is a familiar agency problem.” His general argument is that we should see elected representatives as fiduciaries, using a private law analogy at 695-99. Rave argues at 733 that independence implies deference is appropriate and where it is absent commissions do not deserve it. On fiduciaries in public law, see Evan Fox-Decent, Sovereignty’s Promise: The State as Fiduciary (Oxford: Oxford University Press, 2011).
113 Rave, ibid at 732.
114 Id at 733.
legislatures. If they cannot be categorized as truly independent and impartial, the EMBs are very likely to simply reproduce the pathologies evident in legislatures and executives beset by partisan motivations in majoritarian democracies. This implies that the emphasis should be on how to assess independence and impartiality. The focus of the inquiry should be a contextual assessment in light of a particular EMB’s constitutional and statutory status, its composition, its relationship with the legislature, and its internal functioning.

The challenge is to incorporate both major types of EMBs into a comparative approach to judicial review of the law of democracy. Integrating EMBs into an understanding of the law of democracy shifts the terrain of the debate about the legitimacy of judicial review. In judicial review that is institutionally focused and calibrates the level of deference to the likelihood of self-dealing, the presence of independent and impartial EMBs reduces the occasions in which robust judicial oversight is likely to be required or is justified. Judicial review is necessary to prevent partisan manipulation of the democratic process in majoritarian democracies where elected representatives maintain direct control over election administration and redistricting. Where these same incentives do not exist, the rationale for judicial intervention is not as strong. EMBs reduce the scope for malfeasance by elected representatives and therefore decrease the number of instances in which judicial interference will be appropriate.\textsuperscript{115} EMBs that are

\textsuperscript{115} It appears that there is less judicial intervention in redistricting in countries that adopt commissions when compared to the high degree of judicialization in the United States: Kubin, \textit{supra} note 41 finds there is greater judicial deference to commission designed maps; Stephanopoulos, “Electoral Exceptionalism”, \textit{supra} note 31 at 785-786, 788-792. But Cain, \textit{supra} note 24 at 1832, 1835-1837 highlights that the largely independent Arizona and California redistricting processes have been subject to extensive litigation in their short time in existence.

95
independent and impartial lower agency costs, while the role of courts in this domain is to police super-agency costs that may emerge if EMBs veer toward dependence on elected representatives and partisanship.

There is one exception to the general posture of deference to an independent and impartial EMB. An independent EMB insulated from partisan politics will possess significant discretion, which even if not used for partisan ends can nonetheless be abused. While partisan capture is the primary ill to be avoided, the risk of misuse of EMB independence for other improper purposes must also be acknowledged. Individuals that staff EMBs can misuse their independent authority to serve the personal interests of the institution’s office holders, or exercise their authority arbitrarily. If EMBs are super-agents guarding against agency costs, and partisan capture of the EMB generates super-agency costs, the use of EMB independence for illegitimate purposes other than partisanship also produces super-agency costs. For example, a Chief Electoral Commissioner that pursued a personal vendetta against a cabinet minister using the extensive powers of an election commission free from oversight by elected representatives would be generating super-agency costs. I discuss some examples of this kind of super-agency costs in the section on internal procedures and in Chapter 3. Apart from partisan capture or arbitrary use of its authority, however, courts should not interfere in the decisions of EMBs.
V. Assessing the Independence and Impartiality of EMBs

Greater judicial deference toward the decision of an EMB in comparison to that of a legislature or government department answering to elected representatives is justifiable only to the extent that the EMB is actually independent and impartial. If the EMB does not possess those characteristics that set it apart from government, then the risk of self-dealing will increase as a result. Institutionally focused judicial oversight must therefore also take account of the variation across EMBs, as not all will have been designed to be independent and impartial or operate as such. If an EMB is something less than independent and impartial, then it is likely to have been captured by partisan interests and liable to reproduce the same pathologies as the conflicted legislature and executive, namely self-dealing and manipulation of the democratic process.\footnote{Mackenzie, supra note 34 at ix finds that the “overriding” concern of commissioners is partisanship, but that depends on the structure of the commission and the political dynamics in a state at 12. Mackenzie concludes that judges are “constrained partisans” in his empirical study from 1981 to 2006 (ix). They may be partisan maximizers under certain conditions, for example if their party has been harmed by gerrymandering or if precedent is unclear and leaves great room for discretion. Supporting evidence for the thesis of constrained judicial partisanship is Randall D Lloyd, “Separating Partisanship from Party: Reapportionment in the US District Courts” (1995) 89(2) APSR 413. Mackenzie’s point regarding clarity of precedent runs counter to the argument in Levy, supra note 17 that more discretion reduces opportunities for partisan interference.} If they are not independent and impartial, then EMBs are owed as little deference as the political branches.

The approach I am proposing would require courts to look at institutional factors and, to a limited extent, the functioning of EMBs to determine the appropriate level of deference to be shown. Courts should apply a test that looks at several factors measuring the independence and impartiality of the institution. For a court to make this assessment, a close investigation of the composition, status, and
decision-making of the EMB and the legal constraints on its actions and officials will be necessary. The payoff is that, for example, a redistricting commission staffed by politicians would be entitled to less deference than a commission of non-partisan appointees.

I adapt here John Courtney’s test for measuring the independence and impartiality of redistricting commissions\textsuperscript{117} and apply it to both types of EMBs.\textsuperscript{118} Courtney selects three factors for assessing independence and impartiality. These are: 1) whether the membership of the EMB is made up “non-partisan outsiders”\textsuperscript{119}; 2) whether the EMB faces an “absence of constraints,”\textsuperscript{120} and 3) whether the institution possesses “ultimate authority” or can be overruled by the political branches.\textsuperscript{121} The first criterion relates to how members or officials of EMBs are appointed and who they are. The second is preoccupied with the legal regime surrounding the EMBs and the third with the EMB’s relationship to the legislature.

\textsuperscript{117} Courtney, Commissioned Ridings, supra note 11 at 105-120.
\textsuperscript{118} In Australia, Kelly, supra note 5 at 32 provides a set of eight measures for the independence of Australian election commissions: 1) commissioner experience; 2) the size of commissions; 3) appointment process; 4) political affiliations; 5) length of tenure; 6) security of tenure; 7) reporting mechanisms; and 8) budgetary independence. See Kelly at 29-30 for an application of these criteria to Australian electoral administrators. Criteria 1, 3, 4, 5, and 6 all relate to the selection of administrators for the EMB, which taking after Courtney I call the non-partisan outsiders category. Altering the number of commissioners (criteria 2) is a possible route for partisan manipulation to take, but the number of commissioners is not likely to be much of a factor if there is a significant bureaucracy in place. Concerns about stacking commissions with partisans are more about a fair appointment process than the absolute number. Reporting mechanisms (criteria 7) goes to ultimate authority and budgetary independence (criteria 8) to the absence of constraints. An earlier report by International IDEA, focused like Kelly only on election administrators rather than boundary commissions, came up with another set of criteria: 1) the institutional independence from the executive; 2) implementation; 3) formal accountability; 4) powers; 5) composition; 6) term in office; and 7) budget: Wall et al, supra note 1 at 9. The IDEA proposal touches on appointment of non-partisan outsiders (composition and term of office), the absence of constraints (institutional arrangement, implementation, powers, and budget), and ultimate authority (formal accountability). The Kelly and IDEA frameworks are more cumbersome than my proposed adaption of Courtney’s criteria, are of less direct application to redistricting commissions, and miss the importance of internal procedures for ensuring fair use of the EMBs powers.
\textsuperscript{119} Kelly, ibid at 105
\textsuperscript{120} Id at 112.
\textsuperscript{121} Id at 116.
To these three criteria, I propose a fourth particularly relevant to a legal analysis of EMBs, which are the internal and statutorily-mandated procedures the institution follows in reaching its decisions. The first four criteria are institutional in nature. To these institutional criteria, I also add a fifth behavioural one. If institutions are set up in a flawed manner then partisan activity is the likely consequence. The first four criteria employ this insight. Even if the institution is as insulated as possible from partisanship, however, those staffing EMBs can still choose to behave as partisans if they so choose. The fifth criterion is therefore whether the EMB displays evidence of partisan behaviour, regardless of its institutional makeup. This fifth category is a residual one, as partisanship will usually manifest itself through institutional cracks in the EMB’s independence and impartiality.

These factors collectively take into account what Andreas Schedler identifies as the two types of authority necessary for an EMB to be truly independent and impartial: freedom or independence to act, as well as freedom or independence from interference.122 Courts should balance all five factors, which may not all point in the same direction, to determine how much deference is warranted. I conceive of this approach as calibrating the appropriate intensity of review by a court of the EMB, rather than any rigid set of tiers of scrutiny imposing low, medium, or high levels of deference. Attempts in administrative law to use tiers of review have often been problematic because of the imposition of hard and fast categories. Whether distinctions could be drawn between the categories and their correspondence to the

122 Andreas Schedler, “Measuring the Formal Independence of Electoral Governance” (Paper delivered at the 99th Annual Meeting of the American Political Science Association (APSA), Philadelphia, PA, 28-31 August 2003) at 8 applies these concepts to EMBs from earlier research on central bank independence.
nature of administrative decision-making have been frequent sources of criticism.\textsuperscript{123} The American equal protection jurisprudence has also been critiqued for imposing tiers of scrutiny.\textsuperscript{124} My preferred approach to review of EMBs is to allow courts to assess the factors that I detail below to determine how close a look is needed at the decision-making of the institution. This permits a more flexible inquiry suited to the myriad different institutional forms that can be taken by EMBs and to the varying range of authority and responsibilities held by them.

I elaborate now on each of the criteria in turn, to demonstrate how they can aid courts in evaluating whether the EMB is independent and impartial, which is essential to assessing whether to grant deference. I draw on examples from both redistricting and election commissions. I intend all five criteria to apply to both types of EMB.

a) Non-Partisan Outsiders

First, the “non-partisan outsiders” criterion relates primarily to the rules surrounding membership in the EMB. In order to assess independence and impartiality, courts should consider the appointment and removal procedures for officials in EMBs.\textsuperscript{125} Asking who makes the initial appointment, the rules for re-appointment and removal, and whether removal can be at will or only for cause are appropriate considerations for courts in assessing the independence of an EMB.

\textsuperscript{123} See the references in footnote 102 regarding \textit{Dunsmuir}.
\textsuperscript{124} See Fallon, \textit{supra} note 99 for an excellent overview of the challenges posed by “strict scrutiny” doctrine and Winkler, \textit{supra} note 93 on the application of the strict scrutiny standard and its consequences.
\textsuperscript{125} Hartlyn \textit{et al}, \textit{supra} note 32 at 80-81 show how membership is relevant to ensuring impartiality and independence.
Governments seeking to impose partisan ends on EMBs will often either alter the appointment process or use the current process in a manner that compromises independence and impartiality.

There is significant variation among EMBs in terms of their appointment and tenure rules. This variety of approaches to designing the EMB should be reflected in varying degrees of deference to be accorded by courts. Among redistricting commissions, for example, some are populated entirely by elected representatives, others follow a tie-breaking model, and some opt for non-partisan appointees. On the spectrum of the appropriate level of deference, partisan appointments would be entitled to the least deference, tie-breaking commissions would deserve somewhat more, while a non-partisan approach would garner the most.

A redistricting commission composed of elected representatives fails this aspect of the test because it is made up of partisans and insiders. Commissions where members are appointed by the legislature or executive in majoritarian democracies where one party is likely to control an entire branch of government is one step better, because appointees are potentially closer to outsiders than insiders, but still fails the test for partisanship. By this standard, many American redistricting commissions are insufficiently independent and impartial. Arkansas, Missouri, and Ohio are three American states that use commissions in some form. These states

\[126\] Mackenzie, supra note 34 at 263-4 finds evidence of partisan voting by commission members at 259-60 and concludes that “Commissions can be very partisan institutions.” Jeremy Buchman, Drawing Lines in the Sand: Courts Legislatures and Redistricting (New York: Peter Lang Publishing, 2003) assesses the main contribution of commissions to be a move from single-party to cross-party or sweetheart gerrymanders. Winburn, supra note 39 concludes that commissions fail to deter litigation, despite the initial findings of Kubin, supra note 41; see also Christopher C Confer, “To Be About the People’s Business” (2004) 13 Kan J L & Pub Pol’y 115 at 130-32 discussing commissions’ potential to reduce litigation.
have removed the power over redistricting from the legislature, but continue to allow elected representatives or party officials to determine the membership of the commissions. These partisan commissions fail the non-partisan outsiders test, which indicates that in the balancing equation less deference should be shown.

Another form used in the states is the tie-breaking commission,\(^{127}\) which is characterized by an equal number of partisan appointees from each party (assuming a two-party system) with a single impartial member appointed to break the likely partisan deadlock. For example, in a commission with two Democratic and two Republican appointees, an impartial, tie-breaking fifth member would presumably select among competing redistricting plans on the basis of neutral criteria. Slightly more deference is likely to be owed to tie-breaking rather than wholly partisan commissions on the basis of this first criterion, though less overall than commissions on the Canadian/Australian model that do not appoint partisans at all.

The tie-breaking model is a common one in the United States. In Arizona,\(^{128}\) Democrats and Republicans nominate 25 individuals in total. Five of these nominees may not be registered as members of a political party. The majority and minority leaders of both houses each select one commissioner from the pool of nominees, for a total of four. These four commissioners then select one additional member from the pool. If they fail to reach agreement, as one could imagine on a two-two partisan split, a group of judges appoints the fifth member. Arizona’s approach to the


appointment process is a mixture of partisan control, balance between the interests of the two major parties, and non-partisanship in the form of the fifth member.

Super-majority voting rules are also used in tie-breaking commissions to encourage some degree of cross-party cooperation. New Jersey’s tie-breaking model is similar to Arizona’s.\textsuperscript{129} Twelve members out of thirteen are selected through a partisan process. The partisan members of the commission vote to determine who will be the independent thirteenth member. To be selected, the independent member must garner at least seven votes, which implies some cross-party support. If the twelve members cannot reach an agreement, the state Supreme Court picks the tie-breaking member from among the two individuals who received the largest support in the vote.\textsuperscript{130} Hawaii, Idaho, Montana, Pennsylvania, and Washington State all distribute an equal number of partisan appointments between Democrats and Republicans and permit those partisan appointees to select the independent, tie-breaking member. In Alaska, the judiciary has the direct responsibility to select the tie-breaking member.

Tie-breaking commissions should be entitled to more deference than a full slate of partisan appointees, but less than for truly non-partisan outsiders. Tie-breaking commissions are improvements on partisan controlled institutions, as they provide at least the opportunity for the independent tie-breaking member to make decisions on the basis of neutral criteria rather than partisan calculation. The

\textsuperscript{129} Cain, supra note 24 favours the New Jersey model at 1838-1841, though he sees some room for improvement.

\textsuperscript{130} In New Jersey, the Supreme Court is also the final arbiter between redistricting plans if the redistricting commission fails to reach an agreement: Ernest C Reock Jr, “Redistricting New Jersey After the 2010 Census”, Report of the Center for Government Services (New Brunswick, NJ: Rutgers University, 2008) at 11-16.
presence of party appointees, however, is likely to tilt the process in partisan
directions it would not otherwise go.

The independent member may be faced with merely choosing between the
“least bad” partisan plan. The tie-breaking model reinforces the existing dominance
of the two major parties by emphasizing partisan balance between Democrats and
Republicans in the appointments process, at the expense of smaller parties or
independent voters. Further, the amount of insulation from partisanship provided
by the tie-breaking model is debatable. The tie-breaking member may come under
intense political pressure to favour one of the parties and her security of tenure will
be an ongoing concern. Arizona Governor Jan Brewer’s recent attempt to impeach
the independent chair of the state redistricting commission was an example of an
attempt to undermine the independence of a tie-breaking commission that
displeased elected incumbents.

Other models have proven better than the tie-breaking commission at
insulating decision-making from partisanship and should therefore be entitled to
more deference on the basis of this first criterion. Most Canadian redistricting
commissions achieve relatively strong scores on the “non-partisan outsiders”
criteria through a variety of measures. The federal Electoral Boundaries
Readjustment Act (EBRA) restricts membership on commissions to eliminate
obvious partisans. There are ten federal commissions composed of three members

131 Kelly, supra note 5 at 42-43.
132 AIRC v Brewer, supra note 35; Cain, supra note 24 at 1838 discusses the Arizona impeachment
controversy and the partisan use of the removal power for “gross misconduct”.
133 Redistricting commissions for provincial electoral districts in Alberta and Prince Edward Island
spawned litigation precisely because they failed the partisan outsider test, which resulted in skewed
electoral maps: Courtney, Commissioned Ridings, supra note 11 at 111.
134 RSC 1985 c E-3.
each. No Member of Parliament (MP) or representative in a provincial legislature may sit on a commission (s. 10). The Chair of each commission is a sitting judge appointed by the Chief Justice of the Province. The Speaker of the House of Commons appoints the other two members. The Speaker is an elected MP, which opens up the opportunity for partisanship, but Parliamentary tradition and current practice dictate that she set aside partisanship for the duration of her holding the position.

The provinces follow similar rules, with additional requirements in place in some to ensure non-partisanship. The independent Chief Electoral Officer chairs Quebec’s provincial commission, which is made up of three members. A further super-majority requirements limits partisan appointments to the other two positions, as a two-thirds vote of the provincial assembly is needed to select members. This usually requires cross-party support.

The use of individuals who occupy non-partisan offices serving as boundary commissioners is a common theme comparatively, especially judges, statisticians and those with expertise in geography. Redistricting commissions often include members of the judiciary in jurisdictions where judges are likely to act in a non-partisan fashion. Judges chair the United Kingdom’s four boundary commissions

---


(England, Scotland, Wales and Northern Ireland) and compose two-thirds of India’s redistricting commission.\textsuperscript{137} Australia’s commissions are made up of the non-partisan Electoral Commissioner, the Electoral Officer of the state where redistricting is occurring, the official Surveyor-General, and the Auditor-General.\textsuperscript{138} This lack of discretion over selection of members in Australia guarantees greater independence and impartiality than the Canadian approach, which allows for some partisanship to leak into the appointment process if the Speaker does not strictly follow his mandate of impartiality in appointing members.

The office of Canada’s Chief Electoral Officer (CEO) provides a model for independence in the appointment and removal process for election commissions. The CEO is an officer of Parliament, therefore responsible to Parliament itself rather than the executive or Prime Minister himself. The CEO cannot be removed by Parliament alone, but only on the consent of both Parliament and the non-partisan Governor General. Once appointed, the CEO serves until retirement.\textsuperscript{139} The government of the day has no carrot of re-appointment to dangle over a CEO to induce compliance with partisan goals, and no stick of removal given the

\begin{footnotesize}
\begin{enumerate}
\item Handley, \textit{supra} note 71 at 268.
\item \textit{Elections Act}, \textit{supra} note 16 at ss 13-14; Stevens \textit{v CPC} 2005 FCA 383 at para 19. Proposed amendments would erode this guarantee of independence by instituting a ten year term: \textit{Fair Elections Act}, \textit{supra} note 65 at s 3. The Australian Electoral Commissioner serves for a renewable 7 year term, \textit{Commonwealth Electoral Act 1918}, Act No 27 of 198, C2012C00581, s 8. Section 18 established the office of the commissioner and section 25 sets out the circumstances in which the Governor-General may terminate the commissioner’s employment. Kelly, \textit{ibid} at 41.
\end{enumerate}
\end{footnotesize}
impartiality of the Governor General as head of state. The CEO alone directly appoints the Commissioner of Elections Canada,\(^\text{140}\) who is responsible for assessing whether election law violations by candidates and parties should be forwarded to the Director of Public Prosecutions for prosecution.\(^\text{141}\) Given these guarantees of independence, considerable discretion should be granted by courts to decisions of Elections Canada within its sphere of responsibility, such as ensuring compliance with campaign finance laws, as a non-partisan outsider directs the organization.\(^\text{142}\)

Courts must also be aware of the dynamic nature of the relationship between EMBs and elected representatives in calculating how much deference to accord. Even if an EMB was initially designed to be independent and had operated impartially, political majorities can use the appointment process to capture the EMB and turn it into a partisan organ of the governing party. Sujit Choudhry has outlined the possibility of partisan capture of formally independent institutions in dominant party democracies.\(^\text{143}\) He uses the South African example, where the indicators of democracy are present, but where a single, dominant governing party will hold power for the foreseeable future. The possibility of democratic alternation is low and the African National Congress (ANC) governs with little chance of being

\(^{140}\) The *Fair Elections Act*, supra note 65 would remove this power from the Chief Electoral Officer and give it to the Director of Public Prosecutions, who is accountable directly to the Attorney General and is appointed by Cabinet rather than Parliament: s 108.

\(^{141}\) Davidson, *supra* note 4 at 538-40; Kingsley, *supra* note 4 at 407.

\(^{142}\) Kelly, *supra* note 5 at 34 discusses the appointment procedures to electoral commissions employed by the commonwealth and the states. They range from the most partisan, which is appointment by the governor-general following the elected government’s direction as occurs at the federal level, to cross-party consultation, to consultation with a legislative committee, to resolutions of the House and the Senate. This last procedure is closer to the independent, non-partisan Canadian model. Kelly argues at 35 that the political interests of the government shaped the appointment of the electoral commissioner in 2005, who then acted in a partisan manner in the reforms leading up to *Rowe v Electoral Commissioner* 2010 HCA 46.

\(^{143}\) Sujit Choudhry, “‘He Had a Mandate’: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy” (2009) 2 Con Ct R 1.
replaced. Choudhry traces the implications of this lack of alternation and finds that one of the likely tendencies in dominant party democracies will be the attempted capture of independent institutions by the party in power.\textsuperscript{144} He argues that the powers of appointment and removal are likely vehicles for capture of independent institutions.\textsuperscript{145} The policy of “cadre deployment” that occurs in South Africa is an example of an attempt to capture bodies that are formally at arms-length.\textsuperscript{146} Under cadre deployment, the governing ANC positions partisan supporters within institutions mandated as independent by either the constitution or statute, in order to bring them in line with the interests of the dominant party. The dominant party can use its ability to appoint individuals to the independent body. A dominant party may also seek to remove those who act against its priorities, which reinforces the incentives that partisan and non-partisan appointees will have to toe the party line.\textsuperscript{147}

In majoritarian democracies, there will be fewer opportunities for the full capture of independent institutions than in dominant party democracies. There is greater political competition and a much higher likelihood of alternation. Specific political dynamics, however, may reduce political competition or lower the possibility of an alternative party winning power in subsequent elections. The underlying constitutional structure is also likely to facilitate concentrations of power that can be used against independent institutions. In the absence of

\textsuperscript{144} Ibid at 56.
\textsuperscript{145} Id at 56-7; see also the \textit{Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC) and National Director of Public Prosecutions v Zuma 2009 2 SA 277 (SCA).}
\textsuperscript{146} Choudhry, \textit{id.}
\textsuperscript{147} Id at 57.
entrenchment as a fourth branch of government, there is no constitutional impediment to a Canadian government that sought to return redistricting to Parliamentary control, or move election administration from Elections Canada into a bureaucratic agency controlled by a partisan Minister. While the risk of partisan capture of an EMB may be lower in majoritarian than dominant democracies, it remains a live issue of concern even if the dynamics surrounding interference in an independent institution would be different in Canada than in South Africa. Courts need to assess whether the appointment, tenure and removal process actually guarantees independence and impartiality or whether it has been compromised.

Another example of partisan interference with an EMB designed to be independent comes from India's redistricting commissions. Partisan abuse of the appointment process to India's formally independent and impartial delimitation (redistricting) commissions has tainted Indian redistricting. The original Indian delimitation post-independence was conducted out of the President's office. Fears of partisanship led to the creation of a three-member delimitation commission, including the Chief Election Commissioner, designed to operate at arms-length. The President's authority to appoint members of the commissions opens the process to

---

148 One could argue that the right to vote itself implies independent and impartial election administration and redistricting must be in place for the right to be fully realized. The Supreme Court of Canada unfortunately rejected the idea that independent boundary commissions are constitutionally mandated in Reference re Provincial Electoral Boundaries, supra note 99. Justice Cory in dissent held that even if the government had legislated the boundaries without the presence of a commission, s 3 of the Charter would still apply. This statement implies that s 3 does not require independent commissions, but will simply apply to whatever process the legislature uses. Justice McLachlin for the majority found that legislative involvement in the redistricting did not necessarily mean the electoral map was constitutionally suspect, again implying commissions are not constitutionally mandated. I take up why a constitutional requirement of impartial election administration is desirable in Chapter 5 in pointing out directions for future research.
partisan control, as he acts on the authority of cabinet and the Prime Minister.\textsuperscript{149}

There is therefore the risk that any appointments will be made in the interests of the political party in power.

The independence and impartiality of the commissions has been steadily eroded through the appointment process. The appointment of MPs as “associate” commissioners is a blatant example of growing political control over delimitation. Five MPs and five state legislators now sit as associate members of the Commission when it deliberates on electoral boundaries for each state.\textsuperscript{150} As a result, accusations of partisanship have dogged Indian delimitations. The ongoing theme has been favouritism toward the Congress Party, which was the initial hegemonic party, though greater competition is now the norm.

Outcome-oriented partisan gerrymandering largely occurs through three mechanisms. First, like Canada, the United Kingdom, and Australia, and in contrast to the United States, Lok Sabha (lower house) seats are permitted to vary in population size. There have been ongoing allegations that constituency populations have been manipulated so that Congress-leaning districts are over-represented while those favouring the rival BJP are under-represented.\textsuperscript{151} Second, particular candidates appear to have been favoured in the exact placement of boundary lines. Third, the delimitation commission has significant authority over the implementation of the group-oriented affirmative action policies designed to aid Scheduled Casts (SC) and Scheduled Tribes (ST). The exact location of reserved

\begin{footnotesize}
\begin{enumerate}
\item Alistair McMillan, “Delimitation in India” in Handley and Grofman, supra note 58 at 78.
\item Ibid at 80, though this has not held true for all elections.
\end{enumerate}
\end{footnotesize}
seats for these groups rotates from election to election at the delimitation commission’s choosing. This authority means the commissions could potentially oust nearly any sitting MP that is not a member of an SC or ST by declaring his or her seat reserved in the next election. Delimitation commissions appear to have misused this power by directing partisan animus toward particular MPs.\(^\text{152}\)

Appointment and tenure rules form a key pressure point that permits or hinders partisan interference. By looking at these rules, courts can gain insight into whether the EMB is likely to act independently and impartially. The more likely that the appointment and tenure rules are to guarantee independence and impartiality, then the greater the deference that will be appropriate for courts to show.

b) Absence of Constraints

Second, for commissions to be accorded deference by courts, they should face an absence of constraints imposed by the legislature and executive.\(^\text{153}\) Impartial rules around membership in a redistricting commission or the appointment and removal process for a chief electoral officer are insufficient guarantees on their own if the EMB is restricted from reaching the outcomes it considers preferable. EMBs must have the freedom to effectively regulate political activity in order to be deserving of deference. Even if a commission has only Dworkin’s weak form of

\(^{152}\) Id.

\(^{153}\) Kelly, supra note 5 at 28-29 finds that the authorizing legislation of the EMB can be used to stifle its independence. He argues that Parliament’s control over the legislation controlling elections decreases the independence of the Australian Electoral Commission. See the dissent of Cory J in Reference re Provincial Electoral Boundaries (Saskatchewan), supra note 99, which reflects a similar assumption.
discretion, it needs to have sufficient freedom to reach independent and impartial judgments.\textsuperscript{154}

Constraints are often imposed, for example, on redistricting commissions through restrictions on the criteria that they may consider. Enabling legislation for commissions will necessarily have to establish the principles by which redistricting should be conducted. Traditional districting principles include representation by population, recognition of community of interest such as those formed by media or transportation patterns, fair treatment of minority voters, geographic compactness, and the history of an electoral district.\textsuperscript{155} While the specific detail of these principals and their interpretation obviously can have wide-ranging political and constitutional outcomes, collectively they are relatively non-controversial as the general factors that must be balanced in producing a fair electoral map. Where legislation is amended to artificially restrict the ability of non-partisan

\begin{footnotesize}
\textsuperscript{154} Cain, \textit{supra} note 24 at 1818 positions redistricting commissions on a “theoretical continuum of increasing separation from a legislative conflict of interest” culminating in independent citizen commissions as the most independent.

\textsuperscript{155} Gardner, \textit{supra} note 22 at 400 lists the traditional districting principles in American jurisprudence. See \textit{LULAC}, \textit{supra} note 22 at 433. Gardner makes the argument that state and federal redistricting should be conducted on different principles: 413-18, especially at 414-15. Nicholas Stephanopoulos argues for a different set of redistricting criteria tied to “organic geographic communities”: “Territorial Community”, \textit{supra} note 42. The American jurisprudence requires strict adherence to voter equality. The very independent California citizens redistricting commission had to implement by virtue of \textsection 2 of Article XXI of the California Constitution various neutral criteria including equal population, compliance with the \textit{Voting Rights Act}, contiguity, geographic integrity, compactness, and other administrative boundaries: see Cain, \textit{supra} note 24 at 1826. Australia requires for federal redistributions that constituencies be between 96.5 per cent and 103.5 per cent of voter equality (a 3.5 per cent permitted deviation in one direction or 7 per cent between the least and most populous possible districts). The other criteria are communities of interest, means of communication and travel, physical features and area, and existing boundaries: \textit{Commonwealth Electoral Act} ss 66(3) (b) and 73(4)(b); Orr, \textit{Law of Politics}, \textit{supra} note 5 at 40. Orr also argues at 42 that commissions in actuality take the likely partisan outcome into account when making changes to electoral maps, even though the legislation does not list this as relevant. He does not allege that the commissions are partisan, but that they seek to avoid harming one party over another in a two-party system. In Canada, the federal EBRA, \textit{supra} note 134, s 15 requires consideration of community of interest or community of identity, the historical pattern of a riding, and manageable geographic size in addition to representation by population, though it does permit a massive 25 per cent deviation from voter equality, or more in “extraordinary” circumstances.
\end{footnotesize}
commissioners to balance competing factors, then this may be indicative of constraints that are in actuality attempts to achieve desired partisan outcomes.¹⁵⁶

The Australian High Court case of *McGinty v Western Australia*¹⁵⁷ provides a good example of legislated constraints unduly hampering the work of an EMB.¹⁵⁸ In the lower house of the state, the *Electoral Distribution Act 1947* set a map of 57 districts. Controversially, it reserved a set number of seats for urban and rural regions. There were 34 reserved for the Metropolitan area and 23 for the rest of the state. There was a 291 per cent difference in the smallest and largest district populations in the lower house. The Legislative Council, or upper house, was divided into six regions. There were three regions in the Metropolitan area, one in the South West region, and an Agricultural region and a Mining/Pastoral region. There was a 376 per cent deviation between the smallest and largest districts in the Legislative Council.

The pre-determined division of the state into urban and rural regions limited the ability of the non-partisan commission to exercise its discretion, as it dictated what interests were to be given preference and led to the under-representation of urban areas that had much larger populations than rural ones.¹⁵⁹ In upholding the map, the Australian High Court majority ignored that the division of the state into Metropolitan and non-Metropolitan for representational purposes was arbitrary.

¹⁵⁶ Graeme Orr points out that manipulation of redistricting criteria for partisan gain occurs in Australia. Orr, *Law of Politics*, supra note 5 at 39-40: “…the framework within which discretion is to be exercised, particularly in the drawing of boundaries, is always subject to partisan legislative manipulation.”

¹⁵⁷ (1996) 186 CLR 140.

¹⁵⁸ Though he does not cite the case, Orr, *Law of Politics*, supra note 5 highlights at 40 that the differential treatment of urban and rural areas is the “most obvious” case of partisan manipulation of districting criteria. Rural over-representation means, “Parliaments dominated by parties with strong rural or regional bases thereby set the meta-maps within which malapportionment was guaranteed.”

¹⁵⁹ Orr, *ibid.*
and offered no flexibility to account for changes in the relative populations of each region. The legislation was an attempt to prevent the commission from changing the balance between rural and urban voters, which if moved closer to representation by population would have harmed various incumbents dependent upon rural over-representation for their continued election. Such legislation introduces constraints that should lead courts to doubt whether the redistricting commission is able to truly act independently.

Political majorities will be tempted to circumscribe the discretion of EMBs to prevent the effective regulation of the democratic process. If undue constraints are imposed on an EMB, such that it cannot take decisions that run counter to the interests of elected representatives, then this indicates courts should engage in intense review. Vigilance from courts will be appropriate if the institutional indicia point toward the presence of undue constraints.

c) Ultimate Authority

Third, EMBs must have “ultimate authority” to be fully independent and impartial. Ultimate authority means EMBs are legally able to implement their decisions, rather than simply making proposals that legislatures and executives may disregard if they so wish. Political actors will have tremendous leverage over EMBs that lack ultimate authority. If EMBs must seek approval from elected representatives, then these institutions may incorporate partisan considerations.

160 McGinty, supra note 157 per Toohey J in dissent at para 75.
into their decision-making to gain agreement from the political actors that supervise them.

Ultimate authority is especially relevant for redistricting commissions, though it is also germane to election commissions. Redistricting commissions can take many forms, even ignoring the partisan implications of commission membership. One form is the advisory commission. Maine and Vermont have adopted commissions that provide advice to the legislature on electoral maps. There may be significant pressure on the legislature to adopt a map proposed by an advisory commission, though we should worry that the advice will be disregarded when push comes to shove due to the partisan consequences of a map. Advisory commissions may also self-censor their recommendations to make them more palatable to elected representatives as they know that the ultimate decision rests with the legislature. Where elected representatives are free to ignore commission proposals, there is a risk that the commission’s map will be sidelined.

Canadian federal boundary commissions have ultimate authority to impose the maps that they produce, without any discretion remaining in the hands of cabinet or Parliament. MPs have only the right to file an objection to the proposed

---

161 Cain, supra note 24 at 1818 distinguishes independence as separation from conflicts of interest from independence as “the autonomous power to enact redistricting plans without the approval of the legislature”.

162 Mackenzie, supra note 34 at 209-15; Stephanopoulos, “Electoral Exceptionalism”, supra note 31 at 778-784; Rave, supra note 23 at 729-35.


164 After the commissions respond to objections filed by MPs, the EBRA, supra note 134, s 24 requires the Chief Electoral to produce a draft representation order outlining the new boundaries as decided on by the commissions and file it with the Minister. Pursuant to s 25, the Governor in Council “shall” declare the representation order to be in force within 5 days. The absence of discretion to approve the maps or not on the executive’s part is particularly relevant whenever MPs attempt to influence a commission, as in the recent Saskatchewan dispute surrounding the 2012 redistribution.
maps and to receive a response from the commission; they have no formal power to alter the boundaries. This procedural innovation bypasses the partisan motivations of Parliament and guarantees significant independence for the commissions. Provincial commissions in Canada that lack ultimate authority to impose boundary lines have provided “an open invitation to legislatures to destroy the independence of the commission.” In the history of Canadian redistricting, this invitation has at times been accepted by legislatures seeking to impose partisan maps. The presence of ultimate authority should be an indicator that deference is warranted.

One component of ultimate authority is that the EMB must be permanent, or at least convened at regular intervals, so partisan decision-making does not factor into the choice to convene the EMB. The trend toward permanent electoral commissions, rather than bodies constituted only at election time, adds to the authority of independent election administrators. Permanent electoral commissions have the time to adequately plan for the large-scale logistical task that is administering an election and are more likely to have the capacity to hold political

---

165 MPs can and often do present during the public consultations, and then may work through the Standing Committee on Procedure and House Affairs to file their objections. The EBRA, s 19 sets out the procedures for public hearings, and s 19 (1.1) clarifies that MPs can present at these hearings in addition to their participation in the meetings conducted by the Standing Committee. Section 20 (1) obliges the commissions to present their reports to the House of Commons and section 21 (1) ensures the report will be referred to the Standing Committee.

166 Courtney, Commissioned Ridings, supra note 11 at 116; Orr, Law of Politics, supra note 5 at 36 outlines the absence of political influence on its commissions.


168 Courtney, Commissioned Ridings, id at 116-117. Courtney concludes that legislatures have tended accepted the advisory opinions of commissions, but acknowledges that there are examples of partisan behaviour, such as Ontario in 1965, Newfoundland in 1993 and the Northwest Territories in 1998.

169 Lopez-Pintor, supra note 1 at 3-4.
actors to account. Governments which possess the discretion to decide whether to constitute a commission at election time may choose not to do so, so as to avoid the scrutiny of their actions that comes from creating an oversight body.

Political majorities may also undermine redistricting commissions in a similar fashion. Moving the power to establish and implement an electoral map outside of the legislature eliminates much partisan involvement, but the gains may be illusory if elected representatives retain the discretion to decide whether redistricting should occur at all. To get around this problem, redistricting and redistributions of electoral districts tend to be triggered periodically, such as through the decennial census in the United States and Canada\textsuperscript{170} or every seven years as in Australia.\textsuperscript{171} Australia also relies on an objective trigger based on population, where redistributions happen more frequently than the allotted seven years if districts become malapportioned beyond a set threshold.\textsuperscript{172}

Because of their plenary legislative powers, legislatures retain the authority to pass laws that delay the implementation of a map or to repeal the statute that creates a redistricting commission in the first place. Even the ultimate authority to implement electoral boundaries held by commissions is qualified to this extent. The Canadian Liberal government appears to have delayed the redistribution occurring

\textsuperscript{170} For Canada, see s 51 (1.1) of the Constitution Act, 1867 30 & 31 Victoria, c 3 (UK); for the United States, see US Constitution Art I, s 2, cl 3.

\textsuperscript{171} Courtney, Commissioned Ridings, supra note 11 at 69; Juriansz and Opeskin, supra note 27 at 564-65.

\textsuperscript{172} Courtney, ibid. The Australian Commonwealth government previously had the discretionary power to initiate redistributions, but for the most part no longer does. Changes in the size of Parliament can also trigger redistributions, leaving some discretion in the hands of the executive and legislature: Juriansz and Opeskin, id at 562-564.
after the 1991 Census for partisan reasons. In order to reconcile this plenary power with its potential use for self-dealing, courts may need to scrutinize legislatively imposed delays. I would argue that delays of this sort should be interpreted as constitutionally suspect in their own right, but courts should also take them as possible evidence of a government’s attempt at partisan interference with an EMB.

The art of strategic delay of the work of an EMB for partisan gain has reached an extreme in the delimitation of seats in India’s lower house, the Lok Sabha. The number of seats to be assigned each state in the Lok Sabha and the boundaries of those districts are to be reassessed after each national census, according to Article 82 of the Constitution. Political majorities have frequently amended Article 82, however, to ensure favourable partisan outcomes by delaying the reassessment of electoral boundaries. The 42nd Amendment to the Constitution of India cancelled the delimitations of 1981 and 1991. As a result, constituencies based on the 1971 Census lasted until the 2001 Census. There was hope of a full redistribution of seats across states and redistricting within states, but the 84th Amendment to the

---

173 Courtney, Commissioned Ridings, supra note 11 at 131-32. In the House of Commons, Canadian Prime Minister Stephen Harper accused the previous government of partisanship on this front: “Some years ago the Liberals tried to bring in partisan legislation to overturn boundary commission recommendations. We would never do that.” Steven Chase, “Tories Fight Riding Changes that Would Aid NDP Prairie Revival”, The Globe and Mail, February 6, 2013. The United Kingdom coalition government lost a vote in 2013 that meant the boundary review that would have reduced the size of the House of Commons from 650 to 600 was interrupted, perhaps indefinitely.

174 Article 82 also, however, provides ample room for partisanship to infiltrate delimitation through Parliamentary intervention. It states that delimitation must be carried out “by such authority and in such manner as Parliament may by law determine”. As Alistair McMillan concludes, “Leaving the process of delimitation to the discretion of politicians has opened it to the charge of political manipulation; and the history of delimitation shows a continuing conflict between the desire to present the process as open and fair, and the temptation for politicians to control the process.” Delimitation in India”, supra note 58 at 77.

175 Parliament is able to amend the Constitution with a simple 2/3 vote of each of the Houses and did so in order to indefinitely suspend delimitation: Constitution of India, Article 368.
Constitution in 2001 delayed a full delimitation until after 2026, or in practice the 2031 Census. The delimitation after the 2001 Census only reapportioned seats within states, but did not adjust each state’s representation. No delimitation at all occurred for over 30 years, with a complete one delayed for over 50 years due to the exercise of Parliamentary discretion.

The inevitable result has been massive discrepancies in riding populations within and across Indian states. The government’s rationale is that delimitation has been delayed to prevent rewarding those states that have failed at population control with more seats in the Lok Sabha. This argument is clearly a disingenuous attempt to cover partisan considerations that drove the delays in redistributing seats.176 Delaying the readjustment of seats benefitted the two parties most powerful in the central government, Congress and the BJP, at the expense of regional parties that were likely to gain seats redistributed to the fastest growing states. For example, Tamil Nadu was heavily over-represented, but constituted an important ally in the governing National Democratic Alliance coalition in the early 2000s so there was no incentive to remove seats from that state at the time of the scheduled redistribution.177 I agree with McMillan that punishing failed policy outcomes in a state is not an acceptable justification in a democracy for allocating seats178 and amounts to a “constitutional fraud”.179 By preventing the redistribution of seats through its powers of constitutional amendment, the two major parties in

176 McMillan, “Delimitation in India”, supra note 58 at 87: “The connection between the implementation of family planning strategy and the allocation of seats to the National Parliament is far too tenuous to be taken other than as a smokescreen for more direct political considerations.”
177 Ibid at 89-90.
178 Id.
179 Id at 90.
the Lok Sabha removed any authority from the delimitation commission up until the 2001 Census, and then severely restricted how seats could be reallocated.

Election commissions can also possess ultimate authority. As discussed in detail in Chapter 3, the Election Commission of India has significant rule making power unless the bicameral legislature chooses deliberately to occupy the field. To take another example, the Canada Elections Act does not delegate power to cabinet to issue regulations that interpret the Act. This lack of executive authority led to the conflict between Prime Minister Harper and Elections Canada on veiled voters. The Prime Minister wanted a particular interpretation of the existing legislation to require women wearing a veil to remove it for their identifications to be confirmed prior to voting. The Chief Electoral Officer was able to reject this politically charged interpretation, because Elections Canada alone had the power to apply the Act. Regulatory power vested in cabinet, as is the case for many other kinds of legislation, would have led to a different balance of power between elected representatives and the Chief Electoral Officer, and likely a different outcome.

Courts should look to the funding for the independent agency as one consideration here, as the level of financial independence of the EMB is a factor in assessing whether the EMB can actually act on the authority that it possesses. If governments control the purse strings of agencies too closely, or appear to withhold or reduce funding when the agency acts in ways counter to the partisan interests of a government, then independence and possibly impartiality will be minimized.181

181 Kelly, supra note 5 at 44-49. Kelly argues that along with Parliament’s power over election legislation, its control of the purse strings limits the Electoral Commission’s independence. Juriansz and Opeskin,
Bruce Cain argues that legislative interference through funding mechanisms undermined the independence of the Arizona and California experiments with redistricting commissions.\(^{182}\)

The analogy here would be to judicial independence. Elected representatives are accountable for spending, including the money allotted to the judiciary. Too much oversight of spending or budgets by Parliament or Congress, however, diminishes judicial independence.\(^{183}\) While courts should remain loathe to interfere in the budgetary decisions of legislatures and executives, funding levels for an EMB can be indicative of partisan undermining of independence and impartiality. The lack of stable, long-term funding for the Kenyan Electoral Commission was one of the factors cited by an independent review for the Commission’s failure to prevent fraud in the 2007 election.\(^{184}\) An attempt to de-fund an EMB so that it cannot effectively regulate partisan political activity is one potential maneuver available to elected representatives in majoritarian democracies.

d) Internal Procedures

Fourth, courts should consider the internal procedures followed by the institution in reaching decisions. One way of gaining some assurance that the EMB is acting as a proper super-agent worthy of being accorded deference, and not as a partisan actor generating super-agency costs, is to look to the internal procedures of

\(\text{supra note 27 at 560 also argue that the government’s control over the Commission’s budget means its independence is constrained to some extent. See also Wall et al, supra note 1 at 9.}\)

\(\text{\(^{183}\) Cain, supra note 24 at 1835. Cain implies that commissions must be funded on an ongoing basis, not just at the time of the decennial redistricting.}\)

\(\text{\(^{184}\) See for example Reference re Remuneration of Judges, [1997] 3 SCR 3.}\)

the EMB. Courtney does not include such a criteria in his test, yet it is necessary to
gauge the fairness of the workings of the EMB.\textsuperscript{185} Handing authority to administer
elections to an arms-length body is not a full guarantee of independence and
impartiality, even if the appointment process appears fair, there is an absence of
constraints, and the EMB possesses ultimate authority. An EMB that is captured by
partisans of one political party may use the institution’s powers to pursue an agenda
that helps one set of elected representatives. Internal procedures that ensure fair
treatment of regulated entities are an indicator that the EMB is discharging its
duties in a public minded fashion. If there are sufficient internal checks and
balances, then there is less of a likelihood the EMB’s authority will be used for
partisan gain. If there are few internal checks and balances, then the possibility that
the EMB can be used for partisan purposes will be augmented.

Courts should investigate along a number of lines to determine whether the
internal procedures of the EMB are deserving of deference. For example, they
should ask whether there was consultation with the public? Are there internal
procedures before an individual in the agency can prosecute a political party for
election law violations? Does a single individual possess discretion on whether to
accept a party’s financial statements or are there further layers to ensure that rules
are being applied equally to all? The more rigorous the internal procedures, the
more likely it is that the EMB will act in an independent and impartial manner. This
factor accounts for the possibility that the EMB itself or a rogue member of an EMB
could adopt a partisan agenda and use the powers of the institution to further it.

\textsuperscript{185} Rave, \textit{supra} note 23 at 732-33 also suggests the importance of internal procedural fairness.
Rigorous procedures are not a full guarantee of impartiality, but they are likely to be an effective indicator for courts assessing whether deference is owed.

The internal procedures necessary to suggest independence and impartiality will vary according to the function in which the EMB engages. Courts should expect a degree of procedural fairness sufficient to ensure non-partisanship in light of the specific activity of the EMB. The same set of procedures will not be necessary for each EMB or all roles carried out by these institutions, but will depend on the particular activity they are undertaking.\(^\text{186}\)

Fair internal procedures are especially relevant where election commissions pursue violations of election laws, which is one of their key functions. Fair procedures ensure the assessment by commissions of possible violations of election law is insulated from partisanship or arbitrary action. Where there are potential violations of election law, election commissions may serve an investigatory, prosecutorial, and even a quasi-judicial function. The culprits may be subject to heavy fines, disqualification from office, or even jail time. These serious

\(^{186}\) Administrative law has at times recognized that the level of deference granted by a court should be conditioned to the fairness of the procedures applied by the institution. A notable example is *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15. In *Begum*, the United Kingdom House of Lords rejected a student’s claim that her school violated her religious rights under the *Human Rights Act* by refusing to allow her to wear Islamic religious clothing that contravened its policy. Three Lords found there was no violation of her religious rights and the other two each found the restrictions on her religious freedom to be justified. Part of the logic of the Lords was that the lengthy, thorough, and religiously sensitive procedures followed by the school were sufficient to discharge its obligations, given its role as an educational institution (eg at para 33). Lord Bingham held that it would “irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff, and governors to overrule their judgment on a matter as sensitive as this” (at para 34). Ran Hirschl points out that the fairness of the procedures was “merely helpful” rather than determinative to the Lords: *Constitutional Theocracy* (Cambridge: Harvard University Press, 2010) at 179. It seems unlikely, however, that they would have reached the same decision in the absence of the school's commitment to procedural fairness. See generally David Dyzenhaus, “Proportionality and Deference in a Culture of Justification” (Paper delivered at the Conference on Proportionality, University of Western Ontario, 2010) [unpublished]; Thomas Poole, “Of Headscarves and Heresies: The Denbigh High School Case and Public Authority Decision-Making Under the *Human Rights Act*” [2005] PL 685; and Hirschl at 171-173.
consequences imply that the procedures followed in investigating, prosecuting, and
deciding on the merits of a violation of election laws must include a high degree of
fairness for deference to be warranted. The closer the commission veers toward
exercising power similar to those of the police, criminal prosecutors or judges, the
greater the need for independence and impartiality.

The model used by Elections Canada shows some of the steps necessary to
ensure independence and impartiality through fair internal procedures. Elections
Canada separates its investigation and prosecutorial function from its general
oversight of elections. While the CEO has charge generally, the Commissioner of
Elections Canada has authority for enforcing the Canada Elections Act.187 The CEO
rather than Parliament appoints the Commissioner, thereby adding a layer between
the enforcement officer and the political actors that are the subjects of his powers.
The Commissioner does not inform the CEO of the specifics of his investigations and
may initiate enforcement investigations as needed.188 The Commissioner retains his
own legal counsel and set of investigators. Most importantly, the Commissioner
provides a buffer against partisan-minded prosecutions. The Director of Public
Prosecutions (DPP) pursues enforcement actions that may be politically sensitive,
but can only proceed if the Commissioner has consented.189

When administering elections, election commissions have significant
discretion on matters that can be outcome determinative, such as where to place

---

187 Davidson, supra note 4 at 538.
188 Ibid.
189 Id at 539. The Fair Elections Act, supra note 65, s 118, would alter this arrangement by removing the
Commissioner from Elections Canada and re-establishing the office under the direction of the DPP. This
opens up some potential for partisan interference as the DPP, while formally independent, reports to the
Attorney General who sits in cabinet.
polling stations, how or if to proceed with an election if irregularities have been reported, scrutiny of the identification of electors, or the administration of overseas ballots. Overarching considerations here will be whether partisans of all stripes were treated equally by the EMB and how decisions were made. These activities are likely to require that advance notice of the rules to be followed or notice of commission decisions, for example, be given to all political parties rather than selectively to some partisans and not others. The decision-making functions of the commission should also be structured so as to provide sufficient checks and balances that partisan or arbitrary decisions will be minimized. This will be particularly relevant in multi-member EMBs.

Redistricting commissions have a narrower task that is subject to more predictable measures of independence and impartiality than election commissions with their broad and variable mandates. Fair internal procedures should minimize the chances that the commission will target a particular party or candidate for mistreatment. Public hearings to receive local input on the impact of proposed boundaries, and a requirement to consider that input, will be relevant to ensure that the interests of a variety of groups have been considered. This has the dual benefit of incorporating citizen contributions and decreasing the likelihood that any one faction, such as partisans, will be able to hold sway. The decision-making rules of the redistricting commission will often be tied to its appointment and structure. A multi-member commission will require fair decision-making rules that do not allow one set of partisan appointees to capture the process. Most redistricting commissions have lengthy periods for notice, public input, and revision of maps. It is
the rules for decision-making, especially if there are partisan appointees, which will often be the most relevant. Courts should account for these considerations in determining how much deference to accord.

An additional form of super-agency costs that may occur is when EMBs cease to act in the public interest, but rather than behaving as partisans, instead follow the personal interests of the officials of the EMB itself. Following a private, personal agenda generates super-agency costs just as partisanship does, because it steers the EMB away from its public minded role of ensuring a fair democratic process. This form of super-agency costs has been relevant in India. The ECI has been lauded as an important institution in consolidating Indian democracy, but its “internal decision-making procedures are...often opaque.” After a period of acquiescence to the government of the day, the ECI entered a new period of activism under Chief Election Commissioner T.N. Seshan. While Seshan admirably focused on rooting out corrupt electoral practices and built trust in democracy among voters, his exercise of the powers of the ECI at times stepped beyond his sphere of authority. Seshan guided the ECI to take actions for which there was no legal basis, but to which he was personally committed. Numerous court cases resulted and in this period the Commission was “arguably exceeding its proper constitutional role by asserting new executive powers and attempting to impose sanctions without adequate legal authority.”

---

193 Ibid.
Part of this overstepping of legal authority involved Seshan’s “quixotic”\textsuperscript{194} quest to require voter identification (ID) \textsuperscript{195} and later attempts by the Commission to put in place electronic voting machines without the authority to do so.\textsuperscript{196} As well motivated as the voter ID scheme may have been to prevent fraud, it would have had deleterious effects on the poor and minority Muslim voters.\textsuperscript{197} Seshan went so far as to refuse to call elections in certain states until his voter ID plan came to fruition, though the Supreme Court intervened to stop him.\textsuperscript{198} These incidents highlight that even if not behaving in a partisan fashion, EMBs can generate super-agency costs due to the personal beliefs of administrators. Seshan own personal ambitions, including a desire to run for political office that appears to have coloured his actions while in office, are discussed in more detail in Chapter 3.

e) EMB Behaviour

Fifth, there may be instances where EMBs display the formal indicators of independence and impartiality under the four institutional criteria, but use their authority to act as partisans nonetheless. While the four institutional factors discussed to this point are likely to be a reliable guide for courts in most instances, there will be occasions where despite indicia of independence and impartiality an EMB operates in a partisan fashion. There is therefore the need for a fifth residual

\begin{itemize}
  \item \textsuperscript{194} Id at 191.
  \item \textsuperscript{195} Roy, supra note 7 at 184.
  \item \textsuperscript{196} AC Jose v Sivan Pillai and Others, 1984 SCR (3) 74 found that there was no constitutional authority under Articles 324-29 and no statutory authority for the ECI to implement electronic voting machines. Murtaza Fazl J found that allowing the Electoral Commission to act without relevant authority would turn it into “an absolute despot” at 85, which provides a glimpse into how Seshan was viewed at that time. See Roy, \textit{ibid}.
  \item \textsuperscript{197} Roy, id.
  \item \textsuperscript{198} McMillan, “Administration of Electoral Politics”, \textit{supra} note 7 at 194.
\end{itemize}
category able to catch instances of partisan activity occurring despite the institution’s formal independence and impartiality. Less deference is owed if an EMB behaves in a partisan manner.

Courts should look first to the institutional criteria for independence and impartiality, but must be aware that these standards are not absolute guarantees of how an EMB will actually perform. A fair appointment process and rules of tenure for EMB staffers, an absence of constraints, ultimate authority, and fair procedures will generally restrict partisanship, while their absence will indicate partisan activity is likely. Yet EMBs can act as partisans if so inclined on occasion despite formal guarantees of insulation from politics by deviating from internal or statutory rules or exercising its discretionary authority in a partisan manner.

If a partisan-minded EMB is limited in its ability to favour one political party because of formal guarantees of independence and impartiality, then it may simply refuse to comply with the rules that govern it. Courts should look to how the EMB has actually behaved in adhering to or straying from its own rules or those set by statute.¹⁹⁹ This also addresses the issue of what is the relevant baseline by which courts should measure whether the behaviour of the EMB is partisan. One way around this problem is for courts to focus on the extent to which the EMB deviates from the rules that it is supposed to follow. Traditional administrative law concerns about agencies acting within their statutory grant of authority are relevant here, not just because the EMB could be acting without legal legitimacy, but also because such deviations from internal or statutory procedures may indicate partisanship has

¹⁹⁹ Wall et al., supra note 1 at 223 discuss various methods of evaluating EMB performance, though with effectiveness rather than non-partisanship as the main criterion in mind.
distorted the EMB’s decision-making. Courts should be sensitive to EMBs whittling down public consultation, or shortcutting procedural safeguards designed to ensure objective prosecution and investigation of violations of electoral law, for example. Where an EMB is granted specific rules to follow by statute, but refuses to do so, this may indicate that partisan interests have captured the institution.200

Even if it adheres to the applicable rules, an EMB may also choose to behave as a partisan by using the discretion granted to it in a manner that furthers specific political interests, such as those of the governing party. Democracies that allow deviations from voter equality usually set out a specific variance range above or below the average riding size for commissions to follow in crafting electoral districts, such as plus or minus 5 per cent in the United Kingdom201 or 25 per cent in Canada.202 Redistricting commissions may use this variance range to achieve partisan goals if they are so inclined. A demographic group could be consistently placed in either over- or under-represented ridings to achieve a desired effect by a partisan commission knowledgeable about which party that set of voters is likely to support. As discussed in the section on non-partisan outsiders, there have been allegations that India’s delimitation commissions have at times deliberately over-represented the Congress Party’s likely supporters in exercising their discretion to vary constituency populations.203 As a general rule across democracies that permit population variance, rural voters have long benefitted from being placed in ridings

200 The caveat here is of course whether the statute the EMB is obliged to follow has itself been tainted by partisan self-dealing by the legislature.
201 Parliamentary Voting System and Constituencies Act 2011, supra note 20, s 11.
202 EBRA, supra note 134, s 15.
203 Alistair McMillan, “Delimitation in India” in Handley and Grofman, supra note 58 at 80.
with small populations at the expense of urban voters typically situated in more populous districts. If rural voters tend to support a particular political party, then there is room for a commission’s exercise of discretion around riding populations to have a partisan impact. A court should take an EMB’s partisan exercise of discretion as a sign that less deference is required.

The fifth criterion is intended to be a residual one. The institutional indicia will be the leading indicators of the likelihood of partisan activity. The fifth criterion covers those other instances where partisanship has tainted the activities of the EMB despite careful institutional design. Where the EMB acts as a partisan despite being granted independence and structured to be impartial, then this will count against deference being accorded by courts attuned to limiting partisan self-dealing.

***

Courts should consider these five factors in assessing how much deference to show EMBs. If an EMB is independent and impartial, then deference will be warranted. Where partisans have captured an EMB, then less deference will be owed. EMBs that do not meet the criteria for independence and impartiality will often have incentives to bend their activities to fit with the interests of the government of the day, which consequently diminishes the chance that the institution will fulfill its role of reducing partisan self-dealing. If governments are permitted to interfere with the working of EMBs, then they will have the capacity to distort the democratic process for partisan ends. When engaging in judicial oversight of the law of democracy, courts should therefore operate to prevent elected representatives from compromising the independence of EMBs. In
majoritarian democracies, courts will be the best bulwark against capture of independent bodies by government.

VI. Conclusion

This chapter has engaged with the role of electoral management bodies in the law of democracy and the consequences for judicial review. In majoritarian democracies, clashes between governments, elected representatives, and non-partisan institutions tasked with administering elections and redistricting will be inevitable. EMBs carve out authority over the democratic process from the traditional powers of the elected branches. Majoritarian constitutional structures provide few checks within the legislative process or functioning of the executive to hinder partisan behaviour around election laws. EMBs impede the ability of elected representatives to alter, interpret or evade election laws for partisan ends. As one of the few barriers preventing elected representatives from manipulating the rules governing the democratic process, EMBs are likely targets for partisan capture or attempts to limit their authority.

Recognizing the fundamental role of EMBs in a democracy has consequences for how we envision judicial review. Building on the previous chapter, I argued that courts should show little deference to elected representatives when reviewing election laws, but that EMBs are deserving of deference to the extent that they are independent and impartial. I outlined a series of indicia in order to determine whether the EMB is independent and impartial or has been captured by partisan
interests. This approach provides a baseline test to apply in assessing whether courts should engage in skeptical scrutiny of a decision of an EMB.

Super-agency costs may be generated by partisan capture of an EMB or the pursuit of other private interests. Judicial oversight is warranted to reduce super-agency costs when an EMB strays from its intended role due to partisan capture or for other private-minded purposes. The independence and impartiality test encourages judicial overruling of EMB decision-making only where it is needed. The approach proposed in this chapter circumscribes judicial oversight so that other institutions of electoral governance can engage in management of the democratic process. It is therefore responsive to concerns raised by critics of judicial oversight of the law of democracy, while still ensuring there will still be checks on partisan self-dealing as the principal-agent problem indicates there must be. Chapter 3 applies the test for independence and impartiality that I have outlined to cases involving redistricting and election commissions in order to demonstrate its utility.
Chapter 3: Calibrating Deference: Cases Studies on Redistricting Commissions and Election Commissions

I. Introduction

In this chapter I re-read a select group of cases involving judicial oversight of decisions made by electoral management bodies (EMBs), in order to flesh out my claims in the previous chapter regarding the role of EMBs, their relationship to elected representatives, and the appropriate level of deference that courts should grant. This chapter shows how the approach that I advocate to judicial oversight of EMBs can limit partisan self-dealing emerging from the principal-agent problem, while also providing limits to court involvement. The chapter demonstrates how an approach centered on evaluating independence and impartiality would play out in practice by applying the five-part test advanced in Chapter 2: 1) non-partisan outsiders; 2) absence of constraints; 3) ultimate authority; 4) internal procedures; and 5) partisan behaviour by the EMB.

I consider cases of judicial oversight of electoral maps drawn by redistricting commissions (Section II) and of election administration conducted by election commissions (Section III). I demonstrate how courts should have responded to the risk of partisan manipulation of the law of democracy. Analysis of the cases establishes that: 1) courts have frequently failed to draw a distinction between the decisions of EMBs and those of the political branches; 2) the degree of judicial scrutiny should depend upon the risk of partisan self-dealing posed by the institution whose actions are under review; 3) institutional indicia of deference provide helpful signposts in determining how intense scrutiny of an EMB should be;
and that 4) either blanket deference to or intense scrutiny of all EMBs is inappropriate given the tangible differences in their institutional design.

The section on redistricting focuses on jurisdictions where commissions set electoral boundaries and there exists judicial oversight of electoral maps. Though many jurisdictions delegate redistricting from the legislature to an EMB, judicial oversight of EMBs is limited in some democracies. I look in this section at cases from Canada and the United States. Canada is a particularly relevant jurisdiction because it has both a developed jurisprudence on redistricting and long-term use of commissions. While there is an expansive jurisprudence on redistricting in the United States, commissions are relatively new institutions in most of the states that have adopted them, so there is a less developed jurisprudence on judicial oversight of these bodies. There is relevant, recent case law concerning the redistricting commissions in Arizona and Colorado, however, which I analyze.

There are many fewer cases involving election commissions than redistricting commissions in constitutional democracies. For election commissions, I consider the recent “In and Out” scandal involving campaign finance and political party funding Canada, which led the courts to define the role of Elections Canada. I then look at the often-controversial and undoubtedly powerful Election Commission of India (ECI) through the lens of cases assessing the constitutional and statutory

---


framework for its membership and operation. The Indian cases bear directly on the
difficult balance of preventing both partisan capture as well as arbitrary action by
the EMB.

I begin with consideration of the leading Canadian cases involving
redistricting commissions.

II. Redistricting and Electoral Boundary Commissions

a) Canadian Electoral Boundary Commissions: *Carter, Raîche*, and Competing
Approaches to Deference

The leading case on electoral boundaries in Canada is *Reference re Provincial
Electoral Boundaries (Saskatchewan)* (also known as the “*Carter*” decision).³ The
most recent case and only one to emerge out of the 2004 redistribution of electoral
boundaries is *Raîche v Canada*.⁴ These two cases form bookends that demonstrate a
need for deference where the redistricting commission is independent and
impartial, but for vigorous scrutiny where these qualities are absent. *Carter* saw the
Canadian Supreme Court show a high degree of deference to a commission that had
gerrymandered a map, which the Court upheld as constitutional. *Carter* is a good
example of an instance where the presence of an EMB was insufficient to guarantee
redistricting free of gerrymandering, and hence where judicial deference to an EMB
was not warranted, because the redistricting commission was neither independent

⁴ 2004 FC 679.
nor impartial. Raîche demonstrates the danger of inappropriate judicial interference in the operations of an independent and impartial redistricting commission. The Federal Court intervened in the decision-making of an EMB, which it ultimately overturned, even though there was no evidence or allegation of compensated independence or partisanship.

In short, judicial deference to an EMB was provided improperly in Carter, but denied where it was due in Raîche. The results in Carter and Raîche should have been reversed. The commission process in Carter failed all five criteria for EMB independence and impartiality. Commission membership had a partisan dimension because of chicanery by the government of the day. Constraints were introduced to limit commission discretion in ways that favoured the government, and there was no fair consideration of alternative electoral maps in the internal procedures of the EMB because of those limitations. The commission also behaved in a partisan manner using the discretion that it had. The commission also did not retain ultimate authority, as the legislature implemented the boundaries through legislation. Given

---

5 In arguing that the map at issue in Carter was gerrymandered, Yasmin Dawood points out that the presence of a commission did not stop partisanship tainting the process: “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 UTLJ 499 at 545. “This electoral boundaries case study shows that the existence of independent boundary commissions, while helpful, does not fully eliminate partisan rule-making.” The implication is that redistricting commissions may not be the right institutional solution to prevent gerrymandering. I would argue that what matters is not simply that an EMB is present, but that it be established in such a way as to be independent and impartial. There are important differences between the Saskatchewan process at the time, for example, and the more independent federal regime.

6 This issue was raised before the Court, and Justice McLachlin explicitly concluded that the commission was not unduly constrained, Carter, supra note 3 at 194: “I am satisfied that the proposition that the Commission was unduly constrained by the governing legislation and consequently failed to take into consideration the appropriate factors must fail. The process, viewed as a whole, was fair…. The fact that the legislature was involved in the readjustment does not in itself render the process arbitrary or unfair, in my view.”

that all of these factors point away from independence and impartiality, deference was not warranted. In Raîche, the independence and impartiality of the federal electoral boundary commission was beyond reproach. Federal commissions have ultimate authority to impose a map without Parliamentary consent, apply neutral districting criteria, and must follow carefully delineated procedures including extensive public consultation and a rigid timeline. There was no evidence of partisan interference with the commission in Raîche, on any of the measures, and the court should have been more deferential. Robust oversight in Carter but deference in Raîche to the commission would have been more fitting with the legitimate exercise of judicial power. Judicial intervention is appropriate to combat self-dealing, but in the absence of partisanship, a court should not substitute its judgment for that of an EMB. I now consider Carter in greater detail before turning to Raîche.

i) Carter: Inappropriate Deference to a Partisan-Tainted EMB

At issue in Carter was the commission-produced, provincial electoral map in Saskatchewan that was the result of partisan interference by the government. Carter was the first (and remains the only) redistricting case heard by the Supreme Court of Canada after the introduction of the Charter’s guarantee of the right to vote in s. 3. It is therefore the only case considering redistricting by commission. The majority in Carter unfortunately failed to take into account the partisan capture by the government of the EMB and missed the overwhelming evidence of partisan

gerrymandering in the map under challenge.\(^8\) Scholarship in recent years\(^9\) as well as around the time of the decision\(^10\) identified the map as the product of gerrymandering, though these accounts have not focused directly on the capture of the commission.

The provincial government of the Conservative Party’s Ross Devine in Saskatchewan was unpopular and facing likely defeat in the 1989 election.\(^11\) The government sought to over-represent rural voters and under-represent urban voters in the new electoral map, because Conservatives benefitted disproportionately from support in rural areas while their competitors were


favoured in urban ones. To achieve this goal, the Devine government passed new legislation that tainted the previously non-partisan, commission process. The legislation eliminated the independent body that was already in operation and replaced it with a new commission. The commission dutifully produced an electoral map that dramatically over-represented rural voters at the expense of urban ones. It did so by deviating significantly from representation by population in establishing the provincial electoral districts.

It was to the new, partisan-tainted commission that the Supreme Court inappropriately showed deference. The majority of the Court upheld the electoral map as constitutional under the right to vote guaranteed by s. 3 of the Charter. The majority held that s. 3 guarantees a right to “effective representation”, which permits significant deviations from voter equality, rather than one person, one vote. The commission’s exercise of its discretion to deviate from representation by population was therefore constitutional for ensuring the effective representation of rural dwellers. The majority established the broad parameter that voter equality is only one factor among many to be taken into account in judicial oversight of

---

12 Electoral Boundaries Commission Act, SS 1986-87-88, c E-6.1. The Saskatchewan Court of Appeal had found the Act to be unconstitutional for requiring deviations from voter equality. The province had introduced a non-partisan independent Electoral Boundaries Commission as a response to the “outrageous gerrymander” committed prior to the 1971 election: Mark Carter, ibid at 320, citing Pitsula and Rasmussen, supra note 10 at 254-55.

13 Carter, supra note 3. To justify its conclusion, the majority in Carter relied on constitutional history, the intent of the drafters of the Charter, the need to represent communities and not just individuals, and the practical challenges of drawing boundaries given Canadian geography and settlement patterns (at 184-188). In its view, this was consistent with the British and Canadian history of variable riding populations, and it rejected what it appeared to consider the alien imposition of the American inspired drive for one person, one vote (at 186-187). The decision can be read as hinting that some outer limit of deviations from voter equality would be impermissible, but given the massive deviations in Carter, it is not clear what meaningful standard the Court was envisioning.
redistricting. This rule provided expansive scope for the commission to act in a partisan fashion by manipulating district population numbers.

Applying the five-part test for independence and impartiality in order to determine how much deference was owed, the Court should have seen the new redistricting commission as failing the criteria of non-partisan outsiders, ultimate authority, and fair internal procedures. The new commission was staffed by the partisan chief electoral officer, rather than the non-partisan clerk of the Legislature, as had been the case under the earlier framework. Legislation was required to implement the map, so ultimate authority was not in the commission’s hands. There were no procedural guarantees that dissenting views had to be taken into account. The creation of a new commission and changes to the appointment process, the need for legislative approval of the map, and the absence of procedural fairness should have pointed the Supreme Court in a skeptical direction of inquiry. All suggest the Court was mistaken in granting deference to the commission.

Even more important factors in the conclusion that little deference was owed, however, were the introduction of undue constraints on the commission by the government and the partisan behaviour of the EMB in the exercise of its discretion. The government legislated constraints on the decision-making of the commission, moving beyond neutral districting criteria to do so, in order to achieve certain pre-selected outcomes that favoured their rural supporters. While the appointment process indicates partisan behaviour by the commissioners was likely, these constraints would have prevented the commission from acting independently

---

14 The other two members of the Commission were not partisan appointees.
even if it was inclined to do so. In the bulk of the province,\textsuperscript{15} the legislation mandated that there be 29 urban ridings and 35 rural ones, though Saskatchewan had never before preemptively divided its constituencies into these two categories and determined how many ridings should fall into each one.\textsuperscript{16} The effect of these parameters was to require a number of rural ridings in excess of what the rural population warranted on a representation by population basis, thereby diluting the urban vote.\textsuperscript{17} The legislation also increased the acceptable deviations from voter parity from 15 per cent under the previous legislation to 25 per cent, resulting in the further over-representation of rural ridings.\textsuperscript{18} The commission acted in a partisan manner by hitting the extremes of this permitted 25 per cent range more than was necessary, with the result of further diminishing urban voting power. Taken together, these deviations from representation by population created by the legislative framework for redistricting, and applied to their maximum effect by the commission, aided the Conservative Party’s partisan interests and should have indicated to the Court that the map was the product of a less than independent and impartial process.

\textsuperscript{15} The legislation divided the map into 64 southern constituencies and 2 northern constituencies. The northern constituencies were permitted to have smaller populations than the southern ones. These deviations from voter equality were more justifiable given the sparsely populated vast geography of the province’s North.

\textsuperscript{16} Richards and Irvine, \textit{supra} note 7 at 51.

\textsuperscript{17} Urban constituencies were also obliged to track municipal boundaries, which had the practical result of further harming urban voting power: \textit{Carter, supra} note 3 at 166, 168 \textit{per} Cory J in dissent; Richards and Irvine, \textit{supra} note 7 at 51. Justice McLachlin instead viewed urban voters are not faring that badly under the map, and rejected the idea that the new commission was doing anything different than the previous commission: at 191-93.

\textsuperscript{18} For instance, with an average riding population of 100,000, the 25 per cent standard would allow ridings of 75,000 or 125,000, leading to a 50,000 person or 66 per cent difference between the smallest and largest permissible ridings.
The majority’s failure to address the partisan motivations and consequences of the legislation was egregious given the preponderance of evidence. The 1989 map introduced greater inequalities between voters than the 1981 map, and the Saskatchewan media widely concluded that the map was a partisan gerrymander. Mark Carter, the son of lawyer Roger Carter who was selected by the courts to represent the challengers to the boundaries and after whom the case is named, describes the map as “as good an example of gerrymandering as Canadian history can provide.” The gerrymander of 1989 looks even less defensible over time.

The underlying posture of the Carter majority was of deference to the redistricting commission and the map it produced. The majority’s analysis would fit squarely within the argument articulated by rights theorists that the judiciary should be reluctant to intervene in the political process. The majority’s approach also has some overlap with Waldron’s, though with the important caveat that Waldron does not discuss the role of EMBs. Waldron assumes public-minded behaviour by an accountable, representative, and deliberative legislature in his argument about the need for deference by courts. The majority in Carter made the same assumptions regarding the redistricting commission and the legislature that

---

19 There is one brief mention and dismissal of partisanship, Carter, supra note 3 at 193.
20 The map produced by the commission under these new rules was significantly lacking in comparison to the previous map from 1981 that had applied 15 per cent maximum deviations with no pre-set number of urban or rural ridings. In the interim between the 1981 map and the Devine gerrymander in 1989, population movement continued to flow into urban areas from rural ones, exacerbating the unfairness of deepening rural over-representation: Carter, ibid at 170 per Cory J in dissent.
21 Mark Carter, supra note 9 at 320.
22 Ibid.
23 For comparisons sake, the current Saskatchewan provincial legislation has no quota for rural seats and permits only a 5 per cent deviation from voter parity despite even greater absolute differences in the urban and rural populations than in 1989. Saskatchewan Constituency Boundaries Act 1993, ss 14-15, amended most recently in 2012, Chapter C-27.1 of the Statutes of Saskatchewan, 1993. The legislation divides the province into 56 southern and 2 northern constituencies.
introduced a new process and amended the legislation. The consequence of this approach is that legislatures have the permission to gerrymander by tampering with EMBs. Neither rights theorists, nor Waldron, nor the majority in *Carter*, adequately take into account some of the main implications of the principal-agent problem in the law of democracy: the need for courts to oversee partisan manipulation and guard the independence and impartiality of EMBs.

The majority in *Carter* also can be said to have adopted a modified political questions doctrine, of the type discussed in Chapter 1. It viewed the case as justiciable, but was exceptionally timid in its analysis. While the majority did not frame it in these terms, it appeared worried at the prospect of wading too deeply into the “political thicket”.24 Banning gerrymandering or requiring representation by population under s. 3 would have put the constitutionality of every electoral map in the country in jeopardy. The majority seems to have been unwilling to contemplate such wide-scale unsettling of constituency boundaries under the still nascent s. 3 of the Charter. Engaging with the concept of gerrymandering would have obliged the Court to look at partisan motivations and consequences, which would not have been an alluring prospect. The United States Supreme Court has had notorious difficulty, for example, in setting manageable standards by which to assess if a partisan gerrymander has violated constitutional norms.25

---

24 *Colgrove v Green* 328 US 549 (1946) at *per* Frankfurter J.
This judicial caution was inappropriate. It was the Court’s role to ensure a fairly functioning democratic process, but it failed to do so because of its posture of deference to an EMB that was not independent or impartial enough to justify that degree of judicial respect. Deference to EMBs is only warranted where the institution is sufficiently independent and impartial so as to avoid the partisan pathologies present in legislatures. The majority framed its analysis as an investigation into the meaning right to vote, rather than explicitly about whether deference to the EMB was appropriate. The implicit assumption running through the majority’s reasoning is that the institution tasked with the inherently political issue of redistricting should have few judicially imposed constraints.\textsuperscript{26} The Court should have focused its analysis initially on calibrating the appropriate level of deference and, in making that assessment, understood the EMB as tainted by partisanship and too close to a government seeking to entrench itself despite shifting voter preferences. The suspension of the process, alteration of the membership of the commission, introduction of new constraints, and partisan decision-making of the commission served as indicators that little if any deference to the EMB was justified.

The closest the Court came to engaging with the presence of the EMB was on the issue of whether redistricting by an independent institution is required by s. 3. The concurrence of Justice Sopinka held that redistricting by independent commission is not constitutionally mandated,\textsuperscript{27} even if it is “preferable”.\textsuperscript{28} The lack

\textsuperscript{26} The Court’s misguided interpretation of Canadian political history enables it to reach this implicit conclusion.

\textsuperscript{27} Carter, supra note 3 at 198.
of constitutionally protected independence for commissions, however, does not
diminish the courts' role in ensuring an electoral map that is free from
gerrymandering.

A searching analysis of the electoral map produced by the commission could
have led to its invalidation on the grounds that it had been gerrymandered, if the
court was willing to recognize partisan interference as barred by s. 3. Searching
review might even have led the Court to take more seriously the value of voter
equality, which as a principle limits the discretion available to the body tasked with
redistricting and, hence, may reduce opportunities for gerrymandering. The Court
should have taken a skeptical approach and then have let justice be done by
declaring the electoral map unconstitutional. Whatever the eventual outcome, the
Court should have begun its analysis of the substance of the map from a skeptical
position, because of the indications that partisan self-dealing tainted the
commission.

**ii) Raîche: Insufficient Deference to an Independent and Impartial EMB**

A useful contrast can be drawn with the most recent major Canadian
redistricting case, *Raîche*. While *Carter* was decided on constitutional grounds,
*Raîche* is an example of judicial review under administrative law of the actions of an
EMB. *Raîche* was wrongly decided in my argument because the decision reflects an

---

28 *Ibid.* See Courtney, *Commissioned Ridings*, supra note 8 at 110-111. Samuel Issacharoff argues that the
American Constitution requires independent redistricting institutions in “Gerrymandering and Political
Cartels” (2002) 116 Harv L Rev 593. Along similar lines, I would argue that independent institutions are
required to fulfill the purposes of the right to vote in Canada, though this would require greater elaboration
than I can provide here. I touch on this issue in the concluding Chapter 5 as a direction for future research.
insufficient level of deference to an independent and impartial EMB, unlike *Carter* where the Supreme Court erred in acting too deferentially toward an EMB that lacked those qualities. In *Raîche*, the reviewing court inappropriately showed a lack of deference to the deliberations of a commission that met all factors in the test for independence and impartiality. *Raîche* also demonstrates that applying the five-part test for independence and impartiality does not always result in intervention by the reviewing court. Assessing an EMB for its independence and impartiality therefore ensures the courts have a limited role where the EMB functions to enhance the democratic process, thereby reducing concerns about judicial overreach. In cases like *Raîche*, where deference was warranted, then the more limited role for courts envisioned by Waldron and rights theorists will be appropriate.

The federal electoral boundary commission for New Brunswick was established in 2002 to readjust the province's ten federal electoral districts. At issue in *Raîche* was the boundary between two neighbouring Northern districts, Miramichi and Acadie-Bathurst. Acadie-Bathurst was an 85 per cent majority francophone district because of the long-standing Acadian minority population.²⁹


Miramichi was a majority anglophone district, but with an influential francophone minority of 33 per cent. The commission’s initial map moved some francophone voters from the majority-minority district of Acadie-Bathurst to Miramichi where French-speakers were in the minority, in order to move closer to population equality.\textsuperscript{31} The provincial population quotient, or average riding population at which voter equality would be achieved, was approximately 73,000. Without this transfer between the ridings, Acadie-Bathurst would have been 14 per cent above the provincial quotient and Miramichi would have been 21 per cent below, for a total deviation of 39 per cent between the districts. The federal Electoral Boundaries Readjustment Act (EBRA) allows deviations of up to 25 per cent above or below the provincial average riding population (or more in undefined “extraordinary circumstances”).\textsuperscript{32} Although deviations of 14 and 21 per cent were within the statutorily permitted 25 per cent range, they amounted nonetheless to a large variance between neighbouring, geographically compact districts with no obvious physical dividing line such as a mountain range. The commission adopted a goal of keeping deviations within a range of 10 per cent above or below the provincial quotient in order to adhere as closely as reasonably possible to population equality.

\textsuperscript{31} The map moved the parish of Allardville and parts of the parishes of Saumarez and Bathurst from the Acadie-Bathurst riding to the adjacent Miramichi riding.
\textsuperscript{32} EBRA, RSC 1985, c E-3 at s 15. See Kent Roach, “One Person, One Vote? Canadian Constitutional Standards for Electoral Distribution and Districting” in David Small, ed, Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform, Vol 11 of the Research Reports of the Royal Commission on Electoral Reform and Party Financing (Toronto: Dundurn Press, 1991) at 55 for a critique of “extraordinary circumstances” as potentially not meeting the prescribed by law requirement under s 1 of the Charter: “…the provision for departures beyond 25 per cent of the provincial quotient in ‘extraordinary circumstances’ would be difficult to justify under section 1 of the Charter in its present undefined format…”.
which the EBRA\textsuperscript{33} establishes as the primary goal of redistricting. Moving the boundaries between the two ridings was necessary to achieve that objective.\textsuperscript{34}

A petition and presentations made on behalf of francophone voters to the boundary commission during the public consultation objected to the change. The Official Languages Commissioner and the House of Commons Standing Committee on Procedure and House Affairs, the latter acting at the behest of Acadie-Bathurst MP Yvon Godin, both recommended that the commission preserve the entire francophone presence within Acadie-Bathurst.\textsuperscript{35} The boundary commission modified its initial proposal in the direction urged by the Official Languages Commissioner and the House Committee,\textsuperscript{36} but some Acadians previously within francophone-majority Acadie-Bathurst would still have found themselves in a francophone-minority district under the new plan.

Opponents of the revised map claimed that by moving francophone voters into Miramichi, the commission violated the Acadian minority’s right to vote, failed

\textsuperscript{33} \textit{Carter} also pays lip service throughout the majority decision to the notion that voter equality is the primary criteria. The degree to which the Court in \textit{Carter} actually adhered to this principle is open to doubt given the deviations from voter parity it permitted in ruling as it did in the case.

\textsuperscript{34} This 10 per cent threshold raises the issue of whether the commission was unduly fettering its own discretion. I thank former Supreme Court Justice Michel Bastarache for this point. See \textit{Thamotharem v Canada (Minister of Citizenship and Immigration)} 2007 FCA 198 at 78, leave to appeal refused, 2007 CanLII 55338. See also \textit{Ha v Canada (Minister of Citizenship and Immigration)} 2004 FCA 49 at 70-78; \textit{Ainsley Financial Corp v Ontario (Securities Commission)} (1994) 21 OR (3d) 104 at page 110; and \textit{Maple Lodge Farms v Government of Canada} [1982] 2 SCR 2. I do not believe that the commission acted improperly in setting a lower variance target, as the legislation specifically requires it to adhere to representation by population “as close as reasonably possible”: EBRA, \textit{supra} note 32, s 15. The 10 per cent variances was a means of achieving that statutorily imposed goal that still permitted sufficient leeway to accommodate geographically large ridings and community of interest concerns.


\textsuperscript{36} It moved the parish of Saumarez and part of the parish of Allardville back to Acadie-Bathurst, but kept Bathurst and the remaining portion of Allardville in the Miramichi riding. Federal Electoral Boundary Commission for the Province of NB, \textit{ibid}. 

148
to comply with its statutory obligations under the EBRA to respect community of interest, and breached the *Official Languages Act*. The most important claim was the statutory argument regarding the EBRA, as the Court found that there was no Charter violation. The statutory claim rested on an interpretation of the EBRA that deviations from voter parity were required to respect the Acadian community of interest in Acadie-Bathurst. The claimants asserted that as long as the deviations were within the 25 per cent range set out in the statute, the commission was obliged to depart from its stated goal of no more than a 10 per cent deviation from one person one vote to ensure francophone representation. The commission had reasoned that as a general matter a 10 per cent deviation target was a fair compromise between voter equality and the other factors listed in the EBRA, especially community of interest. On the particular case of the boundary shift of Acadie-Bathurst, the commission explained that it considered the francophone minority in Miramichi to be sufficiently large that its voice would be heard and its interests represented.

Justice Shore reviewed the exercise of the commission's discretion on the administrative law standard of reasonableness, rather than the more deferential patent unreasonableness option as urged by the government. Justice Shore found

---

37 EBRA, *supra* note 32, s 15.
38 The *Official Languages Act*, RSC 1985, c 31 (4th Supp), s 41 obliges federal government institutions, including the boundary commissions, to act to enhance the vitality of French and English minority language communities.
39 The lack of racial vote dilution claims under s 3 is likely due to the fact that the boundary commissions are independent and impartial. There are effects on minority voters, but no animus, making a claim harder to justify under s 3. A claim is perhaps more easily anchored in the s 15 equality rights jurisprudence on adverse effects discrimination given the negative impact on minorities.
40 Canadian administrative law no longer recognizes two different reasonableness standards, but did at the time.
that the commission was entitled to set a target which was less than the maximum permitted in the EBRA, but that it acted unreasonably in failing to consider whether the francophone community of interest and the geographic features of the riding required greater deviation from voter equality in Acadie-Bathurst. Justice Shore concluded that the Act required consideration of the Acadian community of interest and that there was no evidence the minority would be adequately represented in the Miramichi riding. The decision put great emphasis on the fact that the representative for Miramichi was a unilingual Anglophone, while the representative for Acadie-Bathurst was a bilingual francophone. The commission's willingness to adapt its original proposals by keeping within Acadie-Bathurst some of the francophone voters slated to be moved was held to be insufficient to discharge its statutory obligation to consider community of interest.

The five factors indicative of independence and impartiality all point toward a finding that deference to the commission would have been appropriate. Justice Shore's non-deferential approach and conclusion have troubling consequences because in his inquiry into the reasonableness of the New Brunswick commission's actions, he did not factor in whether the EMB was independent and impartial. The decision failed to take into account the nature of redistricting by commission. The appointment process was impartial. There was no hint of bias against francophones by the commission and, on the contrary, two out of the three commissioners were of Acadian lineage. There was no evidence of any partisan machinations in the deliberations of the commission or in the exercise of its discretion. The commission was an impartial, independent body like the other nine commissions established to
conduct redistricting in the provinces after the 2001 Census. The New Brunswick commission had ultimate authority to decide upon an electoral map without Parliamentary interference,\(^41\) though MPs could issue reports commenting on the map as the Standing Committee did.\(^42\) The procedures followed by the commission were not contested, as there was extensive public input, public justification in a report, province-wide consultations, and a dialogue with Parliament. There were no untoward legislative constraints, as the government had not amended EBRA in the lead up to the redistribution.\(^43\) There was no evidence of partisan use of discretion or evasion of the applicable rules. None of the five factors suggests a court should entertain doubts regarding the motives of the commission. On the contrary, they all point toward deference.

The court in effect substituted its opinion on what level of deviation from voter equality was acceptable for that of the commission, as well as its opinion as to how to square representation by population with local community of interest concerns. The decision taken by the commission regarding the boundary line between Miramichi and Acadie-Bathurst balanced multiple competing factors where the EBRA provided no obvious guidance. The court should have accepted that the decision of an independent and impartial commission striking a balance between multiple factors is likely to be reasonable. Absent evidence of partisan capture of the type evident in Carter, Justice Shore should have taken a more deferential approach.

\(^{41}\) EBRA, supra note 32, s 24-25.  
\(^{42}\) Ibid, s 19-21.  
\(^{43}\) A possible criticism of the EBRA is that it permits too much discretion to commissions to balance redistricting criteria however they see fit, which leads to inconsistencies across provinces and weakened adherence to the supposed primary criterion of representation by population. But cf see Levy, supra note 29 who lauds the imprecision of the standards in the EBRA as promoting impartiality.
The commission was independent and impartial and, in fact, amended its original proposal to respond to public concerns. The court would have been better advised to leave the substantive decision on drawing boundaries to the commission, as there was no reason to believe that partisan interests had captured it.

_Carter_ and _Raîche_ highlight the need for courts to account for variations in institutional design among EMBs, so as to assess the degree of partisan influence on them. By being alive to institutional design choices, courts are subsequently able to calibrate the appropriate degree of deference. Doing so provides the prospect of checking partisan self-dealing. It also facilitates a role for courts in overseeing the democratic process only to the degree to which it is necessary. The commission in _Carter_ was a different animal than that in _Raîche_ and the level of deference owed to the EMB should have varied accordingly.

I turn now to cases involving state level redistricting commissions in the United States in Colorado and Arizona, to illustrate the comparative reach of the five-part test to jurisdictions that use tie-breaking commissions that differ in make-up from the Canadian model.

**b) Deference to Redistricting Commissions in the United States: Colorado and Arizona**

Two recent cases involving redistricting carried out in Colorado and Arizona highlight the implications of different institutional design choices regarding EMBs for how much deference is owed. If an EMB is truly independent and impartial, deference is appropriate. If it reproduces the partisan pathologies of the legislature,
then little if any deference is warranted. How should courts calibrate the proper level of deference, however, when the EMB falls somewhere between these two models? What to do, in other words, when the design and operation of the EMB suggests both non-partisan and partisan elements? This is an important scenario to consider in developing a theory of deference because many EMBs reflect in their initial design and subsequent actions both the instinct of elected representatives to maintain some control over election administration along with the desire of reformers to ensure impartiality. The Colorado and Arizona commissions possess structures and appointment processes that are less than ideal, primarily because of partisan appointments, though both operate with decision procedures that reduce partisanship below the level found in legislatures. In considering legal challenges to the actions of redistricting commissions in these states, I address how much deference is appropriate given that the EMB is less partisan than the legislature, but more partisan than a best practices model on the lines of an Australian or Canadian boundary commission.

Redistricting by commission is a relatively recent phenomenon in the United States, where state legislatures traditionally have authority to design state and federal boundaries. While redistricting commissions are being introduced in many states, they remain an exception to the rule of redistricting by the legislature, so the number of states where there has been judicial review of EMB-produced maps is relatively limited despite the massive amount of litigation in the United States on
district design. The commissions in Colorado and Arizona are two of the more lauded examples of EMB success and are therefore useful jurisdictions to consider.

State courts have a limited function when overseeing redistricting, but even within these parameters, they have leeway to adjust their level of deference. I focus on two relevant cases. In re Reapportionment of the Colorado General Assembly (2011) was an instance where the EMB should have been shown greater deference than the court chose to grant. In Arizona Minority Coalition for Fair Redistricting v Arizona Independent Redistricting Commission (2005) deference was shown to the EMB, but more intensive review would have been preferable. Both cases are helpful in determining how much deference is appropriate when an EMB is imperfectly insulated from partisanship, but has not been fully captured. The dissent in the Colorado case endorses a prototype of a test of independence that, while incomplete, has some similarities with my proposal.


45 As redistricting is primarily for the legislature, state courts in the United States are confined in their judicial review of electoral maps primarily to constitutional claims rather than reassessing the merits of the redistricting plan: Arizona Minority Coalition 2005, 211 Ariz 337, 121 P 3d 843 (App) (2005) 772 at para 17; Gaffney v Cummings 412 US 772 (1973) (SC); In re Reapportionment of the Colorado General Assembly, 828 P 2d 185, 189 (Colorado) (1992).


47 There has been subsequent litigation involving the districts at issue in Arizona Minority Coalition, supra note 45. The trial court on remand found for a second time that the maps failed to take into account the requirement to have competitive districts. The Court of Appeals overturned the trial court a second time in 2008 in Arizona Minority Coalition for Fair Redistricting v Arizona Independent Redistricting Commission, 219 Arizona 50 (2008). The litigation regarding maps established initially in 2002 continued before the Arizona Supreme Court with Arizona Minority Coalition for Fair Redistricting v Arizona Independent Redistricting Commission, 208 P 3d 676 (Supreme Court of Arizona) (2009) which was an appeal of the 2008 decision of the Court of Appeals. The final case in the saga considered deference only under administrative law principles, not constitutional ones, as there was no 14th or 15th amendment issue.
i) Redistricting in Colorado: Deference Owed to a Bi-Partisan Commission?

A redistricting commission determines state legislative districts in Colorado. The eleven-member commission adopted a plan for the state House and Senate in 2011 to reflect the changes in the 2010 Census. The commission approved the Senate plan by a 9-2 margin and the House plan by an 8-3 vote. A challenge was launched to 8 out of 35 Senate districts and 18 out of 65 House seats. The Colorado Supreme Court overturned the proposed maps in *In re Reapportionment of the Colorado General Assembly 2011.* It ruled that the commission failed to adequately take into account county and city boundaries, as it was required to by s. 47(2) of the Colorado Constitution, and failed to find a less drastic alternative to the proposed map that satisfied the hierarchy of constitutional criteria set out by the Colorado jurisprudence. While the Colorado commission was not fully impartial, the commission should have been entitled to more deference than the majority granted because of the lack of any credible accusation of a sweetheart gerrymander (where incumbents of both parties are protected), which was the main risk caused by the bi-partisan commission structure.

Redistricting must take into account the federal Constitution, followed by federal law, and then a mix of state constitutional rules, which collectively ensure “equal protection of the right to vote and the right to participate in the political

---

48 The legislature itself sets congressional districts.
49 The commission acted pursuant to its authority in s 48 (1) (a) of the state Constitution. The process included extensive public consultation.
50 *Supra* note 46.
process.”51 A series of cases in the state had clearly established the hierarchy of constitutional criteria to be met by a redistricting commission.52 From the top to the bottom of the hierarchy, the relevant criteria were equal protection under the 14th Amendment and the right of racial minorities not to have their votes abridged on the basis of race pursuant to the 15th Amendment,53 prohibitions on racial vote dilution in s. 2 of the Voting Rights Act (VRA),54 and state constitutional guarantees of population equality,55 the integrity of counties,56 the traditional districting criteria of contiguity and compactness,57 and protection for communities of interest.58 District competitiveness is notably absent from this list. The majority in In re Reapportionment 2011 held that district competitiveness is a legitimate consideration, but only if taken into account after the other criteria.59

The Colorado Supreme Court held that the commission unnecessarily split counties and the city of Colorado Springs in violation of s. 47(2) of the state Constitution. Section 47(2) protects the integrity of counties by permitting them to be split into multiple electoral districts only if required to ensure equal populations

53 The hierarchy places a priority on federal law. The Equal Protection Clause of the 14th Amendment bars states from denying “to any person within its jurisdiction the equal protection of the law”. The 15th Amendment states, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.”
54 Section 2 of the Voting Rights Act of 1965, Pub L 89-110, 79 Stat 445 codified as amended in 42 USC s 1973, which prohibits a state from imposing a “voter qualification or prerequisite…in a manner which results in a denial or abridgement of the right of any citizen…to vote on account of race or color…..”.
55 Article V, s 46 of the Colorado Constitution requires population equality with no more than 5 per cent deviation between the most and least populous district in each house.
56 Ibid, s 47(2).
57 Id, s 47(1) requires contiguous districts that are as compact as possible.
58 Id, s 47(3) requires attention to communities of interest.
59 In re Reapportionment of the Colorado General Assembly 2011, supra note 46 at 10.
among districts. A commission wanting to split counties is required to prove that there is not a less drastic alternative. The provision also instructs commissions to keep a city within a single district to the extent possible. The commission had taken into account a growing Latino population in the state when drawing districts in Aurora, which led it to split counties in setting House districts.

The commission appeared to have satisfied the hierarchy of criteria, since compliance with minority voting rights under s. 2 of the federal VRA takes precedence over the state Constitutional rules regarding county and city splits, and amendments to the electoral map that take into account an increased Latino population arguably fall under changes compelled by the VRA. However, the state court ruled that adjusting district boundaries in response to a growing Latino population were merely community of interest concerns, which has lower priority than the rules regarding county and city splits. The court would have preferred that the commission adopt an alternative map that kept counties intact while establishing Latino majority and minority-influence districts that it considered sufficient to dispose of any s. 2 objections. The dissent of Chief Justice Bender assumed a much more deferential posture to the complex balancing exercise engaged in by the commission to satisfy federal and state law in light of shifting

---

60 Ibid at page 11. The Court reached this conclusion because there was no expert evidence establishing conclusively in its opinion that another set of districts would have violated s 2 of the VRA because of the dilution of Latino voting power. There was an absence of expert evidence regarding racial bloc voting, one of the criteria for a violation of s 2, in Aurora.

61 The commission had weighed these alternative maps and concluded that s 2 of the VRA would have been violated under the map that the state Supreme Court clearly preferred. The Court disagreed and remanded the map to be redrawn by the commission.

62 The Chief Justice was joined by Justice Rice.
demographics. The dissent accused the majority of expanding its review beyond its appropriately narrow scope.63

What level of judicial deference was appropriate for the court to show toward the Colorado redistricting commission? Under the test that I propose, the commission should have been subject to scrutiny because of the risk of a sweetheart gerrymander, but was entitled to more deference than the court ultimately showed. Judicial oversight of the Colorado commission should have been more intense than it would have been had the body been independent and impartial, but less so than for a fully captured institution.

One could argue that rather than intensity of review, which I adopt here, the better approach would be to establish multiple tiers of scrutiny corresponding to independent, bi-partisan, or fully captured types of EMBs. On a tiers of scrutiny analysis, independent and impartial commissions would be entitled to deference, commissions with some partisan and some non-partisan elements would receive a middle level of review, and those that have been truly captured would receive very little. While this approach has some attraction, the experience with multiple tiers of scrutiny in constitutional law reveals difficulties that should give us pause in replicating in here.64 It is preferable, in my argument, to focus on intensity of review.

63 The dissent reached this conclusion “[i]n light of the deference we are compelled to give to the commission” at 1. Chief Justice Bender cited a decision regarding an earlier Colorado map as circumscribing the court’s role, in comparison to the approach adopted by the majority in the 2011 case: “Although we might make different choices were we in the Commission’s place, we should not substitute our judgment for the Commission’s unless we are convinced the Commission departed from the constitutional criteria.” In Re Reapportionment 2011 at 2, quoting In re Reapportionment 1982, supra note 46 at 197.
64 See, for example, Dunsmuir v New Brunswick 2008 SCC 9 (which rejects three tiers as too confusing and adopts a two tier approach of reasonableness or correctness) and the Canadian debate regarding administrative law standards of review. Paul Daly, “The Unfortunate Triumph of Form over Substance in Canadian Administrative Law” (2012) 50(2) Osgoode Hall LJ 1; David Mullan, “Dunsmuir v New
This permits courts to set the degree of scrutiny at the appropriate level without importing what are largely artificial categories that have proven problematic in their application.

In applying my framework to the Colorado commission, consider first the requirement that the membership of an EMB be made up of non-partisan outsiders. Colorado opted for a bi-partisan type commission\(^\text{65}\) that seeks to oppose the partisanship of the two major parties against one another, while creating some mechanisms for compromise and incentives for non-partisan behaviour. The Colorado commission has eleven members in total, with appointment power spread over multiple actors and membership divided among different political parties. It consists of the Speaker and Minority Leader of the state House, the Majority and Minority Leaders of the state Senate, three appointments made by the Governor, and four by the Chief Justice of the Colorado Supreme Court. Within these eleven members, each congressional district must be represented.\(^\text{66}\) The composition of the commission makes capture by one party unlikely. As an additional safeguard, Art. 5, s. 48(1) (c) of the state Constitution bars any party from having more than six appointees out of eleven. The redistricting commission’s structure can be termed a spread commission with a tie-breaker, though there is no guarantee that the tie-breaker be an independent member rather than from one of the two major political

\(^{65}\) Mackenzie, supra note 44 at 210.
\(^{66}\) At least one member must reside west of the Continental Divide.
parties. It ensures partisan balance in the initial membership then reduces partisanship through the appointments made by the Chief Justice and the state Constitution’s six-member rule.

The Colorado commission is not a best-practices model for redistricting as there is not just a risk, but a guarantee, that partisan insiders will populate it. The Colorado model relies on a tie-breaking member to provide incentives to mitigate partisan exuberance. This is a second-best option to appointing non-partisan outsiders in the first place. Chief Justice Bender’s evaluation of the commission as neutral because of its tie-breaking procedure therefore may have been overly generous. An independent, tie-breaking commissioner may end up choosing between partisan-endorsed maps. Further, there is the risk of sweetheart gerrymanders that protect incumbents of both major parties at the expense of challengers and small parties.

Despite flaws in the appointment process, the Colorado commission did appear to have achieved a high level of cross-partisan consensus on the basis of traditional districting criteria and fair procedures. The 9-2 and 8-3 votes in favour of the electoral maps for the state House and Senate indicate that crass partisanship alone did not define the decision-making of the commission. Had there been 6-5 vote splits along partisan lines, then there would be reason to doubt the motives of the commission and to conclude that it had been captured by partisans or behaved in a partisan fashion. The cross-partisan approval, however, indicates some measure of independence and impartiality, even if we should continue to worry about oligopolistic behaviour by the two main parties. The Colorado commission is not as
independent and impartial as those used in Australia, the United Kingdom, or Canada, but it is superior on this measure to a fully partisan commission.

The Colorado commission scores better on the requirements of ultimate authority, absence of constraints, fair procedures, and lack of partisan behaviour. The hierarchy firmly established in the cases contains only traditional districting standards. While the majority and minority of the state court reviewing the plan differed as to whether the growth in Latino voters was linked to s. 2 of the VRA or the lower-tier community of interest concern, the commission was not prevented from balancing relevant factors in making its initial assessment. The hierarchy in the cases imposes some constraints but this is a proper application of relevant districting criteria given the mix of federal and state law, rather than an undue imposition by a self-dealing legislature.

The Colorado commission had ultimate authority, as it did not have to seek legislative approval to institute the redistricting plan. The requirement for fair procedures was met by the extensive internal deliberations and public consultations by the commission regarding the proposed maps. While the presence of partisans will often indicate that deliberations were not insulated from politics, the voting across party lines suggests the majority did not railroad the minority. There was no claim in the litigation that the parties engaged in a sweetheart gerrymander, though the bi-partisan commission structure should raise this as an ongoing concern. In the absence of any claim of a sweetheart gerrymander indicative of partisan abuse, the cross-party agreement is a positive indicator. The deficiencies in the appointment process in Colorado must therefore be weighed against the use of traditional
districting criteria, the commission’s possession of ultimate authority, the relatively fair procedures, and what looks like a public-minded rather than partisan-focused attempt to improve Latino voting power (which the dissent called a “good faith effort”)\textsuperscript{67}.

Chief Justice Bender’s dissent moved some way forward, though not fully, in the direction of evaluating the independence and impartiality of an EMB whose decisions are under review in order to calibrate the appropriate level of deference. His dissent acknowledged that given the highly partisan nature of drawing electoral boundaries within legislatures, commissions are entrusted with the role of limiting political interference. “[The commission system] seeks to change what is inherently partisan about the reapportionment process.”\textsuperscript{68}

Chief Justice Bender’s analysis began with a “strong presumption of validity”,\textsuperscript{69} meaning that redistricting commissions should be granted significant deference in the absence of evidence of gerrymandering. On his test, deference is owed as the map was: 1) set “by neutral decision-makers on neutral criteria”; 2) “there was adequate opportunity for the presentation and consideration of differing points of view”; and 3) “the guidelines used in selecting the plan were explained.”\textsuperscript{70} Applying these criteria, he held that the commission was entitled to deference as there were no deficiencies in the appointment process or procedures of the commission. A “good faith effort” and application of the correct legal standard under the VRA’s s. 2 with regard to Latino

\textsuperscript{67} In Re Reapportionment of the Colorado General Assembly 2011, supra note 46 at 1-2, per Chief Justice Bender.

\textsuperscript{68} Ibid at 3.

\textsuperscript{69} Id.

\textsuperscript{70} Id at 1-2. The Chief Justice relied upon In re Reapportionment 1992, supra note 45 at 189, FN 4 as authority for this statement.
voters was sufficient for the commission to discharge its duties and for judicial
deferece to be warranted.\textsuperscript{71}

The independence test adopted by the Chief Justice in dissent is imperfect
and incomplete, but it is a marked improvement on the majority’s decision, which
treated the composition and procedures of the commission as irrelevant to
calibrating the intensity of judicial review. The dissent’s criteria touch partially on
the appointment process (neutral decision makers), the application of impartial
criteria that do not constrain the commission (neutral criteria), and fair procedures
(consideration of differing points of view and adequate reason-giving). The dissent
was overly optimistic about the independence guarantees of a tie-breaker model
with multiple partisan appointees, though this is balanced out by the other
measures of independence. By contrast, the majority’s non-deferential approach
would permit the judiciary to substitute its own interpretation of the best electoral
map in nearly every instance, and would not give the redistricting commission the
legal space to balance competing factors set out by the applicable legislation and the
state and federal constitutions in good faith. Judicial interference should be
minimized unless necessary to prevent partisan capture of the EMB or
implementation by a captured EMB of a partisan map.

\textit{ii) Redistricting in Arizona: Suppressing Partisan Decision-Making}

Arizona also provides a useful opportunity to assess how deference plays out
when an EMB is given significant authority but is imperfectly insulated from

\textsuperscript{71} Id.
partisan influences, given the state’s move to redistricting by commission in 2000.\textsuperscript{72}

In \textit{Arizona Minority Coalition for Fair Redistricting v Arizona Independent Redistricting Commission 2005},\textsuperscript{73} the Arizona Court of Appeal engaged with the issue of how much deference should be shown by courts in redistricting. Unfortunately, the Court of Appeal did not take into account the difference between redistricting conducted by the legislature and by a commission, or the structure and procedures of the Arizona Independent Redistricting Commission (AIRC).

Proposition 106 amended the state Constitution to remove the state legislature’s traditional power to set both state and congressional electoral boundaries.\textsuperscript{74} The newly created AIRC was constituted like Colorado’s as a bipartisan tie-breaking commission. At the first stage of its work, the commission is required to create districts with equal populations in a grid across the state, thereby minimizing some of the oddly shaped districts that are a telltale sign of gerrymandering in many states. The grid is then altered in order to take into account the districting criteria.\textsuperscript{75} The criteria that the commission is required to take into account for redistricting are similar to those in Colorado, with two major differences. First, Arizona gives community of interest concerns relatively higher priority. Second, the AIRC is required to foster competitive districts as long as there

\textsuperscript{72} Cain, \textit{supra} note 44 at 1830-1836 detailing the workings of the Arizona commission over two redistricting cycles; Betts, \textit{supra} note 44; Rave, \textit{supra} note 2 at 730-35; Stephanopoulos, \textit{“Electoral Exceptionalism”}, \textit{supra} note 2 at 780, 790, 803.

\textsuperscript{73} \textit{Supra} note 45.

\textsuperscript{74} Arizona Constitution, Article 4, pt 2, s 1; \textit{Arizona Independent Redistricting Commission v Fields}, 206 Ariz. 130, 134, 75 P 3d 1088 at 1092 (Court of Appeal) (2003).

\textsuperscript{75} Each criterion is to be fulfilled to the “extent practicable”, with the exception of compliance with federal law, which is not limited by that qualifier.
is “no significant detriment to the other goals”.\textsuperscript{76} The AIRC therefore has its decision-making dictated to a greater extent than in Colorado or in Canada at the federal level. The information that the AIRC may use in its deliberations is also limited in order to hinder any expression of partisanship. Data on party registration and voting history, which could be tools of gerrymandering, can only be used after initial maps have already been drawn and then only to assess compliance with federal and state laws.\textsuperscript{77}

The AIRC certified in 2001 its first ever legislative (i.e. state) and congressional maps to be in place from 2004 to 2010.\textsuperscript{78} The Arizona Minority Coalition for Fair Redistricting and some elected representatives alleged that the legislative plan did not create a sufficient number of competitive districts.\textsuperscript{79} The Coalition and other claimants\textsuperscript{80} also alleged that the legislative map violated the Equal Protection Clause, which obliged the Arizona Court of Appeal to determine whether strict scrutiny, intermediate scrutiny, or rational basis review was the appropriate standard. The trial court had applied strict scrutiny because the plan

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{76} Arizona Constitution, Article 4, pt 2, s 1(14).
  \item \textsuperscript{77} Ibid, s 1(15).
  \item \textsuperscript{78} Pre-clearance by the United States Department of Justice, a requirement under the VRA for Arizona, was pending when challenges were launched to both the legislative and congressional districts.
  \item \textsuperscript{79} A separate challenge claimed that the congressional redistricting discriminated on the basis of race, as it diluted Latino votes and harmed members of the Navajo Nation. The Navajo Nation objected because the Hopi Tribe and 42 Navajo residents were separated from the Navajo majority in District 1 and moved to District 2. The trial court found that the legislative map did not have an adequate number of competitive districts and ordered the commission to develop definitions and standards for redistricting. Prior to the Appeal being heard of this decision, the commission produced the new legislative map that the trial court had ordered, and the trial court approved it. The amended plan was the subject of the appeal.
  \item \textsuperscript{80} Several state politicians, Indian tribes, and other interest groups joined the litigation and many of the claims overlapped. Arizona Minority Coalition 2005, supra note 45 at paras 2-11 details the procedural history.
\end{itemize}
\end{footnotesize}
implicated the fundamental right to vote and potentially diluted Latino voting power.\footnote{The lower court applied strict scrutiny because it reasoned that redistricting implicated the core constitutional right to vote and that Latino voters had their influence diluted by “packing” that group into District 14 counter to the VRA. The AIRC argued on appeal that rational basis review was the more appropriate and deferential option, because the plan did not impair individuals from casting an equally weighted ballot and there was no racial gerrymandering: \textit{Arizona Minority Coalition 2005}, \textit{ibid} at paras 18-22.}

The Court of Appeal held strict scrutiny was inappropriate, as the plan did not burden a fundamental right.\footnote{\textit{Id} at paras 23-33.} The Court also rejected applying strict scrutiny on the basis of racial discrimination against Latino voters, as race was not the “predominant motive” in its assessment and did not “subordinat[e] legitimate race-neutral criteria”.\footnote{\textit{Id} at para 36. The Court of Appeal considered at length which standard of scrutiny to adopt. The decision is clear that “not every law or constitutional provision relating to voting triggers strict scrutiny review” (para 23), and cites the United States Supreme Court in \textit{Burdick v Takushi} that it is an “erroneous assumption” to classify all voting rights claims as invoking zealous oversight (para 25; \textit{Burdick v Takushi}, 504 US 428, 432 (1992)). The \textit{Burdick} Court held that government regulation of elections must be extensive in order to ensure democracy, which requires burdening voting rights to some extent. The Arizona Court applied \textit{Burdick}, but also distinguished an Arizona case that the claimants argued stands for the proposition that redistricting must be reviewed on a strict scrutiny basis. In \textit{Mayor of Tucson v Royal} 20 Arizona Appeal 83 (1973) voters in some wards voted in 1973 while others did so in 1975. The court held this to be a violation of the right to vote requiring strict scrutiny. \textit{Arizona Minority Coalition 2005} distinguished \textit{Royal} by holding that no individual would be denied the right to vote under the redistricting plan at issue. Absent disenfranchisement, the Arizona Court of Appeal reasoned, there was no substantial burden, no severe restriction, and no unequal treatment of voters, so strict scrutiny was unwarranted (paras 26-28).} Since there were reasonable explanations for the redistricting plan’s treatment of minority voters other than racial animus,\footnote{\textit{Arizona Minority Coalition 2005}, \textit{id} at para 35. Previous jurisprudence had established that strict scrutiny is not automatically applicable whenever race is a factor in redistricting, or even whenever majority-minority districts are created: \textit{Shaw v Reno}, 509 US 630 at 642 (1993); \textit{Miller v Johnson}, 515 US 900 at 913, 916 (1995). Race must displace traditional districting criteria or be the predominant factor: \textit{Bush v Vera}, 517 US 952 at 972-973 (1996); \textit{Shaw} at 959; and \textit{Miller} at 916. See Samuel Issacharoff, “The Constitutional Contours of Race and Politics” (1995) Sup Ct Rev 45 and “Race and Redistricting: Drawing Constitutional Lines After \textit{Shaw v Reno}” (1993) 92 Mich L Rev 588 for commentary on this line of cases.} in the Court of Appeal’s view, there was no basis to impose strict scrutiny because of the impact on a suspect class. The Court remanded the map back to the trial court for
reconsideration on rational basis review, and offered guidance to the lower court on the merits that resulted in the legislative plan being ultimately upheld.

By selecting rational basis review, the Court opted for the most deference possible to the AIRC. It’s analysis, however, ignored whether the EMB was likely to produce an outcome that was tainted by partisanship. The Court’s proceeded entirely on the basis of the role of race in the decision of where to set boundaries. In the Court’s assessment, because race was not the predominant factor used by the AIRC, deferential review was appropriate. The Court’s rationale for deference was therefore arrived at without any real consideration of the functioning of the institution that was tasked with redistricting.

Testing for independence and impartiality, and deferring only where those qualities are present, furnishes a more reliable standard for when searching judicial oversight will be necessary. All of the criteria in the independence and impartiality test that I propose, except for the non-partisan outsider factor, point toward deference to the AIRC by the courts. The tie-breaking commission membership structure is preferable to legislative or complete partisan control, but leaves room for bi-partisan incumbent protection. The AIRC appointment process privileges the two major parties at the expense of smaller parties, but there are some substantial guarantees of independence in the selection process. Unlike Colorado, the four partisan appointees choose the tie-breaking fifth commissioner, who serves as Chair and must not be registered with any party that has a representative on the commission already.\footnote{Arizona Constitution, Article 4, pt 2, s 1(8).} The four commissioners must be drawn from a candidate
slate selected by the Commission on Appellate Court Appointments, which guarantees a greater though not total degree of impartiality and independence.\textsuperscript{86} Commissioners serve a ten-year term that also insulates them to some extent from political interference.\textsuperscript{87}

The commission had ultimate authority to establish electoral maps and engaged in extensive public consultations. There was no allegation that its internal procedures, as set out by the state Constitution, were deficient. The constraints imposed on the commission can fairly be characterized as traditional districting principles. Because of its appointment process, there was a live risk that the AIRC was acting to protect incumbents of both parties. The determination of what level of deference is owed to the AIRC therefore turns on whether it operated as a bi-partisan incumbent protection unit, or whether the tie-breaking mechanism was sufficient to ensure independence and impartiality.

The commission in Arizona should have been subject to a degree of scrutiny higher than that established by the Court, because of the allegation of a lack of competition and the possibility of a bi-partisan gerrymander. The risk of a sweetheart gerrymander was substantial given the make-up of the commission, so the court should have been particularly attentive to allegations of uncompetitive districting.

In the end, analysis of the map suggests that the commission was relatively independent and did not use its discretion in a partisan manner. The map did not appear to be the product of gerrymandering. There was perhaps less competition

\textsuperscript{86} Ibid at s 1(6); Cain, supra note 44 at 1830, 1833-1834.  
\textsuperscript{87} Arizona Constitution, id, s 1(3), (23).
than the claimants would have wanted, but a sufficient amount to dispel allegations of a sweetheart gerrymander. This conclusion could only be drawn, however, after a detailed look at the implications of the map and the actions of the commissioners.

A conflict between Governor Jan Brewer and the chairperson of the Arizona commission in the subsequent redistricting cycle (2010) after the litigation in *Arizona Minority Coalition 2005* confirmed, to some extent, the independence of the redistricting process. In 2011, the commission produced its next set of draft state and congressional maps, which increased the number of competitive races between Republicans and Democrats. This display of independence created conflict with the political branches. The Arizona Constitution permits removal of commissioners by the Governor with 2/3 consent of the state Senate. Under pressure from the Republican Governor, the Republican-majority state Senate approved with the required super-majority the impeachment of AIRC Chairperson Mathis. A scant two weeks later, the Arizona Supreme Court found that the Governor had not proven “substantial neglect of duty, gross misconduct in office or inability to discharge the duties of office” by the Chair, and Mathis was reinstated. The extreme measure of attempted impeachment taken by the Governor and Senate indicates that the commission is able to take decisions that harm the partisan interests of key political

---

88 Cain, *supra* note 44 at 1836. Cain partly blames staffing issues for the emergence of partisan tensions at 1833-1834.

89 Arizona Constitution, Article 4, pt 2, s 1; *Arizona Independent Redistricting Commission v Brewer* (Arizona Supreme Court) (2011) No CV-11-0313. Other litigation challenged whether individuals nominated to be commissioners were eligible or not due to the ban on “public officers”: *Adams v Commission on Appellate Court Appointments* (Arizona Supreme Court) (2011), No CV-10-0405-SA. The Court ruled a tribal judge was eligible to be appointed to the Commission, but not directors of irrigation districts.
actors and therefore operates at a significant level of independence. That the courts protected this independence was a hopeful sign.

In *Arizona Minority Coalition 2005*, the Court failed to engage in any meaningful consideration of the role played by the commission. By investigating whether a commission is truly independent and impartial, or whether it reproduces the tendency to partisan self-dealing present in legislatures, a court can better arrive at the proper level of deference that is owed. By contrast, the Arizona Court’s analysis proceeded as if the identity and nature of the redistricting institution were irrelevant. Its assessment of the districting plan would have been identical if the map had been drawn by the legislature, by a commission stacked entirely by partisans, or an entirely non-partisan commission. Its method had no way of distinguishing between different types of redistricting institutions, even though it is crucially important for a reviewing court to do so. The intensity of review that will be appropriate is quite different depending on the incentives of the institution.

I consider in the next section the granting of deference by courts to election commissions by re-reading leading Canadian and Indian cases with this in mind.

**III. Election Commissions**

While redistricting commissions respond to the problem of gerrymandering, election commissions prevent the partisan capture of election administration. Assessing the independence and impartiality of an election commission is also necessary in order to determine whether a court should show deference to its decisions. Because of the wide-ranging functions and varied makeup of election
commissions, as indicated in Chapter 2, courts must engage in institutionally sensitive review of the actions of the EMB. In comparison to redistricting commissions, the extensive activities of election commissions provide a greater number of pressure points for partisan interference to which courts must be attuned.

a) What is the Role of Election Commissions? The “In and Out” Case

The appropriate level of deference to grant to an election commission was raised in Canada in the so-called “In and Out” case. The “In and Out” civil case decided by the Federal Court of Appeal in 2011 provides an interesting study of the relationship between governments and independent, non-partisan election commissions, and the impact that relationship should have on judicial review. The Federal Court of Appeal was properly deferential in the case to Elections Canada’s application of the rules governing federal election campaigns, given the institution’s staffing by non-partisans with significant guarantees of independence, its ultimate authority to interpret and apply the relevant legislation without interference by elected representatives, the absence of constraints on its actions, and its internal procedural fairness.

90 Calaghan et al v the Chief Electoral Officer 2011 FCA 74 (In and Out), overturning 2010 FC 43. Leave was granted to the Supreme Court of Canada, but the appeal was abandoned prior to being heard. The Conservative Party paid back $230,198. Meagan Fitzpatrick, CBC.com, “Tories Ditch ‘In-And-Out’ Case at Supreme Court, March 6, 2012. Available at: http://www.cbc.ca/news/politics/story/2012/03/06/pol-supreme-court-conservatives.html. Last accessed May 29, 2014. In the related criminal action for breaches of the Elections Act, the Conservative Party was required to pay a $50,000 fine and acknowledge its error. The Conservative Party admitted guilt in court to these summary conviction offences and paid the maximum fine permitted in exchange for dropping the charges against individual Conservative campaign officials, which could have led to fines or jail time. The Conservative Fund also paid a fine of $2000. See the Agreed Statement of Facts between the prosecution and the accused that formed the basis for the plea deal. Available at: http://www.ppsc-sppc.gc.ca/eng/nws-nvs/comm/2011/10_11_11b.html. Last accessed May 29, 2014.
The “In and “Out” case stemmed from political party spending in the 2005 federal election. Political parties face maximum national spending limits during election campaigns pursuant to the Canada Elections Act.\textsuperscript{91} Candidates also have distinct spending limits in their own particular ridings. It is a violation of the Elections Act for parties or candidates to exceed these caps on expenditures.\textsuperscript{92} During the final weeks of the federal election campaign of December 2005, the opposition Conservative Party had significant amounts of money still left in its coffers, but was prevented from using these resources because it was very close to the spending limit imposed on parties of around $18 million. The 2005 election was highly competitive and many voters remained undecided into the final days of the campaign. At the local level, the situation was very different in some ridings. Unlike the national party, certain Conservative candidates still retained room to spend funds under their distinct candidate spending limits. Many of these candidates had no need to make further expenditures at the riding level because they were ensured of victory, or their defeats were certain.

The Conservative Party devised a scheme that would allow it to redeploy unused resources to maximize its television and radio advertising, while arguably complying with the Elections Act, by conscripting candidates with unused room under their local spending limits. Candidates with room to spend additional money under the local candidate limits were asked to participate in “regional media buys”. These regional media buys consisted of national advertising produced by the Party

\textsuperscript{91} C 2000, c 9.
\textsuperscript{92} Ibid at ss 497(1)(s), 497(3)(p) and 502(1)(c) for candidates and ss 497(1)(l), 3(g) and 507 for parties. For candidates, the spending limit varies on the basis of the riding’s population. The more people that are in the riding the higher the spending limit established under the legislation.
that would be broadcast in the candidates’ home districts, with an indication that the ads had been approved by the official agents93 of the local campaigns as is required by law for election advertising. The money that was used to pay for the regional media buys was wired to local campaigns by the Conservative Party, in amounts equivalent to whatever additional spending the riding association was permitted under the spending limit. For example, if a local campaign was permitted to spend $80,000 but had only spent $60,000, the national campaign transferred $20,000 to the local campaign. The amount transferred to each riding varied according to the room left under the local spending limit. The local campaigns then immediately wired that same amount back to the national Party to be spent on advertising, although the expenditure was attributed to the local campaign. The money went “in” to the local campaigns from the Party and was immediately transferred back “out” to the Party, hence the “In and Out” moniker.

The charitable explanation for these “In and Out” transactions was that the Conservative Party had found an elegant solution to the problem of having more money that it was allowed to spend under the Elections Act. By coordinating the activities of local candidates at the national level, the Party was able to pool local resources to have a regional impact. The transfer of funds between political parties and local candidates on its own does not violate the Elections Act.94

93 All financial transactions for a local campaign must be authorized by the campaign’s official agent, a defined position under the Elections Act, and the person who must submit expenses to Elections Canada for reimbursement on behalf of the campaign. Canada Elections Act, supra note 91, s 83-84. The chief agent acts in the same role for a party as the official agent does for the local candidate: s 375-76.

94 Ibid, s 404.2(2), (2.1), (2.2) and (3).
The more sceptical explanation is that the Conservative Party breached the spending limit applying to parties through a scheme designed to circumvent the national cap by disguising national political party expenditures as local candidate ones. The advertisements were national in nature, rather than regional, and the local campaigns supporting the advertisements appear to have been used because of their capacity to spend more money under the applicable limit, not due to any common interests or local issues. The regional advertising buys cost $1.2 million, a very significant amount in a campaign with a total spending limit of approximately $18 million per party. These machinations flew under the radar during the election campaign and Elections Canada took no action at the time. The advertising purchased by the Conservative Party potentially had an impact on their victory over the minority Liberal Martin government given how close the 2005 election was.

The “In and Out” scheme came to public light when the local Conservative candidates involved in the plan submitted their election expenses to Elections Canada. Election expenses are defined under the Elections Act to include costs incurred in the election campaign. Under the Elections Act, candidates may submit their election expenses for partial reimbursement. The riding candidates claimed part of the money they had allegedly spent on regional advertising as election expenses incurred by the local campaign and deserving of reimbursement.

---

95 In and Out, supra note 90 at para 90.
96 Elections Act, supra note 91, s 407.
97 Candidates that receive 10 per cent or more of the vote in a riding are eligible for an initial reimbursement of 15 per cent of their expenses. Further reimbursement up to 60 per cent of the riding spending limit may occur after submission of the candidate’s official election campaign return documentation: ibid, ss 464-465.
The Elections Act allows for transfers of money or non-monetary services between the national party and a candidate, and such a transfer does not count toward the party’s spending limit or election expenses. When a local campaign spends the money, this is attributed as an election expense of the candidate. Parties and candidates may not transfer costs between each other, however, for the purpose of maximizing reimbursement of election expenses or evading spending limits. In other words, if the advertising was properly characterized as a national expenditure rather than a local one, then only the Conservative Party could claim it as an expense to be reimbursed and the funds spent on the advertising would count against the national spending limit. Counting the funds as a national expenditure would put the Conservative Party in clear violation of the rules limiting spending.

The Chief Electoral Officer (CEO) did not accept the claims made by the candidates that the advertisements represented legitimate local election expenses. The CEO raised the concern that the “regional media buys” were potentially an effort by the Conservatives to get around the party spending limit that they were close to reaching. The CEO refused to certify the claims of the local candidates on the basis that the expenses were not really incurred at the riding level, but properly classified as national Conservative Party spending. The official agents for 35 of the 67 local candidates applied for judicial review of this administrative decision to the Federal Court.98

In the Federal Court, Justice Martineau found that the CEO had no basis to doubt whether the claims were legitimate expenses of the local candidates and was

---

98 Only one was a party to the appeal for procedural reasons.
therefore wrong to refuse to certify them. Elections Canada appealed the decision and the Federal Court of Appeal overturned the lower court. The Federal Court of Appeal found that the decision of the CEO was not unreasonable, which was the relevant standard of review under administrative law, as the CEO had the authority to refuse illegitimate expenses wrongly claimed for reimbursement.

The role of the CEO in the Canadian democratic architecture is to oversee elections and act as impartial administrator of the *Elections Act*. Section 16 of the Act lays out the functions and responsibilities of the CEO. The CEO “shall” “exercise general direction and supervision over the conduct of elections”, “ensure that all election officers act with fairness and impartiality”, and “exercise the powers and perform the duties and functions that are necessary for the administration of [the Act]”, among other responsibilities. The CEO is appointed by resolution of the House and may only be removed by the Governor General on the advice of Parliament and holds office until retirement. The CEO holds the rank of a Deputy Minister and communicates directly to the relevant Minister. If an “emergency, an unusual or unforeseen circumstance or an error” necessitates it, the CEO even has the power within and just after the election period to alter nearly any provision in the Act, without Parliamentary approval. This is a kind of subordinate legislative power. The appointment and tenure rules provide the CEO with extraordinary independence and the Act furnishes extensive authority over election administration to Elections Canada.

---

99 *Elections Act, supra* note 91, s 16 (a), (b), and (d).
100 *Ibid* at s 13(1).
101 *Id* at s 15(1) and (4).
102 *Id* at s 17.
The CEO communicated specific reasons for rejecting the expense claims in a letter to the head of the Conservative Party: internal invoicing was not supported by third party documentation, and there was a lack of fit between the costs claimed and the commercial value of the advertisements to the campaigns.\textsuperscript{103} There was a strong basis for the CEO to reach the conclusion that the expense claims were illegitimate. Advertisements allegedly paid for by certain local candidates aired outside of the region in which those campaigns were based. There was no consistent assessment of the commercial value of the advertising in the accounting by Conservative candidates, as many campaigns claimed the amount of money left on the local spending limit, rather than the actual market value. For instance, one candidate might claim an advertisement was worth $20,000 and another that the same advertisement was worth $5000 even if it was run an identical number of times on behalf of each campaign.

Further, the amount claimed by the local candidates bore little resemblance to the actual costs incurred to produce the advertisements. Production costs were attributed exclusively to Quebec candidates, though the advertisements ran across the country. Most of the advertising was national in character, rather than local, as it addressed the virtues of party leader Stephen Harper and the alleged failings of the Martin Liberal government.\textsuperscript{104} Local candidates were not featured in the advertisements and the official agents for many local candidates had little if any knowledge of the regional advertising plan.

\textsuperscript{103} In and Out, supra note 90 at para 26.  
\textsuperscript{104} Ibid at paras 84-90 for the evidence of these facts before the CEO. Given the importance of party leaders to voter choice, there was an argument that these were of local significance even if depicting national figures rather than local candidates.
The central issue in the case was the proper understanding of the role of the CEO and Elections Canada in administering elections. The Federal Court of Appeal investigated whether the CEO had the power under the Act to reject expense claims and whether it was reasonable for him to do so in this case. There were two readings of the role of the CEO at war in the case, a narrow one and a broad one. The Conservative affiliates claimed that the CEO had a narrow role, as s. 465 of the Act states that, “On receipt of the documents [related to the expense claims]... the Chief Electoral Officer shall provide... a certificate [approving the expenses][emphasis added].” The claimants argued that this section obliges the CEO to approve the expense claims forthwith, without exercising discretion as to their validity. The Court rejected this interpretation and held that “Parliament did not intend to circumscribe the [CEO’s] role by confining him to the largely clerical function of ensuring that candidates have submitted the documents specified in the Act and, when satisfied that they have, to providing a certificate to enable [reimbursement]”. The Court found that the claimants’ narrow reading was inconsistent with the broad powers and functions the CEO possesses and which are necessary to administer the Act. The requirements in the Act for claimants to produce evidence to justify receiving reimbursements imply discretion is granted to the CEO to approve only legitimately incurred expenses. The powers and functions of the CEO set out in s. 16 of the Act provide residual statutory powers going beyond the specific ones spelled out in the Act, according to the Court, which are sufficient to encompass the CEO’s rejection of the expense claims.

105 Id at para 57.
106 Id at para 59.
The Court’s reasoning establishes a generous grant of powers to the CEO and Elections Canada. Despite the narrow wording in s. 465, the Court reasoned that the Act could not be properly administered if the CEO was deprived of discretion to interpret whether claims were valid. Given this finding, the Court held that the decision to reject the expense claims was a reasonable exercise of discretion that was “amply support[ed]” by the evidence available at the time. The Court held it was reasonable for the CEO to reject the claims and, indeed, it would have been unreasonable had the CEO not considered whether these were legitimate local expenses or an attempt to circumvent the approaching national spending limit. The Court held that the evidence before the CEO meant he was well within his powers to doubt the veracity of the claim that the advertising was truly a local election expense incurred at market value.

On the application of the test I developed in Chapter 2, the Federal Court of Appeal showed the appropriate deference to the work of the non-partial, independent election commission in assessing the decision not to certify the expenses. Elections Canada is staffed by bureaucratic non-partisan outsiders, with

---

107 This holding was at odds with the decision in Stevens v Conservative Party of Canada 2005 FCA 283, which envisioned a much more circumscribed role for Elections Canada and the CEO. At issue in Stevens was whether the CEO had duly authorized the merger between the Progressive Conservative Party and the Canadian Reform Conservative Alliance to form the Conservative Party. Stevens found that the role of the CEO was to mechanically accept the information that was given to him regarding merging parties and assume it is accurate, rather than carrying out further investigations. The Federal Court’s concern was that probing the internal workings of parties could compromise the CEO’s impartiality (Stevens at paras 19, 26-27; In and Out, supra note 96 at paras 70-76). The Court in the In and Out case distinguished Stevens because there was less chance of the impartiality of the office being compromised in ensuring election expense claims were accurate than during involvement in internal party disputes. The Court in In and Out also relied on the Act’s empowerment of the CEO to investigate expense claims further by requiring additional documentation. In my opinion, Stevens narrowly construed the role of the CEO because the merger was already a political fact that the courts had no interest in trying to stop. Its precedential value should be taken as limited given the circumstances of the case.

108 In and Out, supra note 90 at para 91.
109 Id at paras 91-106.
the CEO’s extensive guarantees of independence at the top of the organization. The broad grant of discretionary powers to Elections Canada in the *Elections Act* allows the institution to administer elections relatively free of constraints imposed by the legislature or executive. The power of Elections Canada to alter the Act around the election period without Parliamentary approval is consistent with this absence of constraints. Elections Canada is the ultimate authority vis a vis the political branches on whether the *Elections Act* has been complied with, short of Parliament amending the legislation.

The internal procedures followed by Elections Canada also point in the direction of allowing the independent, impartial body to exercise its judgment. Elections Canada has a lengthy history of approving or rejecting candidate and party expenses without any proven bias. There was no allegation that candidates from other parties were permitted to claim such expenses. Elections Canada communicated the reasons for its decision to reject the expense claims as illegitimate to the candidates, who were given the opportunity to amend their claims to further justify the expenses. Elections Canada conducted investigations involving the advertising agency that managed the Conservative advertisements in order to ascertain the nature of the purchase. There were no super-agency costs generated by partisan behaviour that would have compelled the Court to intervene, as Elections Canada was acting to fulfill its public-spirited mandate rather than in a partisan or arbitrary manner. Overall, these factors indicate that the Federal Court of Appeal showed the proper level of deference in overruling the lower court and upholding the decision of the CEO.
The “In and Out” decision’s treatment of the role of the CEO and Elections Canada is important, particularly for the project of developing an approach to the law of democracy that incorporates the role of electoral management bodies such as national election commissions. The Court was being asked to judicially define the proper functioning of the body tasked with administering federal elections, with serious consequences attaching to choosing narrow or broad definitions of this role. The narrow interpretation of the role of the CEO and Elections Canada would limit the CEO to rubber-stamping the expense claims of political actors without hesitation or investigation. The twin assumptions behind the narrow approach are that: 1) political behaviour is public-minded, rather than partisan-minded, and 2) that the oversight mechanisms over political behaviour, namely Elections Canada and the courts, do not exist to limit partisan political behaviour, but to defer to it. In short, the narrow approach ignores the principal-agent problem and the role of Elections Canada as a super-agent upholding the interests of voters.

Though filtered through the language of Canadian administrative law, the Court understood the CEO’s role as checking and limiting the actions of elected representatives. The statutory interpretation put forward by the Court was persuasive. The wide grant of discretionary power to the CEO and Elections Canada trumped any lack of discretion implied by the use of the word “shall” in s. 465 of the Elections Act. To have the CEO accept all expense claims, even if they were clearly fraudulent or incorrect, would make a mockery of the legislative scheme.

More fundamentally, the holding of the Court in the “In and Out” case is consistent with the understanding that elected representatives, candidates and
parties will not always act in the interests of voters, but at times in their own. The interests of voters and elected representatives are likely to diverge on interpretations of law when elections are at stake because of the principal-agent problem underlying representation. The Conservative Party and its candidates had incentives to get around the spending limit in order to purchase advertising to gain a competitive advantage over their electoral rivals. It was the proper role of the CEO and Elections Canada to enforce the law on behalf of voters who are served by having all parties adhere to the same set of rules. Where we can reasonably expect that political actors will engage in partisan-motivated evasion or interpretation of election law, then independent, non-partisan bodies will be necessary to ensure a fair democratic process. This interpretation of the role of an election commission is consistent with the *Elections Act* read as a whole. The Act envisions the CEO and Elections Canada as the check against political manipulation of the rules structuring elections. The broad interpretation of the CEO’s role was in accordance with a realistic understanding of political behaviour, the scheme in the Act, and the CEO’s significant guarantees of independence. The Court quite properly reinforced the role of the EMB as a check on partisan self-dealing and showed deference to the independent and impartial election commission.

In one respect at least, the Court was mistaken. The Court stated that oversight of election expenses by a commission does not pose the risk of a loss of real or perceived impartiality. This assumption has been proven dramatically incorrect. Since the CEO’s initial ruling in the “In and Out” case, particularly after

---

110 *Id* at para 75.
related charges against senior Conservative Party officials and a raid on Party headquarters, the Conservatives have vociferously argued that Elections Canada is biased against them. In majoritarian democracies, there are few checks within or outside of Parliament that can challenge the decisions of a party with a majority government. The courts and the election commission are two of the few bodies that can do so. The independent CEO, and hence Elections Canada, occupy a particularly contentious place among Canadian democratic institutions. The opportunities for tension between the elected branches and Elections Canada are ample.

Confrontation of the sort evident in the “In and Out” case between elected representatives that push interpretations of election law to achieve partisan goals and a robust regulator is inevitable under that constitutional structure.

b) Independence, Partisanship, and the Election Commission of India

In this section, I consider the jurisprudence of the Supreme Court of India defining the role and function of the Election Commission of India (ECI). The Indian case is of particular importance, as it clearly articulates concerns for super-agency costs in the form of 1) partisan capture of the independent ECI through the appointment process and 2) abuse of the ECI’s extensive powers by the Chief Election Commissioner and the other Election Commissioners. I focus in particular on two cases that address rules around appointment to the ECI, as the political circumstances surrounding those appointments and the legal regime governing them have forced the Court to engage with both partisanship and misuse of

111 See Lorne Sossin “The Puzzle of Independence for Administrative Bodies” (2009-10) 26 NJCL 1 at 8-11 for examples of disputes between the government and Elections Canada across a variety of areas.
authority. I consider first the role of the ECI in Indian democracy and then assess the two cases on appointments in greater depth, *SS Dhanoa v Union of India*112 and *TN Seshan Election Commissioner of India v Union of India*,113 in order to develop the non-partisan outsider prong of the test for independence. These cases represent the Court’s attempt to address the problem of partisan self-dealing by empowering the ECI to minimize it, without allowing the ECI to apply its extensive powers in an arbitrary fashion. Viewing the ECI as a super-agent checking agency costs, but also potentially misusing this authority, provides a consistent understanding of where deference is owed to the ECI by the Court that has been missing in the jurisprudence.

**i) The Role of the Election Commission in India’s Democratic Architecture**

The ECI has played a defining role in India’s democratic evolution.114 It is a national, centralized body with reach across multiple levels of government. Article 324(1) of the Constitution of India assigns the ECI with “superintendence, direction and control” of parliamentary, presidential, and state elections. It possesses constitutional status and significant powers over matters such as party registration and election administration. The ECI has rule-making authority that can be classified

---

112 1991 (3) SCR 159.
as subordinate law-making power and engages in executive-style or quasi-judicial functions.\textsuperscript{115} The ECI engages in “an assertive program of regulatory intervention” stemming from extensive powers, for example, to set the timing of elections,\textsuperscript{116} or to regulate party constitutions,\textsuperscript{117} which in other democracies are generally not within the election commission’s authority.

The ECI’s contributions to Indian democracy can be divided into three phases, according to Alistair McMillan, which closely parallel the development of Indian politics:\textsuperscript{118} 1) its establishment and consolidation post-Independence as one of the state’s central institutions, 2) a diminutive, quiescent period defined by its failure to protect democracy against the ravages of Prime Minister Indira Gandhi’s “Emergency”\textsuperscript{119} from 1975-1977, and 3) an era of renewed activism spurred by an evolving party system and expanded political participation,\textsuperscript{120} especially during the tenure of Chief Commissioner T.N. Seshan from 1990-96.\textsuperscript{121} The ECI has been

\textsuperscript{115} McMillan, “Administration of Electoral Politics”, \textit{ibid} at 189.
\textsuperscript{116} \textit{Id} at 187. \textit{The Representation of the People Act 1951} (RPA), Act NO 43 of 1951, s 14 (2) states that the ECI has power to recommend dates for elections to the House of the People.
\textsuperscript{117} McMillan, \textit{id} at 189.
\textsuperscript{118} McMillan, “Election Commission”, \textit{supra} note 114 at 98-99.
\textsuperscript{119} The Emergency lasted for 21 months. Prime Minister Indira Gandhi ruled under a state of emergency declared by the President pursuant to Article 352 of the Indian Constitution. Other central institutions, such as the Supreme Court and the Presidency, can also be said to have failed during this period: see David Gilmartin and Robert Moog, “Introduction to ‘Election Law in India’” (2012) 11(2) Election LJ 136 at 141-2 on the Supreme Court’s restoration of Indira Gandhi’s eligibility for election under dubious circumstances during the Emergency in 1975 in \textit{Indira Gandhi v Raj Narain} (1975) SC 2299. See also McMillan, “Election Commission”, \textit{supra} note 114 at 108-9.
\textsuperscript{120} McMillan, “Election Commission”, \textit{ibid} at 99.
\textsuperscript{121} Gilmartin and Moog, \textit{supra} note 119 at 143. The role of ECI has been shaped by shifting party politics. Gilmartin and Moog argue at 141-2 that a centralized commission aided in cementing control by Congress, which governed from Independence to 1977, but as India shifted from a dominant party to multi-party democracy, an independent commission worked against the Party. Rekha Saxena, “The Election Commission and Indian Federalism” (2012) 15(1) Think India Quarterly 194 at 204 argues that the Commission’s interventionist role did not come about because of Seshan’s force of personality, but for functional reasons: “[T]he [a]utonomy and activism of the Commission can thus be seen as a functional requirement of the political system marked by the phenomenon of divided governments in a fragmented society.”
accused of the countervailing sins of subservience to political parties\textsuperscript{122} and of overstepping its role by behaving too independently from the government of the day.\textsuperscript{123} There have been accusations of partisanship made against particular Election Commissioners and allegations of an appointment process guided by party politics.\textsuperscript{124} Despite these claims, there is overall confidence in the ECI to act independently and impartially,\textsuperscript{125} especially in its post-1977 interventionist mode.

Despite vacillation by the Supreme Court\textsuperscript{126} about whether to adopt a narrow\textsuperscript{127} or broad\textsuperscript{128} interpretation of the ECI’s mandate,\textsuperscript{129} the general contours of

\begin{footnotesize}
\textsuperscript{122} McMillan, “Election Commission”, supra note 114 at 108-9 points out allegations that the ECI served the Congress Party’s interests.

\textsuperscript{123} See Saxena, supra note 121 at 204; McMillan, “Administration of Electoral Politics”, supra note 114 at 189 and “Election Commission”, ibid at 102-04.

\textsuperscript{124} The President appoints the Chief Electoral Commissioner under the advice of the Prime Minister and cabinet: Constitution of India, Article 324 (2). The President may appoint other Electoral Commissioners as needed. The Tarkunde Committee in 1975 and Goswami Committee of 1990 had both recommended appointment by all-party committee, rather than by the President who does the bidding of the government of the day. The Tarkunde solution would see the committee consisting of the Prime Minister, leader of the opposition in the Lok Sabha, and the Chief Justice. See McMillan, “Administration of Electoral Politics”, ibid and “Election Commission”, id at 101.

\textsuperscript{125} McMillan, “Administration of Electoral Politics”, id at 190.

\textsuperscript{126} The Court has ruled that free and fair elections are part of the basic structure of the Constitution and hence attract the highest protection: Kul dip Nayar v Union of India (2006) SC 3127.

\textsuperscript{127} In MS Gill v Chief Election Commissioner (1978) SCR (3) 272, the Supreme Court took a broad view of the ECI’s powers to annul an election, due to mob violence that destroyed ballot boxes, and schedule a new vote. This interpretation likely reflected the Court’s attempt to preserve maximum flexibility to ensure free and fair elections in light of the regrettable frequency of communal and political violence in India.

\textsuperscript{128} In AC Jose v Silvan Pillai 1984 SCR (3) 74 the Court took a dimmer view of the utility of the electronic voting machines (EVMs) that were the pet project of a number of Chief Election Commissioners. The Court annulled the results in polling stations that had used the machines on the basis that there was no explicit statutory authority to use the machines. This ruling seems directly at odds with Gill’s broad interpretation of Article 324’s grant of powers. Doubts about the utility and fairness of EVMs appear to have swayed the Court in Pillai. Indian National Congress (I) v Institute of Social Welfare (ISW) AIR (2002) SC 2158 circumscribed the ECI’s powers, yet again for what appear to be underlying policy reasons. The RPA, s 29 (5), obliges political parties to meet a test of fidelity to the Constitution, including the principles of secularism, socialism and democracy, and the sovereignty, unity and integrity of India. Parties representing religious communities, separatists, economic liberals, and communists all potentially run afoul of these obligations: see Communist Party of India (Marxist) v Bhara Kumar AIR (1998) SC 184. Section 29A of the RPA granted the ECI the power to register parties, but was silent on whether it could de-register them. While the ability to de-register parties would seem to be a necessary corollary to registering them, the Court ruled that the ECI could not do so except for a limited number of exceptions. The exceptions are fraud, where a party already lawfully registered alters its association so as to act counter to the Constitution and values of secularism, socialism and democracy, and if the political party has been declared unlawful by Parliament under other statutory regimes than the RPA: ISW at 13-14. The limitation
\end{footnotesize}
its powers are now relatively settled. Article 324 is understood as a plenary grant of authority encompassing all aspects of elections with the limit that the ECI must comply with valid statutory directives passed pursuant to the Parliamentary power under Article 327 to legislate on elections. Statutes must pass constitutional muster, however, to bind the ECI and recent experience reveals the Supreme Court will remain vigilant in ensuring only valid election laws restrain the ECI.

**ii) Partisan Capture and Super-Agency Costs**

The alleged partisan capture of the ECI was before the Supreme Court in the *Dhanao* and *Seshan* cases, which involved abuse of the appointment process by the government of the day. The misuse of the appointment process stems from the lacuna in the constitutional and statutory regimes regarding membership in the ECI.

---

of the ECI’s power had as much to do in ISW with the Court’s queasiness about obliging parties to declare allegiance to what are usually contested principles in a democracy, such as secularism and socialism, than any interpretation of the powers granted by the RPA. The Court stated at 13 that allowing the ECI to de-register parties would implicate them to too great an extent in partisan politics and hence taint their independence in ensuring free and fair elections. This rationale is deeply problematic given the need for the ECI to take decisions that shape partisan outcomes in order to regulate the democratic process. In *Special Reference No 1 of 2002*, AIR 2003 SC 87, shortly after ISW, the Supreme Court limited the ECI’s powers to postpone elections without consulting with the Centre or state governments in the context of political violence and an extended time period without a functioning state government in Gujarat.

This is most clearly articulated in *Paramaguru v Tamil Nadu* 2006 (2) CTC 241 at para 19. See also *Union of India v Association for Democratic Reforms* 2002 (3) SCR 294 and *Kanhia v Trivedi* 1986 SCC 111 at paras 13 and 16.

In *Association for Democratic Reforms, id*, the Court upheld the ECI’s power to oblige candidates to disclose their educational, financial, and criminal backgrounds (including pending charges). Parliament responded by amending the RPA to oblige limited disclosure of a candidate’s criminal convictions carrying penalties of two years or more, but not their education, finances, or other criminal information. The amendments explicitly freed candidates from disclosure obligations imposed by the ECI (s 33B). The Court held in *Union of Civil Liberties (PUCL) v Union of India*, AIR (2003) SC 2363 that the amendments were invalid, as disclosure was required to have free and fair elections and as part of the fundamental right of freedom of speech and expression: Constitution of India, Article 19(1)(a). *PUCL* suggests that the ECI’s plenary powers cannot be encroached upon lightly. The interplay between the ECI’s constitutional power in Article 324 and elected representatives’ authority to pass election legislation means the Indian courts will continue to have material upon which to view the ECI’s mandate either broadly or narrowly as they so choose.
Article 324 establishes the ECI as a permanent body headed by a Chief Election Commissioner appointed by the President. The President exercises the appointment power on the advice of the Council of Ministers, which in practice amounts to the Prime Minister. This method of appointment was designed by the drafters of the Constitution as a means of ensuring independence. The Chief Commissioner was given protections in Article 324 (5), as he cannot be removed except on the same stringent rules as those insulating Supreme Court judges, serves until age 65, and his conditions of service cannot be varied to his disadvantage.

The Constitution left it to the President, however, to appoint an unspecified additional number of Election Commissioners if deemed necessary. The drafters envisioned additional commissioners being appointed when the ECI’s workload was high, especially in the lead-up to an election. These Election Commissioners were given fewer protections than the Chief, as they could be removed on the advice of the Chief and could have their terms of service varied by statute against their interests. At times the ECI has operated with a solitary Chief Election Commissioner and at others as a multi-member body. While the Constitution left open the possibility the ECI could function with multiple members, it left unstated how such a body should operate and, if multiple members are appointed, whether the Chief

---

132 Constituent Assembly Debates, Vol VIII at 905-930. See Dhanoa, supra note 112 at 170-74; Seshan, supra note 113 at 9-10; Saxena, supra note 121 at 201-02. As McMillan, “Administration of Electoral Politics”, supra note 114 at 189, FN 1 points out, the only reference to comparable institutions in other democracies in setting up the ECI was the Canadian precursor to Elections Canada existing from 1920.

133 Constitution of India, Article 324 (2). The President appoints the Chief Election Commissioner and “such number of other Election Commissioners, if any, as the President may from time to time fix”.

134 This was a compromise between a permanent multi-member commission and an ad hoc commission convened only at election time. They split the difference and got a permanent commission that was by default a single-member body but could be expanded. See Constituent Assembly Debates, supra note 132 and McMillan, “Election Commission”, supra note 114 at 99-101.
Commissioner is superior in rank to the other Commissioners.\textsuperscript{135} The appointment process can be tainted by partisanship in the initial appointment of the Chief Electoral Commissioner by the President under the direction of the government of the day, or by the appointment of additional Commissioners to dilute the influence of an independent minded Chief.

The \textit{Dhanaa} and \textit{Seshan} cases can be best understood as the Supreme Court of India grappling with how to account for partisan interference in an independent EMB through the appointment process and manipulation of its internal rules. The other confounding factor relates to the personal interests of the Chief Commissioner. The Court was well aware that the more independent the ECI, the greater the risk that its expansive powers could be used for arbitrary purposes or to further private interests. The balancing act for the Court is determining how to simultaneously insulate the ECI from partisan interference, while also preventing misuse of its extensive powers by Commissioners freed from oversight by the elected branches.

In neither case did the Court really address head-on the partisan machinations that it hinted were the root cause of the two disputes. In \textit{Dhanaa}, the Court permitted a newly elected government to remove two Election Commissioners that had been appointed just prior to the election by the previous regime. These two additional Commissioners formed a voting majority able to carry 2-1 votes in which the pre-existing Chief Electoral Commissioner was in the minority. There was evidence that the Election Commissioners were doing the

\textsuperscript{135} The Chief was to serve as Chairman, but this fact only raised the question of whether the Chairman was superior in power to the other Commissioners or simply facilitated their meetings.
bidding of the government. In Dhanoa, the Court was right to uphold the removal of the Commissioners, but it should have done so on the grounds of preventing partisan capture. The failure to establish doctrine preventing partisan capture meant that the Court was ill-equipped to guard the independence of the ECI in later cases and to distinguish between proper and improper actions by a partisan-captured ECI. This failure eventually reverberated in the subsequent Seshan case.

The Court ruled in Seshan a few years after Dhanoa that the appointment of additional Election Commissioners was valid and that legislation permitting the ECI to be run by majority vote among the three Commissioners was constitutional. Like Dhanoa, Seshan involved plausible evidence of the stacking of the ECI with partisan appointees by a government displeased with the independence of the regulator. Seshan failed to recognize that the appointment of additional commissioners was another attempt to stack the membership of the ECI in the government’s favour. The Court’s task was muddied in Seshan by the serious risk of super-agency costs generated by Chief Election Commissioner Seshan’s pursuit of his own interests. Despite the ECI’s formal guarantees of independence, the cases on appointments raise troubling questions for a court seeking to assess the independence and impartiality of the ECI.

The issue of partisan appointments first came to a head in Dhanoa.136 The governing Congress Party feared losing the imminent 1990 Parliamentary elections to the Janata Dal Party. The President, under the advice of Congress Prime Minister Rajiv Gandhi, appointed two new Election Commissioners to sit alongside the Chief

136 Saxena, supra note 121 at 202-04.
Commissioner in 1989, which brought the total membership in the ECI to three and allowed Gandhi’s selections to form a voting majority. This was the first time the government had used the power to appoint additional Election Commissioners. The ECI had functioned as a single-member body from 1950 until these appointments in 1989. Some partisan chicanery surrounded the appointments. The ECI has discretion to set federal election dates. The Principal Secretary to the Prime Minister called one of the new Commissioners just over 24 hours after the appointments and it was “conveyed to him the desire of the P.M. that the...elections to the Lok Sabha should be held on a particular date and that the announcement...should be made by the Commission forthwith and before 2 p.m. on that day, in any case.”¹³⁷ There was a dispute between the Chief, appointed by an earlier government, and the new Commissioners whether to approve Congress’ preferred election date. Upon gaining office in 1990, the newly elected Janata Dal promptly removed these two Commissioners and abolished the posts, leaving the Chief again as the sole Commissioner.

The appointment of two new Commissioners forming a 2/3 voting majority on the ECI just prior to the election smelt of an attempt at partisan capture of the commission by a government facing a difficult re-election campaign. Their subsequent removal by the new Janata Dal government was therefore a response by a party that feared that Commissioners appointed by Congress would use the ECI’s extensive powers in a partisan fashion. The new Commissioners alleged that they were the victims of a political vendetta by the government for positions taken

¹³⁷ Dhanoa, supra note 112 at para 18.
against them during the election campaign. The Court held that the Janata Dal government had the power to remove the Commissioners, mainly on the logic that the appointment of the Commissioners by the previous Congress Party government, and the Election Commissioners’ behavior, hindered the ECI’s independence.\textsuperscript{138} The Court found that the “appointments were an oddity, the abolition of the posts far from striking at the independence of the Commission paved the way for its smooth and effective functioning.”\textsuperscript{139}

The Court appeared torn between limiting capture of the EMB and guarding against abuse of the ECI’s powers for other improper purposes. Even though it allowed the ECI to revert to a single Chief Commissioner, the Court waded into the long-standing debate on whether a multi-member commission was desirable. Though discretion rests with the President to make the appointments as needed, the Court held that in an “institution which is accountable to none” a multi-member commission is preferable to a single individual in charge in order to “assure judiciousness and want of arbitrariness.”\textsuperscript{140} The Court in this fashion acted to check partisan capture of the ECI, but also warned of the dangers of super-agency costs generated by the unchecked arbitrary actions of the Chief Commissioner acting alone. Had the Election Commissioners been acting as a bulwark against partisan capture, the Court likely would have been more generous in preventing their removal.

\textsuperscript{138} \textit{Ibid} at para 20: The “manner of appointment [of the new commissioners] and the attitude adopted by them in the discharge of their functions was hardly calculated to ensure free and independent functioning of the Commission.”

\textsuperscript{139} \textit{Id} at para 23.

\textsuperscript{140} \textit{Id} at para 21.
The Court did not directly address the allegations of partisanship and the need for judicial review to limit capture. The Court maintained that the removals were justified because there was no reason to appoint new commissioners in the first place, but its reasoning makes clear that it was aware of the political circumstances\textsuperscript{141} and the centrality of the appointment process to an institution’s independence and impartiality. The Court also acknowledged that insulating the ECI from political control meant it could abuse its authority in the future. This approach fits with the argument that the ECI should be reined in by the courts only where it is at risk of being captured by partisans or abusing its authority for purposes other than ensuring a fair and efficient democratic process. Non-interference is the appropriate posture for courts to adopt in relation to independent and impartial EMBs, but where its non-partisan credentials are in doubt, as in Dhanoa, courts should act to reset the proper balance.

The Supreme Court very quickly had to confront the failings of the appointment process to the ECI again in Seshan. The Court was faced in Seshan with the question of whether there was a difference in status between the Chief and the other Election Commissioners, which was raised though not resolved in Dhanoa. The Congress Party lost the 1990 election, but quickly returned to power in 1991 as part of a coalition government, replacing the short-lived Janata Dal government. Soon after taking office again, Congress legislated to alter the terms of service and tenure of the Chief Commissioner and the Election Commissioners, with the effect of

\textsuperscript{141} Id at para 23 the Court wrote that the government has “not been all that candid with the reasons for the abolition of the posts” and stated that “[w]hat other considerations weighed with the then Government in making the appointments is anybody’s guess, and we do not propose to go into them.”
erasing the discrepancies between the Chief and the others. Along with enhancing the status of the Election Commissioners, the legislation regulated specifically for the first time the decision-making process of the ECI when functioning as a multi-member body. Parliament stipulated that the Commission may operate unanimously, but that in the absence of unanimity, a majority vote would suffice. Shortly after this law was passed in 1991, the President at the behest of the Congress-led coalition appointed two new Commissioners to form a three-member body along with the Chief, who had been a Janata Dal appointee.

The combined effect of the legislation modifying the ECI's decision-making procedures and the appointments was that the two new Commissioners could outvote the Chief Commissioner and seize control of all decision-making in the ECI. If the two Commissioners acted on the behest of the government that appointed them, then the ECI would be in the Congress Party's partisan hands. The Chief Commissioner argued the legislative provisions relating to internal decision-making and the appointments amounted to a partisan takeover of the ECI.

The Court opted to uphold the appointments and permit the new legislation, despite legitimate concerns about an institutional power-grab by a Congress Party whose traditional dominance of Indian politics was being eroded. Chief Commissioner Seshan was appointed by the Janata Dal government and was the

---

142 The Chief Election Commissioner and Other Commissioners (Conditions of Service) Act, 1991, No 104-C of 1990, amending the RPA, supra note 116. The law was passed pursuant to Parliament’s power reserved by Article 324 (5) to set the terms of the Election Commissioners’ service. The pay and retirement age of the Election Commissioners was raised to match the terms given to the Chief: s 3(1)-(2).
143 Id. s 9-10.
most activist head of the ECI to that point, with great zeal for tackling political corruption,\textsuperscript{145} especially of Congress politicians. Under Seshan the ECI had taken a number of decisions adverse to the Congress Party’s interests.\textsuperscript{146} The government therefore was likely to benefit if the new Commissioners outvoted him. New Commissioner Gill was allegedly a close friend of the Prime Minister and was “called to Delhi by a special aircraft” by the government, which seemed to display unseemly haste in appointing him.\textsuperscript{147}

The Court downplayed these partisan elements.\textsuperscript{148} The Court filtered its analysis through the issue of whether the Chief and the Election Commissioners are equals and decided the only difference was the permanent presence of a Chief. It therefore endorsed majority rule within the ECI rather than control by the Chief on the theory that all Commissioners should be given an equal say.

The Court’s fears of misuse of the ECI’s independence in furtherance of some private purpose, however, were also legitimate. The \textit{Dhanoa} opinion had stressed that a multi-member commission was more likely to act in the public interest than follow the whims of the Chief Commissioner. This statement was motivated by the controversial actions of Chief Commissioner Seshan, who had been sanctioned by

\textsuperscript{145} Saxena, \textit{supra} note 121 at 203-04 describes Seshan as “the first incumbent in the office [of Chief Commissioner] to try to use the constitutional powers and autonomy that the constitution has given to the Commission.” McMillan, “Administration of Electoral Politics”, \textit{supra} note 114 at 189.

\textsuperscript{146} These included fear of the Chief’s application of a new model Code of Conduct for elections that significantly raised the ethical bar, his refusal to delay elections in several states, zealous enforcement against some Congress officials for violations of electoral rules that the party blamed for its losing the election in Tripura, and what Congress regarded as insufficient deployment of staff to by-election campaigns of important party leaders: \textit{Seshan, supra} note 113 at 8.

\textsuperscript{147} \textit{Ibid} at 21-22.

\textsuperscript{148} \textit{Ibid} at 23 the Court wrote that one can’t “jump to the conclusion that [partisanship] was the cause for the…appointments…We find it difficult to hold that the decision to constitute a multi-member Commission was actuated by malice…It is wrong to think that the two [Election Commissioners] were pliable persons who were being appointed with the sole object of eroding the independence of the [Chief Commissioner].”
the Court previously for his “abrasive behaviour.”\textsuperscript{149} Seshan’s activism at times veered into an outsized assessment of the Chief’s role or, worse, a search for personal aggrandizement. The Chief, a former head of the influential civil service, had mused about forming his own political party to fight corruption.\textsuperscript{150} Seshan did in fact eventually run unsuccessfully for the Presidency in 1997. In a fit of institutional pique, the unanimous Supreme Court also appears not to have taken kindly to Seshan’s comparison of his role to that of the justices of the country’s highest court. The Court’s reasoning displays much greater concern with the possibility that Seshan was misusing the ECI’s powers for private gain rather than any partisan takeover by the Congress Party. The Court held that, “[n]obody can be above the institution which he is supposed to serve” and plainly viewed Seshan and his anti-corruption crusade as attempting to elevate himself to a superior position over the other Commissioners but also the other organs of the Indian state.\textsuperscript{151}

While the Supreme Court’s concern with Seshan’s abuse of his authority is admirable, and often overlooked in the case law, the decision in \textit{Seshan} permitted a partisan takeover of the Commission.\textsuperscript{152} All indications were that Congress was attempting to cement its unstable governing status at the head of a coalition by capturing the ECI. The Court’s main focus here should have been on preserving the independence of the ECI, rather than on the admittedly present risk Seshan would go beyond his mandate. Both the appointment process and the internal rules governing the ECI pointed toward partisan interference.

\textsuperscript{149} \textit{Id.} \\
\textsuperscript{150} \textit{Id.} \\
\textsuperscript{151} \textit{Id} at 18. \\
\textsuperscript{152} \textit{Id} at 23.
Both *Dhanoa* and *Seshan* indicate that there is a balance to be struck between minimizing partisan control and checking the misuse of the ECI’s powers by Commissioners with private mandates operating with little oversight. In *Dhanoa*, the Court properly limited the partisan harm imposed by the Rajiv Gandhi government, while in *Seshan* it focused unduly on the misuse of the ECI’s powers by Chief Commissioner Seshan. Until the appointment process is reformed to eliminate partisans being named as either the Chief or as Election Commissioner, these issues will continue to resonate.

Disputes about partisanship by the ECI erupted in the lead-up to the 15th General Election. Opposition *Bharatiya Janata Party* (BJP) MPs asked for the dismissal of allegedly Congress-favouring Commissioner Chawla in 2006, and in 2009 Chief Commissioner Gopalswami, who had been appointed by the BJP and was a former Minister in a BJP government, sought Chawla’s dismissal as well. This led to an “unseemly constitutional crisis” and Chawla’s eventual elevation to the Chief Commissioner’s role by a Congress-led government. The independence of the ECI remains compromised by Presidential appointment on the advice of the government of the day. The Supreme Court should minimize the opportunities and effectiveness of attempts at partisan capture of the EMB.

IV. Conclusion

---

154 Saxena, *ibid* at 204 writes that he was accused of taking a partisan role during the Emergency of 1975-1977, of being close to Congress, acting in a partisan fashion as a Commissioner, and of his NGO benefiting from Congress funds.  
155 *Id* at 206.
This chapter has applied the approach outlined in Chapter 2 to case law involving judicial oversight of the actions of redistricting commissions and election commissions. Courts assessing an electoral rule need to inquire as to the independence and impartiality of the EMB that produced it. The more independent and impartial the EMB, the more deference it should be owed in striking the complex balance between redistricting principles or considerations necessary in administering elections. If an EMB is not independent and impartial, then it is likely to have been captured by partisans and to repeat the same pathologies as legislatures and executives. In order to make this assessment, courts must engage in a close investigation of the EMB. The independence test that I adapted provides a roadmap for courts seeking to discover whether partisan capture has occurred. This independence test aids in showing why Carter and Raîche were wrongly decided and why the courts in the Colorado and Arizona cases should have reasoned differently. The “In and Out” case demonstrates that this approach is applicable to election commissions as well as redistricting commissions. Analysis of the Indian cases emphasizes the need to restrict super-agency costs generated by both partisan capture and misuse of EMB authority.
Chapter 4: 

Motive-Based Judicial Review and Improper Partisan Purposes

I. Introduction

Chapters 2 and 3 provided and applied an approach to judicial oversight of electoral management bodies (EMBs). EMBs are fundamental to the democratic architecture of most countries and administer large portions of the electoral and political processes. Theories of judicial review of the law of democracy that do not engage with EMBs are therefore incomplete. Despite the importance of EMBs and the need for theories of judicial review to engage with these institutions, direct clashes between courts and legislatures remain inevitable. No intervening institution is present to separate the two when a legislature beset by the principal-agent problem establishes partisan-tainted election laws whose constitutionality is challenged before the courts. While the presence of EMBs reduces the instances where such a direct confrontation occurs, judicial oversight of legislative behaviour on the law of democracy will remain necessary as long as elected representatives hold the power to set election laws. Direct judicial oversight of legislative behaviour will characterize a smaller sub-set of the cases involving the law of democracy than is often assumed, but we must still account for how courts can limit partisan self-dealing by legislatures.

This chapter addresses how courts should respond to self-dealing by legislatures on the law of democracy in those instances where EMBs are not a factor. In Chapter 1, I argued that judicial review of the law of democracy is legitimate in order to check partisan self-dealing. Even accepting the legitimacy of oversight by
the courts, judicial review of the law of democracy raises particular challenges. Courts in majoritarian democracies have generally declined to confront the partisan gamesmanship behind election laws. As a consequence they have failed to produce frameworks of analysis up to the task of identifying and limiting self-dealing, as I detailed in Chapter 1 through consideration of jurisprudence in Canada, Australia, India, and the United States.

I argue in this chapter that a way through this impasse is for judicial oversight of the law of democracy to be conceived of as motive-based\(^1\) review. The underlying claim is that the search for partisan gain is an improper purpose for exercising public authority to shape the law of democracy and an illegitimate justification for limiting democratic rights.\(^2\) Courts have traditionally shied away from considering the partisan effects of election laws, but they have been even more reluctant to look at the motives behind government action. Yet self-dealing is a deliberate act where the goal is to alter the democratic process to favour the prospects of a particular set of partisan actors. Where political actors engage in self-dealing, they are intentionally attempting to manipulate the democratic process. Judicial review should therefore be focused on preventing or minimizing improperly motivated partisan manipulation. In this argument, the partisan effects of a law will

\(^1\) I follow Elena Kagan in not making much of the distinction between the terms “motives” and “purposes”: “Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine” (1996) 63(2) U Chi L Rev 413 at 426, FN 40. John Hart Ely had earlier adopted the same position: “Legislative and Administrative Motivation in Constitutional Law” (1970) 79(7) Yale LJ 1205 at 1220. I use these terms interchangeably here, though much ink has been spilled on whether a distinction exists. See Ely at 1217-1221.

be relevant to assessing whether a right has been infringed and then at the proportionality stage of the analysis in assessing whether limitation of the right is justified. Partisan effects, however, should be understood as *prima facie* evidence that the law was improperly motivated. Courts have frequently failed to limit partisan abuse. The failure of courts to do so stems at least in part from their reluctance to engage directly in motive-based judicial review.

Judicial oversight of the law of democracy concentrated on a searching review of legislative purposes that integrates the partisan effects of a law as evidence of improper motives has the potential to limit self-dealing. It can also aid courts in assessing whether the burden imposed on a right is justified. Governments need leeway to regulate the democratic process, but must be constrained from engaging in self-dealing that harms accountability or that unduly harms democratic rights.

Elected representatives will rarely be so cavalier as to make explicit their improper motivation in the text of the legislation or in the public rationales they give for their actions. Courts must therefore find ways to evaluate whether the reasons given for a law are the real ones at play and, if not, to uncover the likely motives behind the government action. As elected representatives seeking to avoid judicial disapproval will couch their partisan efforts at self-dealing as legitimate regulation of the democratic process, doctrine must be developed to discover hidden partisan purposes. Effective doctrine to achieve this task has either been

---

3 In the American First Amendment context, Kagan, *supra* note 1 at 414-5 argues that a test to smoke out improper purposes would proceed in the abstract on very similar lines to that developed in existing doctrine.
absent or under-used in recent jurisprudence on the law of democracy. I address in this chapter how courts should go about limiting self-dealing through motive-based analysis that looks beyond the stated justifications provided for a law.

This chapter will proceed as follows. As motive-based review is controversial, Section II will consider first how legislative motives may be improper, how improper motives are taken into account by some existing constitutional doctrines, and then evaluate some objections to incorporating consideration of legislative purposes into judicial review. Section III analyzes two cases, *Figueroa v Canada (AG)*\(^4\) from the Supreme Court of Canada and *Rowe v Electoral Commissioner*\(^5\) from the High Court of Australia. I claim that the impugned law at issue in each case was designed to fulfill partisan ends. While the courts in both instances reached the correct conclusion, they were unwilling to directly confront the partisan purposes and effects of the legislation. As a result, their reasoning is unpersuasive and constitutes an inadequate foundation from which courts can base their efforts to restrict self-dealing. Despite their failings, Section IV extracts doctrinal tools hinted at in *Figueroa* and *Rowe* to aid courts to smoke out partisan-motivated laws. These are: 1) non-retrogression; 2) refining proportionality tests to be skeptical of legislative motives; and 3) anti-majoritarianism.

II. Judicial Review of Legislative Action on the Law of Democracy

a) Improper Partisan Purposes

\(^4\) 2003 SCC 37.
\(^5\) 2010 HCA 46.
Laws altering the democratic process and motivated by partisan ends are problematic because they are private rather than public regarding. Private-directed, partisan self-dealing undermines the legitimacy of the democratic process because elected representatives are not truly accountable if they are able to entrench themselves so as to be insulated from changes in public opinion or preferences. As agents (elected representatives) control the agent selection process (elections) through self-regulation, legislatures may remove themselves from oversight by the voting public. That a campaign finance, redistricting, or party funding law would harm a legislative majority's political competitors is not a legitimate justification for the exercise of political power.

i) Types of Election Laws as Classified by Motive

There are three general types of election laws, as classified according to the justifications offered by the legislature. First will be those motivated by proper, constitutionally valid purposes. Second will be those laws motivated by a mix of proper and partisan purposes. Third are those designed entirely to fulfill partisan ends.

The first category of cases does not generally raise problems for the law of democracy. If a law is legitimately motivated to enhance democratic participation, there is no constitutional problem. Potential difficulties may arise if the law limits democratic rights. Courts are occasionally faced with thorny problems caused by

---

6 Michael J Klarman recognized this point early on in the development of the law of democracy scholarship. “Majoritarian Judicial Review: The Entrenchment Problem” (1997) 85(3) Geo LJ 491 at 529: “A particular legislative action might reflect illegitimate entrenchment motives or perfectly defensible non-entrenchment considerations, or some of each.”
well-motivated laws that also happen to limit democratic rights. Yet governments are likely to need to limit rights to ensure a healthy democratic process, given the complexity of modern elections and the need for appropriate regulatory responses. Any set of standards for registering voters at the polls or setting times for voting, for example, will limit who is able to exercise their democratic rights.

Another potential problem with well-motivated laws involves unintended partisan consequences. Even in the absence of a partisan purpose, it is possible that legislation may have an unanticipated partisan impact. As Justin Levitt points out, a requirement that election laws produce no partisan effects would likely prevent nearly all of the regulation of the democratic process with which we are familiar.8

Given the likelihood that all election laws will have at least some minimal impact on political competition, requiring no partisan effect would neuter the state’s ability to

---


regulate politics. As Levitt correctly argues, where the unintended partisan effect is sufficiently serious, this set of cases may be constitutionally problematic. The degree of harm stands as relevant to assessing whether a law containing partisan effects alone, without a partisan motive, is troubling.\(^9\) I agree with Levitt that we should be vigilant in preventing serious harm to political competition, even if unintended. Yet, in my opinion, this type of case has generally not bedeviled the law of democracy.

The second category of mixed proper and partisan motives encompasses most election laws. Elected representatives’ public-minded desire to improve the democratic process will often co-exist with the temptation to achieve re-election by altering the terms of democratic competition.\(^10\) Elections are complex and dynamic regulatory environments, where separating what portion of a law is public-minded from what is partisan-oriented represents an ongoing challenge for courts.\(^11\) Courts will often be confronted with a mix of possible motives to consider.

The third category of laws are those “whose only plausible justification was pure partisanship”.\(^12\) That a law may be directed toward a partisan end without mitigating proper purposes flows from the principal-agent problem at the heart of the law of democracy. Justin Levitt argues there are different categories of partisanship, which exist on a spectrum of legitimacy, with “tribal partisanship”

---

\(^9\) *Ibid* at 1809.
\(^10\) Klarman, *supra* note 6 at 529: “The difficulty is that legislatures usually act upon mixed motives.”
\(^11\) *Ibid* at 530: “I concede that these tasks - discerning the predominance of entrenchment motives and balancing competing policy arguments after neutralizing entrenchment considerations - in some contexts may be unmanageable for courts.” Klarman argues for a “but-for” test of causation at 529-30.
being the least defensible. His understanding of tribal partisanship largely maps onto this third category of cases. Tribal partisanship exists where, policymakers may favor public action purely because the policy in question is perceived to benefit those with a shared partisan affiliation, or because the policy in question is perceived to injure partisan opponents, wholly divorced from, or stronger yet, contrary to the policymaker’s conception of the policy’s other merits.\(^{13}\)

**ii) Coming to Terms with Improper Motives**

Courts have at times turned their minds to the problems posed by partisan-motivated laws, even if they struggle to conclusively establish the existence of an improper motive or are reluctant to declare a law to fit into one of the three categories. In a recent case on an Indiana voter ID law that was likely designed to erect barriers to minority voting, *Crawford v Marion County Election Board*,\(^{14}\) the United States Supreme Court per Justice Stevens wrote that, “If [partisan] considerations had provided the only justification for a photo identification requirement, we may also assume that [the law] would suffer the same fate as the poll tax at issue in *Harper* [which was struck down as unconstitutional].”\(^{15}\)

A particular piece of legislation may reflect both non-partisan and partisan goals, as is the case with the *Fair Elections Act*,\(^{16}\) which recently amended Canadian federal election laws. The Act makes some changes to election administration that

---

\(^{13}\) Levitt, “The Partisanship Spectrum”, *supra* note 8 at 1798.

\(^{14}\) 553 US 181 (2008). The lack of evidence to justify voter ID rules troubled the lower courts and many commentators. Writing before the case was heard by the Supreme Court, Edward B Foley highlighted the possible partisan dimensions of the voter ID law: “The fact that the Indiana law was enacted on a party-line vote might reinforce [the Court’s] suspicions and thus their insistence on strict scrutiny.” “*Crawford v Marion County Election Board*: Voter ID, 5-4? If So, So What?” (2008) 7(1) Election LJ 63 at 74.

\(^{15}\) *Crawford*, *ibid* at 203; cited in Issacharoff and Pildes, “Epilogue”, *supra* note 11 at 10.

can be fairly characterized as neutral in terms of partisan impact. For example, it removes the ban on the transmission of election results from the Eastern provinces before the polls have closed in British Columbia.\footnote{Ibid at s 73, amending s 329 of the \textit{Canada Elections Act} SC 2000, c 9.} The ban had been found to be constitutional by the Supreme Court in \textit{R v Bryan},\footnote{2007 SCC 12.} but was widely criticized as an undue restraint on political expression and the Chief Electoral Officer subsequent to \textit{Bryan} recommended that it be scrapped as unenforceable.\footnote{Elections Canada, \textit{Report of Chief Electoral Officer of Canada on the 41st General Election of May 2, 2011} (Ottawa: Elections Canada, 2011) at 49: “…the growing use of social media puts in question not only the practical enforceability of the rule, but also its very intelligibility and usefulness…The time has come for Parliament to consider revoking the current rule.”}

The bill, however, also contains blatantly partisan elements. It allows political parties and candidates to appoint poll workers.\footnote{Partisans (the electoral district association, party, or the candidate) will be able to recommend deputy returning officers, poll clerks, and the central poll supervisor. Elections Canada is bound to accept these recommendations. Appointment power would in effect be granted to those with a direct interest in the outcome: ss: 18-21, 44 of the \textit{Fair Elections Act}, supra note 16.} This is a clear departure from the principle of impartial election administration and reflects the desire to gain partisan advantage. An earlier version would also have introduced a loophole allowing the cost of fundraising from prior donors to be exempt from the spending limits imposed on political parties during election campaigns.\footnote{The exemption applied to donors of $20 or more within the past 5 years to the party, candidate, leadership candidate, or an electoral district association of the party: s 86 of the \textit{Fair Elections Act}, C-23, \textit{An Act to Amend the Canada Elections Act and other Acts and to make consequential amendments to certain Acts (Fair Elections Act)}, Second Session, Forty-first Parliament, 62 Elizabeth II, 2013-2014 (First Reading, February 4, 2014).} This proposal seemed tailor-made to allow the governing Conservative Party, which has both a lengthy donors’ list and far more money on hand than it is permitted to spend during a campaign, to gain a financial advantage over its competitors. This loophole was withdrawn after intense criticism. Under a constitutional challenge to the
validity of these types of provisions, a court would be faced with discerning whether partisan entrenchment is prevented by the right to vote in s. 3 of the Charter and the motives behind the law.

Motive analysis aids in establishing whether a partisan end was the true goal of the legislation or a particular provision. Looking only at partisan effects, and not the motives behind the law, is an “impoverished” analysis, because it does not tell us why the partisan effect was sought. Confronting motive requires us to assess whether the government’s stated purpose for the law is the actual one, and if its actual motive is a legitimate exercise of public power. A searching analysis of the most plausible purpose underlying an election law will generally be useful for assessing when partisanship has irredeemably tainted the legislative process.

Motive analysis requires investigating the particular political and constitutional context in order to assess how partisanship operates. Both the effects of and motives behind a law are relevant and should be considered, even while keeping the two concepts of effect and motive analytically distinct. Partisan effects are

---

22 Levitt, “The Partisanship Spectrum”, supra note 8 at 1795.
23 Ibid: “[I]f we seek to not only measure but influence partisan effect - to soften, limit, harness, or control it - we must also be concerned with the inputs to partisan decisions.”
24 Issacharoff and Pildes, “Epilogue”, supra note 11 at 6. For example, a majority of the Canadian Supreme Court in Figueroa, supra note 4 struck down rules discriminating against small parties, including ones that prevented small parties from issuing tax receipts for donations outside of the election period or from transferring funds unspent by candidates to the party. Iacobucci J for the majority began his analysis of the right to vote at para 48 by stating that “it is not my position that s. 3 [the right to vote] imposes upon Parliament a freestanding obligation to extend to political parties the right to issue tax credits for donations received outside the election period, to extend to candidates the right to transfer unspent elections funds to the party. Section 3 prevents Parliament from interfering with the right of each citizen to play a meaningful role in the electoral process; it does not impose upon Parliament an obligation to enact legislation that enhances the capacity of political parties to raise funds for the purpose of communicating the ideas and opinions of its members and supporters to the general public.” (emphasis in original).
25 Kagan, supra note 1 makes this point with regard to American First Amendment jurisprudence at 427.
primarily of relevance for motive-based review because they are the most reliable indicator of the likely purpose behind a law.

For example, following Crawford, numerous American states have recently raised barriers to voting through stringent voter identification (ID) laws.26 These laws impose burdens on individuals seeking to vote to prove their identity at the polls with photographic ID. Their stated purpose is to prevent voter fraud, but there are reasons to doubt that this is the real motive. There is little evidence of voter fraud for in-person voting.27 The particular rules in the voter ID legislation tend to require types of identification that the poor, students, and African Americans are less likely to possess.28 Republicans passed almost all of these voter ID laws,29 which appear to have targeted the coalition of voters supporting Democrats by making it harder for them to cast a ballot. Despite the Supreme Court in Crawford upholding the Indiana voter ID law,30 (largely because it was a preemptory challenge and the harm had not yet been realized), courts around the 2012 election cycle struck down

---

26 Issacharoff and Pildes, “Epilogue”, supra note 11. States also imposed other barriers to voting, such as arbitrary restrictions on early voting, which were struck down as inconsistent with the notion of the equality of voters from Bush v Gore. See Obama for America v Husted, 697 F 3d 423 (6th Cir 2012). Underlying these cases was the unstated view that these were attempts by Republicans to suppress Democratic turnout: Issacharoff and Pildes at 9-11.
27 See the reasoning in a recent Wisconsin case that struck down voter ID legislation, largely because it found the claim regarding the need to prevent fraud overblown. Frank v Walker (2014) Case No. 11-CV-01128 (US District Court Eastern District of Wisconsin).
29 Hasen, “The 2012 Voting Wars”, ibid, at 1870: “The story of the 2012 voting wars is a story of Republican legislative and to some extent administrative overreach to contract voting rights, followed by a judicial and public backlash.”
or enjoined implementation of related pieces of legislation.31 A similar story occurred around partisan-minded rules restricting early voting in the 2012 electoral cycle.32

Stringent voter ID requirements are not, in the abstract, troubling. The integrity of elections matters and fraud should be prevented. The context of Republican disenfranchisement of likely Democratic voters, however, is problematic. The disproportionate impact on Democratic voters and the lack of evidence of fraud indicated that the ID laws were partisan-motivated. A focus on motive assists a court in assessing whether a procedural change that might otherwise be acceptable is inappropriate in the political context. It is necessary to evaluate the political context of state action in order to check partisan self-dealing.

It is an interesting theoretical question whether a law stemming from a partisan motive, but where the court can discern no partisan effects, should be held to be unconstitutional purely on the basis of the improper purpose underlying it.33

31 Issacharoff and Pildes, “Epilogue”, supra note 11; Hasen, “The 2012 Voting Wars,” supra note 28. This renewed equal protection jurisprudence to protect voting rights represents a shift from earlier more pessimistic takes on Bush v Gore. See Richard L Hasen, “The Untimely Death of Bush v Gore” (2007) 60 Stan L Rev 1 at 6-15. Some of this was achieved through s 5 of the Voting Rights Act, where the Department of Justice used the preclearance provision in the Act to bar legislation that was likely to be discriminatory, as it did with the law in Texas. Other voter ID legislation that was deemed less objectionable was passed. Crawford was not controlling precedent in interpretations of state constitutions, which opened space for state courts to prevent unequal voting rights. See Hasen, “Untimely Death” at 6-7.


33 Richard Pildes considers laws favouring incumbents by requiring they be listed first on the ballot as examples of cases that raise this issue. In “Foreword: The Constitutionalization of Democratic Politics” (2004) 118 Harv L Rev 28 at 76 he writes that, “The intriguing general issue such examples raise is whether laws whose sole or predominant purpose is political self-entrenchment, of incumbents or parties, should be unconstitutional in principle. That issue, not yet fully developed, lies beneath the surface of many constitutional conflicts in [the law of democracy].” He argues that the case law of the United State Supreme Court is in flux on this point at 78: “Thus, whether self-entrenchment for its own sake is unconstitutional in principle, when manageable remedies exist, remains an open question.” Richard Hasen argues that Pildes is open to invalidating laws on the basis of unconstitutional motives as is perhaps his frequent co-author and fellow structural theorist Samuel Issacharoff: “Bad Legislative Intent” (2006) Wisc L Rev 843 at 846-7, FN 17. Adam Cox argues there is ambiguity in the structural approach of Issacharoff and Pildes as to whether
Some motivations clearly expressed by legislators, such as racism or the goal of establishing a state religion, could conceivably so taint legislation as to undermine the rule of law. A law seeking to eliminate political competition and motivated by extreme partisanship could in theory rise to such a level as to render it irretrievably tainted. It is hard to imagine many election laws, however, that would be so motivated but also so ineffective at achieving the desired goal as to have no corresponding partisan impact. Where the law is clearly motivated by self-dealing but no partisan effects are evident to the reviewing court, it is likely that the court has missed the likely partisan impact, rather than that one is absent. In practice, cases like this will arise very rarely. A partisan motive should be taken as an indicator that some kind of partisan consequence is likely to exist, just as partisan effects imply an improper motive. It will be rare to find one without the other.

b) Motive Analysis and Improper Purposes in Existing Constitutional Doctrine

Courts have generally been reluctant to engage in motive-based review of the law of democracy. Incorporating the likelihood of improper purposes into judicial review, however, is not completely alien to constitutional jurisprudence more broadly. There are some notable exceptions that point us in the direction of how motive-based judicial review of the law of democracy might operate as well as its relative merits. I therefore consider some key examples in this section. Engaging partisan motives are relevant: “Partisan Gerrymandering and Disaggregated Redistricting” (2004) Sup Ct L Rev 409 at 422-3, especially FN 45.

with the partisan motives behind a law is a productive way for courts to proceed if
the goal is minimizing partisan manipulation.

There are strands of American constitutional doctrine where divining
improper motives lies at the heart of the judicial endeavour.35 The concept of
impermissible motives animating government behaviour has been identified as
relevant to First Amendment jurisprudence by a number of scholars.36 Elena Kagan
puts forward the most forceful argument on this point. She claims that First
Amendment doctrine largely conforms to the sort of tests that would be developed if
the judicial intent were to see past the superficial justifications put forward by
legislatures attempting to hide their true motivations.37 She argues that First
Amendment doctrine has as its,

primary, though unstated, object the discovery of improper
governmental motives. The doctrine comprises a series of tools to
flush out illicit motives and to invalidate actions infected with
them....the application of First Amendment law is best understood
and most readily explained as a kind of motive-hunting.38

Sophisticated actors will rarely declare their improper purposes out in the
open.39 While there may be instances of election laws intended to harm minorities
or opposing political parties that are explicitly justified by political actors as being

35 Generally, see Gordon G Young, “Justifying Motive Analysis in Judicial Review” (2008) 17(1) Wm &
Mary Bill of Rights J 191; the special edition of the San Diego L Rev Vol 15 (1978); the useful exchange in
the affirmative action context between Jed Rubenfeld, “Affirmative Action” (1997) 107 Yale LJ 430 and
Larry Alexander, “Affirmative Action and Legislative Purpose” (1998) 107 Yale LJ 2679, with
Rubenfeld’s reply, “The Purpose of Purpose Analysis” (1998) 107 Yale LJ 2685; and Ashutosh Bhagwat,
36 See Kagan, supra note 1 at 425 and FN 39 for a helpful summary.
37 Ibid at 414. Kagan advocates “motive-hunting” as a descriptive theory for understanding the case law,
but hedges on whether it provides the best normative justification for First Amendment doctrine: 415.
38 Id at 414.
39 Id; Hasen, “Bad Legislative Intent”, supra note 33 at 861.
directed at achieving partisan ends, these will be rare. Elected representatives will instead generally offer what Kagan labels “pretextual” justifications for the law. If the stated purposes of government cannot be relied upon, then courts need to develop doctrine capable of “smoking out” the actual purpose behind a law.

Strict scrutiny jurisprudence in the United States can also be characterized as motive-based. Justice Stone’s famous footnote number four in *United States v Carolene Products* proposed “exacting judicial scrutiny” for all rules affecting rights fundamental to the “political process”, because of the likelihood that process would fail to function. The United States Supreme Court in *Burdick v Takushi* stated clearly that strict scrutiny does not apply to all voting rights claims, thereby rejecting the logic of *Carolene Products*. Improper purposes, however, are intimately tied to the American jurisprudence applying strict scrutiny to suspect class discrimination, fundamental rights, freedom of association, and religious liberty, in addition to the First Amendment. Current strict scrutiny doctrine

---

41 Kagan, supra note 1 at 414.
43 Discriminatory intent plays a role in the litigation under the *Voting Rights Act* 42 USC ss 1973-1973aa-6 (VRA). I focus in this section on motives in constitutional cases, but the litigation under the VRA also recognizes improper purposes.
45 *Carolene Products*, ibid, at FN 4.
48 John Hart Ely famously argued that democratic politics failed with regard to minority rights and the democratic process, thereby requiring judicial intervention of the type engaged in by the Warren Court: *Democracy and Distrust*, supra note 46.
49 Winkler, supra note 42 at 797.
involves a two-part test. First, courts investigate whether there is a compelling underlying governmental end to justify the restriction on one of these rights or freedoms and, second, ask whether the law is narrowly tailored in pursuit of those interests.\textsuperscript{50}

Cass Sunstein views the role of strict scrutiny as ensuring “courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work.”\textsuperscript{51} While strict scrutiny doctrine has been applied inconsistently and has not always been focused on legislative purposes, one strand can be best described as operating as a test for illicit motives.\textsuperscript{52} The American Supreme Court has at times deployed this interpretation of strict scrutiny,\textsuperscript{53} though it has also clearly departed from it at others.\textsuperscript{54} As Adam Winkler states with regard to the test, the “inquiry into ‘fit’ between ends and the means enables courts to test the sincerity of the government’s claimed objective” (emphasis added),\textsuperscript{55} which is necessary because legislation “may be motivated by improper or invidious purposes”.\textsuperscript{56} That is why process theorists like John Hart Ely advocated that courts engage in “flushing out unconstitutional motivation.”\textsuperscript{57}

\textsuperscript{50} Ibid at 801.  
\textsuperscript{53} Fallon, ibid at 1309-1310.  
\textsuperscript{54} Id at 1311. This is a conclusion that Fallon calls “indisputable”.  
\textsuperscript{55} Winkler, supra note 42 at 801.  
\textsuperscript{56} Ibid at 802.  
\textsuperscript{57} Democracy and Distrust, supra note 46 at 146.
In the partisan gerrymandering cases, some opinions do engage with the issue of partisan motives, but the United States Supreme Court has yet to agree on a standard by which to determine if a gerrymander has occurred.58 In Vieth v Jubelirer,59 Justice Stevens in dissent held that “a naked desire to increase partisan strength” went to a finding there was no rational basis for the map.60 Later in LULAC v Perry,61 however, a majority of the Court mysteriously held that even if partisanship is the sole motive behind the new districts, this does not prove partisan gerrymandering.62

Outside of the United States, some doctrinal tools that can assist in smoking out election laws that are intended to have partisan effects have lain dormant or been under-utilized. Proportionality tests for justified infringements of constitutional rights are the main example,63 as investigating legislative motive is built into this type of analysis, but often not conducted in a searching manner. The potential inherent in proportionality analysis to aid courts in limiting self-dealing and agency costs generated by partisan-motivated election laws has not been fully

60 Ibid at 1812.
62 Ibid at 2602 per Kennedy J; Grofman and King, “Partisan Symmetry”, supra note 58 at 3.
realized by courts. I engage extensively with proportionality analysis in Section V of this chapter.

c) Objections to Motive-Based Analysis

Before expanding on its potential in the law of democracy, I consider the main objections to motive-based review. There are two central concerns: 1) institutional capacity and 2) separation of powers arguments. Though they raise legitimate issues and deserve to be taken seriously, neither of these two objections should be understood as decisive.

In the first objection, courts are not institutionally equipped to assess legislative intent, particularly where elected representatives deliberately hide behind pretextual motives. John Hart Ely identified this problem as the ascertainability challenge. Richard Hasen argues that the ascertainability challenge is “particularly acute in the context of election laws” and that legislative

---

64 Mattias Kumm has argued for the need to consider improper motives generated by “the capture of the political process by rent-seeking interest groups”: “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review” (2010) 4(2) Law & Ethics of Human Rights 141 at 143, 162-163. Kumm considers this capture one of four types of pathologies that can “vitiate the democratic process even in mature liberal democracies” at 157. Kumm discusses legitimate aims at 148 and lists “traditions, conventions, preferences, without an attachment to legitimate policy concerns” as not potentially being acceptable reasons to limit rights at 158-159, as well as “illegitimate reasons related to the good” at 163. He discusses proportionality analysis at 159-160. Kumm writes at 160 that, “One important function of proportionality analysis is to function as a filter device that helps to determine whether illegitimate reasons might have skewed the democratic process against the case of the rights-claimant.”

65 Hasen, “Bad Legislative Intent”, supra note 33 at 861, 866-67 argues that legislators will adjust their behaviour to take into account likely judicial disapproval of what he calls “bad intent”. As a result, he claims judicial searches for motive are misplaced as they are likely to be ineffective. Public choice theorists have argued there is no single intent that can be identified in a multi-member legislative body, with the implication being that courts will be unable to divine one. Kenneth A Shepsle, “Congress Is a ‘They’, Not an ‘It’: Legislative Intent as Oxymoron” (1992) 12 Int Review of Law and Econ 239. Even within the public choice, framework legislative intent is not always viewed as an “oxymoron.” See the critique of Shepsle by Arthur Lupia and Matthew D McCubbins, “Lost in Translation: Social Choice Theory is Misapplied Against Legislative Intent” (2005) 14 J Cont Legal Issues 585. Aharon Barak argues that with regard to multi-member legislative bodies, it is the “aggregate intention of the legislative body as a whole that matters” in Proportionality, supra note 63 at 300.

intent is much more difficult to parse out in the constitutional context than the statutory one. Hasen claims that anti-competitive behaviour around election law will be hidden even deeper than other improper motives for legislative action, such as religious beliefs, because there is no segment of voters that supports making elections less competitive, while there may be constituencies for other improper purposes.

The second objection is that by investigating legislative motives, courts may tread too deeply into territory reserved for elected representatives, namely deliberating on policies of net benefit to society. As Adam Winkler has noted, “separation of powers...concerns ordinarily lead courts to presume that legislatures act within their powers and that legislation is constitutionally valid...”. Hasen claims that searching through empirical evidence of partisan impact or the particulars of the legislative process “has an aura of ad hoc'ry and unreliability about it”. On Hasen’s view, motive-based analysis to restrict partisan law-making provides cover for judging that is arbitrary and tantamount to “naked policy” made

---

67 Hasen, ibid and at 861-2. Hasen does recognize what he calls a “very limited role for evidence of bad legislative intent” as part of his preferred approach of careful balancing at 879. Hasen expands on this narrow role, which he argues triggers a “hard look” but not strict scrutiny at 888-890.
68 Ibid at 861-2 and 870-1. Hasen’s views here seem at odds with partisan support by certain parties for restrictions on democratic rights. Republican Party fervor for restrictive laws on voter ID and early voting stand as an example here. It should be noted that Hasen also has a third objection beyond ascertainability and the separation of powers. I do not consider this objection as central and therefore do not engage with it as extensively. Hasen claims that well-intentioned laws may also lead to anti-competitive outcomes at 851-8, which implies we should focus on partisan effects rather than motives. In my opinion, the risk of missing the partisan dimension is much higher if we ignore motive and, as indicated in the section on categories of laws, these types of instances will be relatively rare.
69 Winkler, supra note 42 at 802.
70 Hasen, “Bad Legislative Intent”, supra note 33 at 869.
by courts that are supposed to have a more constrained role.\textsuperscript{71} Searching for motive “may lead to the striking down of too many laws.”\textsuperscript{72}

The first objection about institutional capacity is a relevant one. There is a risk that courts will not be able to divine the actual, underlying partisan purposes behind a law when sophisticated actors are dedicated to obscuring them. Skeptics of considering legislative motive such as Hasen are correct to point to the legitimate practical difficulties that this may pose. It will be particularly onerous to establish whether a law was partisan-motivated to the degree that it should be invalidated where there is a mix of both proper and improper partisan purposes.

The use of motive-based analysis in other areas of constitutional law, however, indicates that the search for improper purposes is far from futile.\textsuperscript{73} The law of democracy is subject to the ongoing risk of deliberate partisan manipulation and judicial review should therefore be focused on establishing whether elected representatives were improperly motivated. Even if courts lack the clear evidence to make a conclusion regarding motive - such as a partisan or racist statement on the legislative record - they may be able to draw this conclusion indirectly. Proportionality tests, in particular, ask what is the purpose underlying the legislation? That a stated purpose for limiting a right is in actuality a smoke screen, and the real goal is a partisan one, can be divined by looking at the evidence of partisan effects. If legislation limits the political participation of unions, for example, with the stated goal of leveling the electoral playing field, but does not restrict the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{71} Ibid at 850.
\item \textsuperscript{72} Id at 871.
\item \textsuperscript{73} Barak, supra note 63 at 301 makes this point.
\end{itemize}
\end{footnotesize}
involvement of corporations and in practice bolsters the political prospects of the
government, then the effects of the law indicate that the reasons behind the rights
limitation are likely to be improper. The “ascertainability” challenge is therefore
over-stated by critics of motive-based review.

The separation of powers objection must also be taken seriously. There is
always a risk that courts will overreach into the legislative sphere of authority as the
separation of powers objection suggests.74 Yet the alternative of ignoring motive
entirely is equally untenable. Without judicial oversight that minimizes self-dealing,
the risk is that the democratic process will be illegitimate. Unless judges behave as
full out partisans indistinguishable from elected representatives, the danger of
excessive judicial interference will generally be less problematic than the
demonstrable harm of permitting partisan self-dealing on the basis of deference to
the legislature.75 The separation of powers objection does highlight the need for
judicial doctrines to be calibrated so that intervention is primarily targeted to limit
self-dealing, rather than allowing courts to substitute their policy opinions for those
of legislatures. Section V develops doctrines with this in mind.

In both the institutional capacity and separation of powers objections, the
underlying claim is that it is unnecessary (and perhaps unwise) to engage with
motive and that courts should instead target their ire exclusively at unconstitutional
effects. This argument is misplaced, in my view. Focusing exclusively on the effects
of an impugned law has proven to be insufficient to check partisan self-dealing, even

74 See the discussion of the legitimacy of judicial review of the law of democracy in Chapter 1, Section V.
75 I acknowledge that judicial over-reach may be more problematic in particular democracies, such as the
United States, where judicial partisanship is relatively high. This may also be the case in transitional
democracies without a tradition of judicial independence.
where courts acknowledge partisan entrenchment as unconstitutional. For example in redistricting cases, courts looking only at the constitutionality of the effects of legislation have missed obvious instances of partisan gerrymandering. Courts have also missed the partisan aspects of laws that permit only tiny amounts of interest group spending during the campaign period. Restrictions on political speech that monopolize the election period for political parties by effectively neutering interest group participation can serve as incumbent-protection devices. Courts focused on the effects on interest groups of these bans have missed the dimensions of the law that potentially diminished accountability and competition, as in the Canadian Harper v Canada (AG) case, and in the Bowman v United Kingdom decision of the European Court of Human Rights.

Considering the effects alone of an allegedly unconstitutional action does not provide courts with the context necessary to prevent self-dealing. Most attempts at partisan self-dealing in established democracies will not be as blatant as banning an opposing party (though this is an issue in some democracies) or a segment of citizens from voting, where the constitutional problem is readily observable. Self-dealing will most often take the form of subtle alterations to the rules of the game. A

---


78 1998-I Eur Ct HR 175; Samuel Issacharoff, “The Constitutional Logic of Campaign Finance Regulation” (2008) 36 Pepp L Rev 101. A similar argument can be made about the campaign finance rules in Bowman being the product of self-dealing as was the case in Harper.
change to election administration rules may very well appear innocuous in the
abstract and perhaps very far removed from broad constitutional language
protecting the right to vote or representative government. Looking at the effects of
an electoral rule takes a court part of the way. A reviewing judge can see that
moving polling stations away from university campuses, for example, makes it
harder for students to vote. This may seem constitutionally unproblematic on first
glance as a technical decision. Connecting the potential motive - that the party that
passed the legislation loses the student vote and would benefit from suppressing it -
to the effects allows a court to assess the importance of seemingly minor changes to
electoral rules. The plausibility of an improper, partisan motive should act as a
trigger for reviewing courts to view the effects in a new, more skeptical light.

Even in cases where partisan laws have been struck down, the reasoning
finding government action on electoral regulation unconstitutional is often
suspiciously unpersuasive. One way of understanding the gap between existing
doctrine and the results reached is that courts have shied away from admitting that
the finding of unconstitutionality rests at least partially on an awareness of
improper partisan purposes. As Issacharoff and Pildes argue in the American
context, courts have struck down election laws lacking “public-regarding and
neutral justifications...while leaving unsaid the more bald-faced statement that the
law is a purely partisan act.”79 As a result, the reasoning can appear disconnected
from what was actually at stake in the case, as courts struggle to fit their role in
checking partisan behaviour into existing doctrinal approaches that do not readily

79 Issacharoff and Pildes, “Epilogue”, supra note 11 at 11.
lend themselves to the task. Courts subsequently have inadequate ammunition with which to wage the battle against partisan attempts to limit the accountability of incumbents in future cases.

This reluctance to confront partisan motives holds true with the two decisions dealt with in detail in the next section, Figueroa and Rowe. These cases demonstrate the continuing challenges posed by partisan self-dealing and the need for courts to consider improper motives. Figueroa concerned rules regulating small political parties in Canada and Rowe voter registration cut-off dates in Australia. I argue that the best way of understanding the reasoning in both cases is that the courts were well aware of the partisan motives underlying the legislation and acted to prevent diminished political competition, though they were reluctant to admit as much and adopted other, unpersuasive, reasons for doing so. Neither case can be properly understood without acknowledging the role of improper, partisan motives behind the laws under review and their electoral consequences. Courts should address partisan-motivated laws head on, in order to better prevent self-dealing.

III. Judicial Oversight of Partisan Rule-Making: Figueroa v Canada

In order to expand on the need for courts to account for partisan motives and effects in their jurisprudence on the law of democracy, I analyze the case of Figueroa v Canada.\(^8^0\) The majority and concurring opinions also engage with the underlying majoritarian features of the constitutional structure. In Figueroa, the Canadian

\(^{80}\) Supra note 4.
Supreme Court struck down provisions in the *Canada Elections Act*\(^{81}\) that furnished financial benefits and preferential treatment on the ballot to large, established parties, and thereby discriminated against small political parties and parties without representation in Parliament. I argue that the Court reached the correct result, but that the majority’s reasoning is inadequate. The majority opinion centers on individual rights and the harms to citizen participation caused by the legislation.\(^{82}\) This approach fails to engage with the motivations of the political actors that enacted laws discriminating against small parties and the partisan consequences.

### a) The Background

The *Canada Elections Act* requires political parties to register with Elections Canada. As the legislation stood prior to *Figueroa*, registration conferred particular benefits, but various thresholds had to be crossed for organizations to qualify to register as parties. The Act obliged parties to field 50 candidates or more in a general election to be registered. Existing parties not in compliance with the 50-plus rule were stripped of their assets and de-registered. Implemented in 1970, the 50-plus rule worked against small parties who did not have the resources or support to generate a larger slate of candidates. Amendments to the Act in 1993 requiring parties to have at least $50,000 available to them to be registered reinforced this

---

\(^{81}\) *Supra* note 17.

\(^{82}\) The concurrence of Lebel J rejects this individualism in favour of majoritarian community values. I deal with the concurrence in greater depth in Section V on doctrines to prevent self-dealing.
bias. The law became a “matter of life and death” for small parties. The rules were a disincentive to start new parties and threatened small ones with extinction.

The leader of the Communist Party of Canada, Miguel Figueroa, launched his constitutional challenge against this backdrop. Under these rules, the Communist Party was unlikely to be able to contest future elections with any significant number of candidates. At issue before the Supreme Court was the constitutionality of the provisions restricting three specific benefits to registered parties meeting the 50-candidate threshold: the ability to issue tax receipts outside of the election period (s. 127 (3) of the Income Tax Act); the right of candidates to transfer unspent election funds to the party (s. 232 of the Elections Act); and the right to list a candidate’s party affiliation on the ballot (s. 100 of the Elections Act). A majority of the Supreme Court held entirely in favour of Figueroa, concluding that the 50-candidate threshold for issuing tax receipts, transferring unused funds, and listing party affiliation all violated the right to vote in the Charter (s. 3) and were not saved by the limitations provision (s. 1).

---

83 Heather MacIvor, “The Charter of Rights and Party Politics: The Impact of the Supreme Court Ruling in Figueroa v. Canada (Attorney General)” (2004) 10(4) IRPP Choices 1 at 8. In order to run for election, candidates were required to deposit $1000, up from $200, and only $500 would be returned to those who won less than 15% of the vote. Small parties were therefore guaranteed of losing at least half of the $50,000 in deposits needed to field 50 candidates.

84 Ibid.

85 Id. The CPC was in dire financial straits and had nominated only 8 candidates in the 1993 election, compared to over 50 in every other election since 1970.

86 Figueroa won at trial (1999), 43 OR (3d) 728 ONSC (Gen Div), but lost at the Court of Appeal (2000), 50 OR (3d) 161 where Doherty JA upheld the 50-candidate threshold for the right to issue tax receipts and to transfer unused funds to the party, but struck it down as it related to the right of candidates to list their party affiliation. See the decision of the Supreme Court in Figueroa, supra note 4, for a summary of the lower court decisions.

87 Figueroa, supra note 4 at para 4.

88 Iacobucci J’s opinion was joined by five others (McLachlin CJ, Major, Bastarache, Binnie and Arbour JJ), with Lebel J in dissent writing for two others (Gonthier and Deschamps JJ).

89 The constitutionality of other regulations that favour large, established political parties was not at issue in the case, though they raise similar concerns regarding fairness. Figueroa, supra note 4 at para 4;
b) Re-Reading the Majority Decision: Individual Participation, the Egalitarian Approach, or Partisan Self-Dealing?

There are at least three main plausible readings of the reasoning and result in Figueroa. The first is the rationale adopted by Iacobucci J., for the majority, that the provisions in the Elections Act were unconstitutional for offending the ability of individuals to meaningfully participate in the electoral process through small political parties. The second is that Figueroa represented yet another victory for the “egalitarian” model of election law that had been adopted in Libman v Quebec\(^{90}\) and Harper. The third is that the Court barred an attempt at incumbent-protection by the partisan-motivated parties in Parliament that supported the legislation. I will argue that this third option, directed at improper motives revealed in the legislative record and the effects of the law, is best able to justify striking down Parliament’s choice of electoral rules.

i) Meaningful Individual Participation

The majority judgment notably interpreted s. 3 as protecting an individual right to vote that encompassed myriad forms of political participation beyond simply casting a ballot. Iacobucci J.’s reasoning on the purpose of the right to vote

---

Christopher D Bredt and Laura Pottie, “Liberty, Equality and Deference: A Comment on Colin Feasby’s ‘Freedom of Expression and the Law of the Democratic Process’” (2005) 29 Sup Ct L Rev (2d) 291. Bredt and Pottie argue at 301 that “[m]uch of the current electoral regime is clearly designed to protect and promote established parties and/or incumbents.” Candidates and political parties who receive a certain threshold of the vote obtain partial reimbursement of their expenses: at 301-2. By making eligibility for reimbursement of expenses contingent on electoral performance, smaller parties are disadvantaged in relation to larger, more successful ones. Broadcasting time allocated to parties is also dependent on electoral performance.

\(^{90}\) [1997] 3 SCR 569.
expanded on the concept of meaningful individual participation\textsuperscript{91} that had not previously been understood as so central to s. 3.\textsuperscript{92} While s. 3 on its face protects only voting, Iacobucci J. reasoned that in order to do justice to the purpose behind the right, it must be interpreted to include related protections for participation not evident in the text. His new doctrine envisions participation as an individual right, exercised in concert with other citizens and channeled through parties.\textsuperscript{93} On this reasoning, participation encompasses all political activities regardless of the size of the party through which it flows. Even if a party is insufficiently popular to form government and implement policy, the participation of its supporters must be protected because their ideas contribute to public debate.\textsuperscript{94}

Applying this understanding of s. 3, Iacobucci J. found that individuals who support parties that field fewer than 50 candidates seek to participate meaningfully in the electoral process and, therefore, that the 50-candidate threshold impairs their ability to do so. Withholding the ability to issue tax receipts or transfer unused funds unless a party meets the 50-candidate threshold financially benefits parties

\textsuperscript{91} Figueroa, supra note 4 at para 28: “The fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country.”

\textsuperscript{92} Section 3 had been understood to require “effective representation” with respect to electoral boundaries: Carter, supra note 76, which was followed in other contexts in Haig v Canada, [1993] 2 SCR 995; Harvey v New Brunswick (Attorney General), [1996] 2 SCR 876; and Thomson Newspapers Co v Canada (Attorney General), [1998] 1 SCR 877. Figueroa does not reject effective representation explicitly, but its focus on meaningful participation may do so in effect. The Ontario Court of Appeal in Figueroa had understood s. 3 as primarily protecting effective representation. See Figueroa, ibid at paras 22-26. The first use of the phrase “to play a meaningful role in the selection of elected representatives” at the Supreme Court was by L’Heureux-Dubé J in Haig at 1031.


\textsuperscript{94} Figueroa, supra note 4 at paras 40-44. Regional parties that do not intend to be elected nation-wide are examples of parties that meaningfully further the views of their supporters, on this approach.
that field the requisite number of candidates and harms those that do not. Contrary to s. 3, these provisions impaired the ability of supporters of small parties to have their voices heard by disadvantaging their chosen vehicle for participation. The 50-candidate threshold for listing party affiliation on the ballot was found to violate s. 3 because all voters should have access to the same information in casting their ballots,\(^95\) given the close connection between voters' policy preferences and their choice of party.\(^96\)

Three purposes were advanced to justify the rights limitation: 1) improving the electoral process, 2) preserving the integrity of the campaign finance system, and 3) facilitating majority government formation.\(^97\) All three are potentially legitimate aims of government action, but can also be used as fig leaves to cover partisan goals. The risk that these stated objectives were merely pretextual was ignored by the Court for the first two and at best partially acknowledged with respect to the third. The majority accepted the first two as pressing and substantial, while casting doubt on the third.\(^98\)

The proportionality analysis, particularly the rational connection branch, was more searching. Iacobucci J. found there was no rational connection between the objective of improving the electoral system and the 50-candidate threshold.\(^99\) As

---

\(^95\) *Id* at para 57.
\(^96\) *Id* at para 56.
\(^97\) Iacobucci J applied an abbreviated analysis of the government’s claim that the impugned provisions aided in majority government formation, but nevertheless concluded that none of the three benefits had a rational connection to the objective and the harms outweighed any gains: *id* at paras 86–89. I address this governmental purpose at greater length in Section V so I do not go into detail at this juncture.
\(^98\) Iacobucci J writes that he has doubts whether facilitating majority government formation is actually pressing and substantial (*id* at para 80), but leaves that determination to another day (para 83) and proceeds with the proportionality analysis.
\(^99\) *Id* at paras 67–70.
s. 3 was now defined by the new doctrine of meaningful individual participation, and the impugned provisions all hindered individual participation through small parties, he could not find other than that they harmed rather than improved the electoral system.\textsuperscript{100}

The government’s second justification for limiting the right to vote was to preserve the integrity of the electoral finance regime, largely by deterring fraud and reducing demands on public funds. As there was no evidence the impugned provisions actually deterred fraud,\textsuperscript{101} Iacobucci J. found the 50-candidate threshold failed the rational connection branch with regard to this objective as well.\textsuperscript{102} There were many regulatory alternatives that could have saved more money, such as reducing the rebate given to donors to all parties. This implied the intent of the provisions was something other than to reduce reliance on public funds, though Iacobucci J. did not speculate on what the real motives might be, such as incumbent protection. The presence of other options that would have produced less harmful results for small parties meant, however, the provisions in the Act could not satisfy the minimal impairment test in the majority’s analysis.\textsuperscript{103}

On the third objective of facilitating majority government, Iacobucci J. cast doubt on whether the Canadian democratic system actually valued single-party

\textsuperscript{100} Preventing the issuance of tax receipts additionally failed the minimal impairment branch and the balancing test. There were far less restrictive means for ensuring a fair electoral system than drastically harming the financial position of small parties, and any benefits produced by the 50-candidate threshold, such as dissuading sham parties, were outweighed by the negative impact on individual participation. \textit{Id} at paras 69-70.\textsuperscript{101} \textit{Id} at para 76.\textsuperscript{102} See \textit{id} at para 73 (party affiliation), para 76 (tax receipts), and para 77 (unspent funds).\textsuperscript{103} \textit{Id} at para 78.
majority over minority or coalition government.\textsuperscript{104} He found that it was the number of parties contesting elections that harmed the chance a single party would form a majority, not whether parties ran a sufficient number of candidates to meet a threshold.\textsuperscript{105} He therefore held there was no rational connection between the 50-candidate threshold and the purpose of aiding majority government formation.

Iacobucci J.’s individual participation approach has some appeal.\textsuperscript{106} The right to vote must surely protect something beyond simply casting a ballot. The right to vote attaches to individuals, and they may choose to aggregate themselves with others in the form of parties, or to support candidates nominated by parties. To the extent that the collective vehicle chosen for individual participation - the party - is hindered in its ability to exist, operate, and attract votes, then meaningful individual participation may also be stunted.

The meaningful participation rationale, however, is unpersuasive when looked at more closely. The legislation was not aimed at all individuals participating in the democratic process, but instead specifically at harming those supporting small or new parties. The legislation protected some collective vehicles, namely the Liberal and Conservative Parties, while harming their competitors. These partisan effects, the ineffectiveness of the chosen means of the legislation to reach the stated

\textsuperscript{104} Id at paras 79-89. Lebel J in contrast penned an ode to majority government: paras 137-46.
\textsuperscript{105} Id at paras 84-86.
\textsuperscript{106} The pivot to s 3 as protecting meaningful participation allowed the majority to discard the constraints of the “effective representation” doctrine developed in earlier cases. The effective representation doctrine created in \textit{Carter, supra} note 76 allowed vote dilution and under-representation of urban voters in order to facilitate the more effective representation of over-represented rural voters. A similar logic applied in \textit{Figueroa} would have resulted in allowing limitations on small parties in order to aid large parties and the creation of a hierarchical approach. Iacobucci J is careful to reject this reading of \textit{Carter, supra} note 76, and redistricting and party regulation are not analogous, but the most plausible explanation in functional terms for the creation of the new doctrine was that the previous one would have led to an unpalatable result.
ends, and the existence of other means likely to be more effective at achieving those goals, all indicate that the true motive in enacting the law was not to improve elections, deter fraud, or ensure a majority government.

**ii) The Egalitarian Model**

A second plausible understanding of *Figueroa* is that it forms part of a trilogy of s. 3 cases in which the Supreme Court of Canada adopted an “egalitarian” model. Prior to *Figueroa*, the Supreme Court held in *Libman* that while a cap on campaign spending during a referendum amounting to an effective ban on speech was unconstitutional, s. 3 did permit more reasonable restrictions on political spending.107 After *Figueroa*, the Court upheld spending limits on third party campaigns for federal elections in *Harper*.108 The Court’s jurisprudence has been debated in the growing literature as a choice between an egalitarian and a libertarian model of political speech and spending.109 The egalitarian model supports reasonable restrictions on political expression and spending in order to prevent those with resources from dominating the electoral process to the exclusion of all others. Egalitarians seek to equalize opportunities to participate and do so by ensuring there is a level playing field. Libertarians view freedom of political expression as sacrosanct and, consequently, understand restrictions on speech as violating the principle of political liberty. They are therefore skeptical of state regulation of political spending, which they equate with speech.

107 *Libman*, supra note 90.
108 *Harper*, supra note 77.
Colin Feasby and Heather MacIvor\textsuperscript{110} have separately argued that \textit{Figueroa} fits within an egalitarian paradigm.\textsuperscript{111} The three provisions tied to the candidate threshold - the ability to issue tax receipts, the ability to transfer unused funds to the party, and the right to list party affiliation on the ballot - created two tiers of political parties.\textsuperscript{112} On their view, \textit{Figueroa} ensured parties were treated equally regardless of size, which fits the egalitarian model.

While the egalitarian model was clearly at play in the campaign finance and spending contexts in \textit{Libman} and \textit{Harper}, it is an uneasy fit with \textit{Figueroa} despite the arguments of Feasby and MacIvor. Manfredi and Rush among others have argued that \textit{Figueroa} is at most a qualified endorsement of the egalitarian model.\textsuperscript{113} Manfredi and Rush have rightly pointed out that the egalitarian interpretation of \textit{Figueroa} strains the actual reasoning used by Iacobucci J., as he emphasized individual participation not party equality.\textsuperscript{114} Lending credence to Manfredi and Rush’s argument is the fact that other aspects of a two-tier approach to party


\textsuperscript{111} Feasby, “Political Theory”, \textit{ibid}; MacIvor, “The Impact of \textit{Figueroa}”, \textit{ibid}

\textsuperscript{112} The constitutional status of political parties was a long-running issue prior to \textit{Figueroa}, with two main approaches competing. The party equality approach would ensure political parties are treated identically regardless of their size. A two-tier approach would allow preferential treatment for larger parties over smaller ones. The \textit{Elections Act} embodied the two-tier approach: Heather MacIvor, “Judicial Review and Electoral Democracy: The Contested Status of Political Parties under the Charter” (2002) 21 Windsor Yearbook of Access to Justice 479 at 479-504; MacIvor, “The Impact of \textit{Figueroa}”, \textit{ibid} at 5-6.

\textsuperscript{113} Manfredi and Rush, \textit{Judging Democracy}, \textit{supra} note 77 at 100-1. They also put \textit{Libman} in the category of a partial endorsement, because the actual spending limits there were struck down.

regulation that offend party equality remain in place.115 While the end result of

Figueroa is a move toward more equal treatment of parties, on the whole the
egalitarian model does not appear to have animated the majority.

While the egalitarian/libertarian lens is useful in resolving the parameters of
regulation of political spending under s. 3, it has a large blind spot. Neither the
egalitarian nor libertarian visions have much to say about the partisan uses of
election law or oligopolistic behaviour by large political parties using their
legislative power for private gain. The Canadian debate between egalitarians and
libertarians has been about finding the proper balance between unhindered political
speech and restrictions on political spending that level the playing field, not
distortions caused by partisanship. The egalitarian approach adopted so decisively
in Libman and Harper does not provide a real model for identifying and limiting
partisan self-dealing.

**iii) Partisan Motives and Effects**

The most plausible reading of Figueroa is that the law was a partisan-minded
attempt at incumbent protection and the court was obliged to stop it to ensure a fair
democratic process. The individual participation reasoning of Iacobucci J. and the
egalitarian-libertarian lens did not and cannot address who stood to gain from
limiting participation. The underlying issue in Figueroa was about partisan
imposition of unnecessarily onerous rules around party registration and the denial
of its accompanying benefits to small parties.

---

115 Ibid; MacIvor, “The Impact of Figueroa”, supra note 83 at 8.
The history and political circumstances surrounding the passage in Parliament of the rules at issue in *Figueroa* suggest partisanship and incumbent-protection motives were central factors for the large parties that supported the amendments. Canada’s majoritarian democratic structure allowed the largest parties in Parliament to collude to hinder the smaller parties that compete for voter support. Campaign finance and political party regulation were first introduced in 1970 through amendments to the *Elections Act*. The 50-candidate threshold was justified in Parliament on two grounds: 1) keeping frivolous and regional parties off the ballot; and 2) ensuring the integrity of the public purse, which funded parties through tax rebates and other measures.\(^\text{116}\) An all-party Parliamentary committee had recommended a requirement to field 10 per cent of the number of seats in the House (26 or 27 at the time), but the Liberal government initially chose to set an even higher threshold of 75 seats without explaining why it was necessary.\(^\text{117}\) The higher threshold would have favoured large parties much more than the committee’s proposal.\(^\text{118}\) The government backed down, but only to a 50-candidate rule.\(^\text{119}\)

---

\(^{116}\) *House of Commons Debates (Hansard)*, 28th Parl, 2nd Sess, No 8 (1970) at 7395 (Hon Donald MacDonald); MacIvor, “The Impact of *Figueroa*”, *supra* note 83 at 6.

\(^{117}\) *Hansard*, *ibid*. Minister MacDonald merely stated the result of the government’s deliberations to raise the threshold to 75: “The committee thought that this threshold should be set at 10 per cent of the constituencies, which would mean 26 or 27 nominated candidates under our present system, and that this is a sufficient threshold to determine a party. However, the government has concluded that the threshold should be raised to a higher level for the purpose of determining what constitutes a political party at a national election, that is to say, 75 candidates at an election.” Even the Conservatives, who supported the 75-candidate threshold, felt there was insufficient public reason-giving by the government. MP Heath MacQuarrie at 7400: “I am impressed by the increase from 26 to 75 candidates... I did not think that the minister was too lucid or helpful in explaining why the 26 to 75 bump was insisted upon by the government.”

\(^{118}\) MacIvor, “The Impact of *Figueroa*”, *supra* note 83 at 6-7.

\(^{119}\) As the discussion in committee indicates, the Liberal government may only have relented once it was explained that if they were to become the Official Opposition, a snap election call by the Conservatives
The Liberal majority government with the support of the Conservative Party was able to pass the changes despite objections from the smaller New Democratic Party (NDP) and Créditiste caucuses. The two national political parties that had alternately formed government were united in benefitting from the new rules. The dubious motivations behind the provisions were apparent to those debating their merits in Parliament. MPs from small parties repeatedly highlighted the discriminatory impact, the lack of substantial justification from the government, and the benefits that would flow to parties already represented in the House. The Conservatives spoke in favour of the 75-candidate threshold. The government furnished no evidence of sham parties taking advantage of the public purse or to prove that minor parties detracted from elections. The bar against candidates from unregistered parties having their party affiliation listed on the ballot was the most arbitrary of the provisions, and attracted the most criticism in the House. There might mean they themselves would have difficulty fielding 75 candidates. See the comments of MP Les Benjamin in *Hansard, supra* note 116 at 8205.


121 *Hansard, supra* note 116: The 75-candidate limit was called “discriminatory”, “infamous” and “ludicrous” (MP AD Alkenbrack at 7463); “It would therefore mean discrimination if we set at 75 the minimum number of candidates of a political party before party affiliation could be mentioned on the ballot” (MP Theogene Richard at 7925); “The number of 75 set by the government means that it is up to the government to impose its definition of a national party”, which means it is likely to ignore the rights of parties that are “neither Liberals nor Progressive Conservatives”…, “…the government shows discrimination against people who wish to elect a group of men who could do as efficient a job as any member of any other party.” (MP Andre Fortin at 7412).

122 *Ibid* at 7400 (MP Heath MacQuarrie).

123 Bill C-215 introduced party affiliation next to the names of candidates from registered parties for the first time, as previously only the candidate’s occupation had been listed. *Hansard, supra* note 116 at 7407. The main critic for the NDP, Les Benjamin, tied the party registration amendments to the blatant attempt by the government to maintain control over the appointment of returning officers so as to be able to name partisans to those roles. The MP called the appointment power for returning officers “the result of an old hangover from pork-barrel days” that would provide “unfair advantage to the party in power”. He then connected this partisan abuse with the party registration provisions: “Including a candidate’s party affiliation on the ballot is an improvement in the law, but that provision is not completely in accord with the principle that we must not discriminate against minor or new parties or in favour of the established, larger parties. No government or Parliament has the right to introduce unreasonable prohibitions which
was evidence the provisions were aimed to harm separatist parties in Quebec.\footnote{Id at 7463 (MP Alkenbrack). He argued the law was an attempt to harm separatist parties in Quebec, but a poor one, as separatism, “cannot be fought by discrimination, by making two classes of federal candidates, one with the blessing of the government.” This seems a reasonable assessment of one motive for the original 75-candidate threshold, as Quebec had 75 seats in Parliament.}{124}

Successive Liberal and Conservative governments kept intact the general two-tier framework of party regulation, which worked in their interests, from 1970 onwards. By harming small parties, the large parties eliminated direct competitors for votes, money, and influence. They behaved as a duopoly or oligopoly seeking to entrench their privileged status.

The s. 1 analysis in \textit{Figueroa} ignores the possibility that the provisions were partisan-motivated. The government advanced three pressing and substantial objectives that were merely fig leaves, as they served to cover up the partisan motives lurking behind the legislation. Iacobucci J. held that the cost-efficiency of the tax scheme and the objective of preventing fraud were legitimate objectives.\footnote{\textit{Figueroa}, supra note 4 at para 72; following \textit{Harvey}, supra note 92.}{125} He raised serious doubts about, though did not ultimately rule on, the objective of facilitating the formation of majority government.\footnote{\textit{Figueroa}, \textit{ibid} at para 83.}{126} The sincerity of the purported objectives of tax efficiency and preventing fraud were belied by the substantial public funds dispersed to large parties through tax rebates and reimbursements for election expenses, and the absence of any evidence of fraud. Iacobucci J.’s analysis of whether these purposes were truly compelling and substantial did not connect the last dot and ask which real motives were at play.\footnote{See the analysis of the law’s detrimental impact, \textit{id} at paras 50-54, without asking why it was passed.}{127}
The rational connection analysis was more revealing. Iacobucci J. found that there was no rational connection between meaningful individual participation and requiring that a 50-candidate threshold be met for party registration. The 50-candidate threshold was not a rational means of furthering the goals advanced by the government to justify the rights infringement. It did not improve the electoral process (because it harmed participation), preserve the integrity of the campaign finance system (because it permitted other significant dispersals of funds), or facilitate majority government formation (because it did not cap the number of parties able to compete).

An absence of a rational connection between a provision and the stated objective can indicate that the scheme was ineffective and the infringement of the right is therefore not worth the damage. It may also mean, however, that the objective was pretextual and the legislation was directed at some other goal. The legislation at issue in *Figueroa* was not in actuality attempting to improve the electoral or campaign finance systems, or aid in government formation. None of the measures were rationally connected to the stated goals, because they were instead aimed at minimizing competition from small and new parties against the Liberals and Conservatives. *Figueroa* was a missed opportunity by the Supreme Court to develop doctrine to curtail attempts at partisan entrenchment of a duopoly or oligopoly. As a result, Canadian jurisprudence is ill-equipped to minimize future instances of self-dealing.

I turn now to the Australian *Rowe* case where the High Court prevented partisan self-dealing around voter registration rules. The case provides an example,
similar to *Figueroa*, where a court reached the correct conclusion, but missed the central issue for fear of investigating partisan motives and effects too closely. The case is particularly useful because of the possibilities for limiting self-dealing hinted at in its reasoning.

IV. Partisan Voter Registration Rules: *Rowe v Electoral Commissioner*

A notable case of legislative manipulation of election laws and a judicial response that downplays partisan motives and effects is the decision of the High Court of Australia in *Rowe v Electoral Commissioner*.¹²⁸ *Rowe* involved manipulation of the Australian rules setting a cut-off date for voter registration in federal elections. The implications of the self-dealing were relatively stark. The impugned legislation passed by the conservative Liberal/National coalition would have made it harder for new voters and those who had moved to register to vote. As a consequence thousands of citizens of voting age who were likely to support the opposition Labor or Green Parties would have been ineligible to cast a ballot. The government justified the changes on the need to prevent voter fraud, despite the lack of any plausible evidence of a flawed registration process.

The High Court of Australia found that the tradeoff between any potential gains in preventing fraud were outweighed by the harm caused by making it harder to register. The Court reached the proper result, but failed to engage with the partisan motives behind the law and its consequences for political accountability.

¹²⁸ *Supra* note 5. *Rowe* is notable for its role in the continuing debate within the High Court regarding the living tree doctrine, and the evolution of the proportionality analysis employed by the Court in assessing what limits on constitutional rights are reasonable.
Australia offers an interesting case for how courts can check partisan self-dealing in the absence of an explicit textual guarantee of the right to vote and in the midst of considerable flux regarding constitutional doctrine. I turn now in Section IV (a) to a discussion of the political and legal context for the partisan-tainted registration rules struck down in *Rowe*. I then move on to an analysis of the decision itself in Section IV (b).

**a) The Political and Legal Background to *Rowe***

Citizens in democracies must generally register with electoral authorities in order to be qualified to vote. Registration ensures that only those eligible to vote as citizens meeting the requisite age and residency requirements are allowed to cast a ballot.129 Some democracies permit voters to register at the polls on election-day, such as New Zealand and Canada, in order to enfranchise as many eligible voters as possible.130 In democracies that do not permit same-day registration, a cut-off date is generally set a certain amount of time prior to the election by which time citizens must register in order to be permitted to cast a ballot. The justifications for preventing voter registration after the cut-off date are the prevention of fraud and the need to ensure the integrity of the electoral rolls. But allowing legislatures to set a cut-off date poses a risk they will engage in self-dealing if they know with any

---

129 One must be 18 years of age and live in a particular electoral district to cast a ballot there. Graeme Orr, “The Voting Rights Ratchet: *Rowe* v Electoral Commissioner” (2011) 22(2) Public L Rev 83 at 84-5.
130 *Ibid* at 87.
certainty which voters will be unlikely to have registered in time. The earlier the cut-off date, the less likely that unregistered citizens will register to vote.\textsuperscript{131}

As in other parliamentary democracies, Australian elections are technically pronounced by the issuance of a “writ”,\textsuperscript{132} which establishes the date of the vote. The issuance of a writ as the means of carrying out an election raises distinct issues for election administration. Without fixed election dates, voters in parliamentary democracies are unlikely to know when the writ will be dropped, as this is done at the whim of the executive.\textsuperscript{133} The long-standing Australian convention was that a government declared an election would be held on a given date, but delayed the formal issuance of the writ to give voters time to register.\textsuperscript{134} The traditional approach was to have a seven-day period between the announcement that an election was forthcoming and the issuance of the writ, giving voters a week to register if needed.

The John Howard-led Liberal-National coalition government sought to manipulate the voter registration rules to its partisan advantage in 2006 by altering the convention providing a week’s grace period. Under the \textit{Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth)},\textsuperscript{135} the government restricted voter registration in the run-up to the election. The Act

\textsuperscript{133} Kelly, \textit{supra} note 131 at 61.
\textsuperscript{134} “Ratchet”, \textit{supra} note 129 at 84; Greenwood, \textit{supra} note 52 at 122-3. Greenwood finds there was a significant grace period ranging from 5 to 63 days between 1902 and 1983. Colin A Hughes and Brian Costar found the average was 19 days: \textit{Limiting Democracy: The Erosion of Electoral Rights in Australia} (Sydney, UNSW Press, 2006) at 47.
\textsuperscript{135} No. 65, 2006; C2006A00065.
severely limited the ability of new voters to register and those needing to re-register because they had moved addresses. Under the new legislation, new voters were permitted only two hours on the day the writ dropped in order to register to vote. The writ was deemed to be dropped at six pm (s. 152(2)) on the day it was issued and the rolls were officially closed at eight pm on the same day (s.102(4)). Voters needing to change addresses on the electoral roll were given greater but still minimal leeway, as they had three days from the issuance of the writ to do so to ensure they were able to vote in the proper constituencies (s. 155). The result of the legislation was that close to 100,000 voters would not be able to register in time.136

The voters who would be potentially excluded from the rolls or from voting in their own constituencies were those who tended to vote against the conservative Liberal Party. New voters, including the young and recent immigrants, would be disproportionately affected by the early cut-off as they needed to register in order to vote.137 Young voters tend to be enrolled at much lower rates than others138 and the end of the seven-day grace period constituted a “structural barrier to youth enrolment.”139 Youth140 as well as recent immigrants,141 who tend to be minorities,

---

136 An evaluation of the 2010 election by the Australian Electoral Commission, once the rule was repealed after the High Court decision, found that over 98,000 electors registered for the first time or altered their registration details during the seven-day period. Parliament of Australia, JSCEM, Inquiry into the Conduct of the 2010 Federal Election and Matters Related Thereto (2011) at 79. There were 57,732 new electors and 40,408 changes by those already enrolled. Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=e m/elect10/report.htm. Last accessed May 29, 2014.
137 Orr, “Ratchet”, supra note 129 at 85.
140 Kelly, supra note 131 at 63.
favour the Australian Labor Party or other left-wing parties. Indigenous peoples, the poor, and those who move frequently such as students and renters would have been similarly burdened. All of these groups are more likely to support Labor over the Liberals.142

This was not the first time the parties forming the coalition had tried to game the cut-off date.143 The Liberals and Nationals had long been hostile to the rule permitting registration over a seven-day period, which had been customary since after 1983 election. In 2000, the Joint Standing Committee on Electoral Matters Committee (JSCEM),144 with a majority of Liberal/National members, investigated

---


142 Some voters in remote locations that are potential Liberal supporters would also have been disadvantaged.

143 In 1983, the Australian Liberal (i.e. conservative) government led by Prime Minister Malcolm Fraser broke with convention and simultaneously announced the election and issued the writ that same afternoon, which was a partisan-minded attempt to gain electoral advantage in a snap election given dysfunction among his major political opponents. As a result, voters who were not already registered were disenfranchised. Greenwood, supra note 52 at 123; Kelly, supra note 131 at 61; Anne Twomey, “Rowe v Electoral Commissioner – Evolution or Creationism?” (2012) 31(2) UQLJ 181 at 181. A challenge to this law was made pursuant to s 41 of the Australian Constitution, which states that those eligible to vote in state elections should not be deprived of that right in federal elections. Orr, The Law of Politics, supra note 132 at 46-7. This argument was rejected in R v Pearson; Ex parte Sipka (1983) 152 CLR 254 on the grounds that s 41 is dead letter. Snowdon v Dondas (1996) 188 CLR 48 at 71-2: “[T]he practical effect of s 41 is now spent”: see Orr, Law of Politics, at 46, FN 8. Orr laments in “Ratchet”, supra note 129 that s 41 has been “neutralized by narrow interpretation” at 83. The Fraser government was defeated in the 1983 election and the new Labor government of Prime Minister Hawkes legislated a seven-day period between the announcing of the election and the issuance of the writ.

144 The JSCEM has members from both the House and Senate: Kelly, supra note 131 at 14. Its majority comes from the governing party, with a minority from other parties, which acts to “simply reinforce any disproportionality or bias that is caused by election outcomes” and leads to “a significant incumbency advantage” for the government: Kelly at 23. It also benefits parties with representation in Parliament: ibid.
The hearings culminated in a Report in 2000 that identified electoral fraud as a serious issue to be tackled. The Liberal/National majority JSCEM continued their fight against the rule by issuing a second Report in 2002. In the second Report, the JSCEM rejected the findings by the independent and impartial Electoral Commission and Australian National Audit Office (ANAO) that the federal electoral rolls were functioning well. The 2002 Report asserted that the surge in last minute registrations permitted by the rules created the conditions for fraud. In 2005, the JSCEM issued a third Report that recommended the early closing of the rolls. The Liberal/National majority on the JSCEM concluded that removing the grace period prior to the writ being dropped would serve to deter fraud and encourage Australians to register in a timely fashion, which was a legal obligation given the country’s mandatory voting rule.

The lack of supporting evidence undermined the conclusion that the rules designed to encourage voter registration permitted fraud. The seven-day grace

---

145 State-level electoral fraud in Queensland precipitated the Parliamentary interest in the topic, though the JSCEM quickly veered into other matters.
148 Ibid; The opposition Labor and Green members of the Committee found no reason to be as concerned regarding fraud.
150 The JSCEM is noted to be “the most political of committees” and “its recommendations are invariably often political…The government of the day has a significant influence on the outcome”: Kelly, ibid at 15, quoting an anonymous elected member of the JSCEM. Kelly argues that the committee’s investigation into
period was in effect from 1983 to 2006 without evidence of fraud. The ANAO had concluded that “the Australian electoral roll is one of high integrity, and that it can be relied on for electoral purposes” and that the roll is “accurate, complete, valid and secure”. The Australian Election Commission, which is responsible for maintaining the electoral rolls and processing new applications for registration, submitted to the JSCEM that it “does not support major amendments to the Electoral Act for the introduction of early close of rolls” because it feared “a reduction in the franchise, particularly affecting the young and the socially disadvantaged” and “a decrease in the accuracy of the rolls”. The National Party acknowledged there was “no evidence that we can submit” of fraud or misuse of the rolls. A study found that late enrolments were processed with an error rate of only 0.02%. The government's efforts to eliminate the seven-day grace period were initially stymied because while it maintained a majority in the lower house, Labor controlled the upper house. Once the government gained a majority in the Senate, however, it moved swiftly to eliminate the grace period in its 2006 legislation.

---

a disputed election result stemming from allegations of misleading election material by a minor party in 2004 displayed the JSCEM’s partisan orientation: 16-17.

151 Australian Electoral Commission, Submission to the Joint Standing Committee on Electoral Matters Inquiry into the Integrity of the Electoral Roll (Submission No 26 of October 17, 2000) at section 8 covers the period 1990-2000. Section 12.2.3 states more broadly: “It is also worth noting that no evidence has been uncovered by the AEC or the JSCEM since 1984 that there has been any widespread and organised conspiracy to defraud the Electoral Roll at the close of rolls.”


153 Australian Electoral Commission, Submission, supra note 151 at 72, section 13. See also at 64, section 12.2.5.

154 JSCEM, 2005 Report, supra note 149 at 32.

155 Hughes and Costar, supra note 134 at 49-50, FN 16; Orr, “Ratchet”, supra note 129 at 85.

156 Orr, ibid; Kelly, supra note 131 at 15 quotes an anonymous election administrator noting that the JSCEM became more partisan once the Howard government formed a majority in the Senate (2005-2007) as well as the House.
Shannon Rowe and Duncan Thompson launched an action just prior to the 2010 federal election claiming that the hasty closing of the rolls was unconstitutional\(^\text{157}\) for disenfranchising 100,000\(^\text{158}\) otherwise qualified voters.

Australia has no constitutional bill of rights and hence no guarantee of the right to vote or to free and fair elections. The Commonwealth Constitution drafted in 1900 provides only that members of the House of Representatives and Senate be “directly chosen by the people”\(^\text{159}\) and that no adult entitled to vote in a state election may be deprived of the franchise in federal elections.\(^\text{160}\) Rowe and Thompson alleged the Act violated these constitutional provisions (ss 7 and 24).\(^\text{161}\)

**b) The High Court Decision**

The High Court split four to three and six different opinions were drafted,\(^\text{162}\) but the majority struck down the new voter registration rules in the *Electoral and Referendum Act*.

\(^{157}\) Rowe had become eligible to vote just prior to the election and had not yet registered, while Thompson had moved and was registered in a constituency in which he was no longer resident. Rowe would have been prevented entirely from voting by the closing of the rolls and Thompson would only have been entitled to vote in his former constituency. Despite removing the seven-day period, Prime Minister Howard had given three days notice prior to dropping the writ in the 2007 election, which was the first after the passage of the *Electoral and Referendum Act* in 2006. Orr, “Ratchet”, *supra* note 129 at 85.


\(^{159}\) *Commonwealth of Australia Constitution Act 1900* 63 & 64 Victoria, Chap 12, s 7 with reference to the Senate and s 24 for the House of Representatives. See Orr and Williams, *supra* note 7 at 129 on the lack of clarity of the term “chosen by the people”.

\(^{160}\) *Commonwealth Constitution*, *ibid*, s 41.

\(^{161}\) They also asserted that the law exceeded the federal government’s constitutionally limited spheres of legislative authority, but this claim did not factor as greatly into the eventual decision. The relevant provisions are s 51 (xxxvi) (“Matters in respect of which this Constitution makes provision until the Parliament otherwise provides”) and ss 8 and 30 (qualifications of electors). Together these provisions mean Parliament decides who is eligible to vote in federal elections and were designed to “prevent plural voting by people with multiple landholdings” as part of the historical move to one person, one vote: Orr, *Law of Politics*, *supra* note 132 at 47.

\(^{162}\) The separate opinions were authored by French CJ, Gummow and Bell JJ, and Crennan J in the majority with Heydon J, Crennan J and Kiefel J in the minority. The bulk of the six different opinions concerned debates on how constitutional interpretation should square modern conceptions of democracy with an antiquated constitution that did not reflect a deep textual commitment to democratic rights. Out of the seven opinions, five favoured interpreting the constitution as a “living force”; Kiefel J dissented from the majority
The opinions that engaged extensively with the challenges posed by the political actions of the Howard government are worthy of further analysis. The three separate majority opinions applied a proportionality test, which turned on the requirement of a rational connection between the limitation on the right to vote and the government objective and interest in circumscribing that right. All three held that the lack of evidence concerning actual fraud was a fatal blow to the government's position. There was a lack of a rational connection because the means chosen did not fit the government’s stated purposes of deterring fraud and ensuring the integrity of elections. This finding indicates that either the legislation was singularly ineffective at achieving its desired ends, or that the stated motives were pretextual and the elimination of the grace period for registration was designed to achieve some other purpose.

but employed a proportionality test and a living force approach: Greenwood, *ibid* at 119, 123 and 128. The Court here was very influenced by its earlier decision in *Roach v Australian Electoral Commissioner* (2007) 233 CLR 162 at 174 and statements by McTiernan and Jacobs JJ in *McKinlay v Commonwealth* (1975) 135 CLR 1. James Allan, “The Three ‘Rs’ of Recent Australian Judicial Activism: *Roach, Rowe* and (No)’riginalism” (2012) 36 Melbourne UL Rev 743 at 753 critiques the living tree approach. Anne Twomey, *supra* note 143 argues that *Roach* and *Rowe* did not adopt a living tree approach. She attacks the judgments for rejecting both originalism and a living tree metaphor in favour of an evolutionary approach to constitutional interpretation. The evolutionary approach is unmoored in her argument from contemporary public attitudes, which are used as a justification by living tree advocates: at 183-7 on *Roach* and 187-191 on *Rowe*. Twomey incorrectly in my opinion ignores that contemporary democratic principles, regardless of public opinion on prisoners for example, require that government derive its legitimacy from elections within a constitutional framework that allows participation by all of the people.

The Australian Labor Party-led coalition government elected in the 2007 election sought to solidify the seven-day grace period, but had two separate pieces of legislation on the topic languish before the conservative majority in the Senate. See Twomey, *ibid* at 182 and FN 14 and Sarah Murray, “Forcing Parliamentary Rollback: High Court Intervention in Australian Electoral Legislative Reform” (2012) 11(3) Election LJ 316 at 320. After the 2010 election, the Labor-coalition was able to enact the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011*, No. 29, 2011 – C2011A00029 which re-introduced the seven-day period. See Orr, “Ratchet”, *supra* note 129 at 85 for further detail surrounding the Act.

Orr, *ibid* at 86; Greenwood, *supra* note 52 at 133-34 highlights a rational connection as one of the relevant factors accepted by both the majority and minority; Murray, *id* at 319.
The earlier *Roach*\textsuperscript{165} case on prisoner voting and then *Rowe* established that the guarantee representatives be chosen by the people means the franchise can only be limited for a substantial reason.\textsuperscript{166} Despite the uncertainty caused by three different majority opinions, *Rowe* indicates that limitations on existing voting rights will be evaluated using a proportionality test very similar in broad strokes to those employed in other constitutional democracies. The state must establish that the law is “reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of a constitutionally prescribed system of representative government.”\textsuperscript{167} The majority opinions recognized that the limitations imposed by the government on the right to vote of affected individuals were not trivial.\textsuperscript{168} Given the hypothetical nature of the government’s claim that the legislated changes were necessary to prevent fraud, the majority opinions found the limitation of the right disproportionate to the claimed government interest. The majority opinions found the actual harm caused by the short cut-off time outweighed the abstract government interest in preventing fraud, in the absence of any concrete evidence of abuse of the system.\textsuperscript{169}

\textsuperscript{165} *Supra* note 7.
\textsuperscript{166} The opinions of French CJ and Gummow and Bell JJ go into the relevant factors that compose the test for determining if a limit is “reasonably appropriate”.
\textsuperscript{167} *Rowe*, *supra* note 5 at paras 23-5 per French CJ and para 161 per Gummow and Bell JJ. See *Roach*, *ibid*, at para 219 per Gummow, Kirby and Crennan JJ.
\textsuperscript{168} The need for an inclusive franchise was approved of by several justices of the High Court in earlier cases and Orr argues that these opinions were the basis for the decision in *Roach: Law of Politics*, *supra* note 132 at 50, FN 23 and “Ratchet”, *supra* note 129 at 85-86. See *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36 (McTiernan and Jacobs JJ); *McGinty v Western Australia* (1996) 186 CLR 140 at 201 (Toohey J) and 221-2 (Gaudron J); and *Langer v Commonwealth* (1996) 186 CLR 302 at 342 (McHugh J). McTiernan and Jacobs JJ in *McKinlay* at 36 stated that “the long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether...anything less than this could be described as a choice by the people.”
\textsuperscript{169} *Rowe*, *supra* note 5 at para 78 per French CJ: “That detriment [ie disenfranchisement] must be considered against the legitimate purposes of the Parliament...Those purposes addressed no compelling
Legislative motive was an omnipresent but unexamined presence throughout the opinions. In the oral argument, the plaintiffs’ lawyer argued there was an improper partisan purpose behind the law, because it disenfranchised voters likely to support parties other than the Liberals and Nationals, but the Justices distanced themselves from having to consider this possibility. Immediate reaction to the decision in the media quickly identified the partisan dimension. While recognizing that the law would have disenfranchised particular segments of the electorate, the High Court did not inquire whether this benefited any particular political party. The validity of the government’s stated objectives were assumed because of the inherent value of preventing fraud and protecting the integrity of elections, without questioning whether those purposes were actually behind the practical problem or difficulty. The heavy price imposed by the Act was disproportionate to the benefits of a smoother and more efficient electoral system to which the amendments were directed.”

At para 167 per Gummow and Bell JJ: “A legislative purpose of preventing such fraud ‘before it is able to occur’…where there has not been previous systemic fraud associated with the operation of the 7 day period…does not supply a substantial reason for…disqualifying large numbers of electors.” At para 384 per Crennan J: “…the impugned provisions have not been shown to be necessary or appropriate for the protection of the integrity of the Rolls, as that object was advanced by the [federal government].” Further in the paragraph, Crennan J writes: “…the justification put forward to support the impugned provisions does not constitute a substantial reason, that is, a reason of real significance, for disentitling a significant number of electors from exercising their right to vote.”

170 Rowe v Electoral Commissioner, High Court of Australia Transcript Day 1 of Hearing [2010] HCATrans 204: MR. MERKEL (Plaintiffs’ Lawyer): “But we say ultimately the question is why was the seven-day period abrogated?”……KIEFEL J: “That [legislating against fraud when there is no evidence of fraud] is no purpose. That is no legitimate purpose. Full stop. You go that far. MR MERKEL: We go that far. We have no hesitation in going that far…”. (underline added) Available at: http://www.austlii.edu.au/au/other/HCATrans/2010/204.html, Last accessed May 29, 2014.

171 Ibid: FRENCH CJ: We cannot get into a situation, can we, of, as a Court, passing judgment on the merits of parliamentary debate about the justification or otherwise of this measure? MR MERKEL: No, your Honour, we need to look at the…GUMMOW J: We need to look at the practical effect of the measure and to that degree one can have regard to this evidentiary material. MR MERKEL: Sorry, your Honour? GUMMOW J: One has to look at the practical effect of the law to assess its validity and to that extent one can look at this material that you have been putting to us. MR MERKEL: Yes, your Honour. GUMMOW J: It is not just its legal effect. It is a practical effect. MR MERKEL: Yes, your Honour. FRENCH CJ: But whether the debate was politicised or otherwise surely is nothing we are concerned about. GUMMOW J: That is all anterior to its practical effect.

amendments imposed by the Howard government.\textsuperscript{173} Neither the majority nor minority opinions engaged significantly with the possible partisan motives or consequences of the change in the rules surrounding the writ and the closing of the rolls. The Justices failed to ask why a technical aspect of voter registration was targeted despite no evidence of fraud. Academic commentators have largely followed suit in seeing the partisan motives behind the law as secondary.\textsuperscript{174}

The Act could have been interpreted 1) as a legitimate attempt to prevent fraud, or 2) as a partisan-minded attempt to disenfranchise voters likely to be hostile to the Liberal government and favourable to the Labor or Green Parties. Preventing electoral fraud is an obvious governmental interest and a legitimate aim in the abstract. Deterring potential fraudsters, as the government claimed to be doing in \textit{Rowe}, is surely an important component of ensuring the integrity of elections. The Liberal Party had a history of limiting access to the franchise on the justification that voting requires a display of personal responsibility.\textsuperscript{175} Heydon J.

\textsuperscript{173} Gummow and Bell JJ explicitly rejected the idea that the Court should consider parliamentary motive, even though they must investigate on the test in \textit{Roach} whether there is a substantial reason to limit a right: \textit{Rowe}, supra note 5 at para 166.

\textsuperscript{174} Allan, supra note 162, Murray, supra note 163, and Twomey, supra note 143, do not engage with partisanship in the decision at all. Some commentators have picked up on the partisan dimension, which was raised by the plaintiffs, but largely in passing. Orr, “Ratchet”, supra note 129 at 88 observes the court’s reluctance to engage with partisanship (“The court is careful to repeat the mantra that it is not its place to judge parliamentary motivations. Hence, even in an area as prone to partisan feather-bedding as electoral law, it shows little sign of moving to a strict scrutiny approach.”). Cheryl Saunders, \textit{The Constitution of Australia: A Contextual Analysis} (Oxford: Hart Publishing, 2011) at 143 identifies the electoral advantage provided by the law (“In the absence of constitutional protection...important details of the franchise can be changed by an incumbent government that has the support of both Houses, in ways that may give it an electoral advantage. Amendments to the electoral legislation in 2006 that shortened enrolment deadlines and disqualified convicted prisoners from voting were controversial for this reason.”). Greenwood, \textit{supra} note 52 mentions it at 126 in summarizing the argument of the plaintiff (The law “affected a particular class of voters which were statistically more likely to vote for particular parties.”).

\textsuperscript{175} As Orr \textit{ibid} at 85 points out, however, as recently as 2003 they had been part of the Parliamentary consensus supporting the seven-day grace period. The dissents of Hayne J and Heydon J in \textit{Rowe}, supra note 5 picked up this long-standing theme in the context of Australia’s commitment to the individual fulfilling her civic duty, exemplified by the country’s mandatory voting regime, at paras 220, 225, 254 per
rejected the argument that the amendments had a disproportionate and therefore unconstitutional impact on the young and disadvantaged as “an appeal to pathos.”

The harm to voters blocked from registering, the near total absence of any documented instances of attempted or successful fraud, or of any evidence that fraud was likely to expand in future elections, however, indicated that something other than a sincere desire to ensure electoral integrity motivated the law. There is compelling evidence that the Howard government eliminated the seven-day grace period to gain partisan advantage. The disenfranchisement of approximately 100,000 voters was a serious harm to a fundamental right of an identifiable minority of voters.

There is evidence in Australia that lower turnout as a general matter helps the Liberal-National coalition and harms the Australian Labor Party. The amendments on registration were more precise than a general attempt to suppress turnout, as it targeted likely supporters of other parties. Closing the rolls early would hinder the ability of likely supporters of other parties from coming to the polls. By depressing turnout among the young, the poor, immigrants, and the

---

Hayne J and paras 274-75, 283-91 per Heydon J. Twomey, supra note 143 at 183 echoes this sentiment in arguing that the plaintiffs “claimed to be disenfranchised, even though it was their own fault (and choice) not to have enrolled or changed enrolment details at the time they were required by law to do so or within the requisite period after the election had been announced.” Hayne J also emphasized Parliamentary supremacy and the absence of a guaranteed right to vote in the Constitution.

176 Rowe, ibid at para 271.

177 Australia’s Commonwealth Parliament and state legislatures “maintain a tight control on the form of electoral systems and administration of elections”: Kelly, supra note 131 at 23. This suggests that the electoral consequences were likely to have been deliberate and known in advance by the government. Rowe, supra note 5 at para 69; JSCEM, 2011 Report, supra note 136 at 79.

178 McAllister, supra note 141 at 93: “…it is evident that there are distinct party advantages to be gained from differential levels of turnout in Australia….Under the compulsory system, Labor gains where there is higher turnout, and the Liberals lose.” Mackerras and McAllister, supra note 138 find that the higher voter turnout achieved through compulsory voting aids left-wing parties at 227-9. They warn that as a consequence, the right-wing Liberal and National Parties may seek to end compulsory voting to gain a partisan advantage, as voter turnout would predictably fall, at 232.
Indigenous, the Liberal Party led coalition government decreased the likelihood that those who supported other parties would be able to cast a ballot. Viewed in this light, the amendments at issue in Rowe look less like a philosophically minded attempt to deter fraud or encourage personal responsibility among voters, and more like a deliberate attempt to achieve partisan ends through the manipulation of the ground rules governing registering to vote.

Some scholars have been fiercely critical of Rowe for eviscerating Parliamentary sovereignty and for alleged judicial activism. Anne Twomey calls Rowe a “radical new approach to constitutional interpretation that is not justified by the text or structure of the Constitution.” James Allan argues courts do not have a supervisory role over rights in Australia due to the lack of a constitutional bill of rights. He asserts that the political and moral sensibilities of elected representatives prevent them from using their power to disenfranchise citizens. Allan claims that even without judicial supervision of the franchise, “no political party or government would ever legislate to remove the vote from women,

180 Twomey, supra note 143 at 189. George Williams and Andrew Lynch, “The High Court on Constitutional Law: The 2010 Term” (2011) 34(3) UNSWLJ 1006 at 1012 question whether the reasoning in Rowe would lead to constitutional disapproval of existing limits on voting by overseas citizens. See Twomey at 187 and FN 39. I agree with Twomey and Williams and Lynch that restrictions on voting by citizens living abroad will likely fall on an application of the reasoning in Rowe. But I do not see why that is a troubling result. Citizens living abroad may be as informed about and connected to an overseas political community as many residents, particularly through information dissemination possible with new technology that did not exist when restrictions on non-resident voting were implemented. Twomey raises other hypothetical questions at 190 as a slippery slope argument against the reasoning of the majority in Rowe. Similar restrictions on Canadians living abroad were recently struck down as unconstitutional for being contrary to the right to vote: Frank et al v Canada (AG) 2014 ONSC 907.

181 Allan, supra note 162. He calls Roach and Rowe “blatant examples of judicial activism” and “blatant examples of illegitimate judging techniques or interpretive approaches” at 745.

182 Twomey, supra note 143 at 185.

183 Allan, supra note 162 at 763. He is referring to Roach rather than Rowe at this point in his argument but the point holds for his view of Rowe as well. Later, he writes, “Rowe is one of the worst decisions by the High court of Australia in years, and by worst I mean most feebly reasoned and most reliant on implicit assumptions…that can never be explicitly cashed out in any convincing or persuasive way” at 771. See also 773-8.
or indigenous Australians, or Catholics” and lauds rights protection through parliamentary sovereignty in New Zealand and the United Kingdom prior to its incorporation of European rights obligations.\textsuperscript{184}

The deferential approach advocated by these scholars is misplaced. Their criticisms miss the need to check partisanship in a majoritarian democracy. Allan does not explain why the disenfranchisement of an unpopular minority by Parliament dealt with in the \textit{Roach} case - namely prisoners - indicates the franchise is safe in the hands of elected representatives, how his rosy view of Australian constitutional history squares with the very late enfranchisement of Indigenous Australians,\textsuperscript{185} or what would happen if a minority such as Muslim citizens became unpopular in the future.

Twomey and Allan’s critique of judicial overreach is also undermined because they treat \textit{Roach} and \textit{Rowe} as requiring heightened scrutiny of all electoral matters, whereas the High Court was more timid than alleged. As Sarah Murray points out, the approach adopted in \textit{Roach} and \textit{Rowe} is closer to the variable balancing used by the United States Supreme Court in \textit{Crawford}\textsuperscript{186} than a doctrine of strict scrutiny for all election laws.\textsuperscript{187} The justices in the majority in \textit{Rowe} did acknowledge a wide scope for Parliamentary action.\textsuperscript{188} This is why Orr and Williams

\begin{footnotesize}
\begin{enumerate}
\item[Ibid] at 763.
\item[184] Indigenous Australians gained the vote in 1962, but were only included as part of the mandatory registration scheme of compulsory voting in the 1980s. Allan, \textit{id} rejects talk of “apocalyptic” scenarios where governments reject rights protection as beyond the ability of courts to prevent anyway at 764.
\item[185] Murray, \textit{supra} note 163 at 329-30.
\item[186] Murray, \textit{supra} note 5 at para 29 per French CJ, para 125 per Gummow and Bell JJ, and para 387 per Crennan J. Murray, \textit{ibid}, points out that this continued a trend found in earlier jurisprudence at 322.
\end{enumerate}
\end{footnotesize}
have called for strict scrutiny of Australian election laws, as a counter to the relatively deferential approach actually taken by the High Court.189

Bicameralism functioned to block majorities in the lower house from changing the registration system under the Howard government and then also under Prime Minister Rudd. When the same party controlled majorities in both the lower and upper houses, however, there was no barrier to partisan self-dealing operating within the legislature. In the absence of internal checks, external ones are needed and courts are best positioned to provide them where the EMB is not able to intervene directly.

A legislative majority acting in its own partisan interests is not entitled to deference when seeking to entrench itself from full accountability from the people. By not squarely addressing the partisan motives behind and consequences of the law, the High Court left itself open to critiques of illegitimate judicial policy-making. The reasoning in Rowe is lacking and unpersuasive, because it does not advance the argument that partisan self-dealing must be checked. As a result, the majority must resort to claims about the evolution of representative democracy, which does not answer why Parliamentary action can expand constitutional protections on the franchise, but not reduce them.190

While reaching the right conclusion, and displaying an admirable understanding of the significance of practical burdens imposed on voters by changes

189 Orr and Williams, supra note 7 at 136-8; see also Orr, Law of Politics, supra note 132 at 13. As Orr notes at 131, Kirby J had called for “heightened vigilance” in Mulholland (paras 241, 264 and 270-3), which “was required when incumbents drafted electoral rules that might be partisan or target minorities.” The High Court had generally taken a deferential approach in the earlier cases: Murray, supra note 163 at 318.

190 This argument is made by Orr, ibid at 189 and 194-195 and more pointedly by Allan, supra note 162 at 746.
in election administration,\textsuperscript{191} the High Court refused to engage with the partisan dimensions of \textit{Rowe}. One of Australia’s leading commentators on election law, Graeme Orr, has stated that the setting of the date for the federal vote is a reflection of “executive whimsy”,\textsuperscript{192} with the executive possessing unconstrained power to call elections and drop the writ at will. The motivations and consequences that would have flowed from the proposed changes in \textit{Rowe} could fairly be labeled acts of “partisan whimsy” given the attempts to prevent individuals likely to support the opposition from voting.

\textbf{V. Doctrine to Prevent Self-Dealing}

\textit{Figueroa} and \textit{Rowe} did not confront self-dealing head-on, but some principles for reducing agency costs generated by partisan behaviour can be extracted from the two cases. In this section, I consider tools appropriate for judicial review of legislative action on the law of democracy. Such tools have been missing from the jurisprudence and this gap has contributed to the failure of courts to protect a fair democratic process. Across democracies, we need interpretations of constitutional protections of the right to vote that ensure courts can prevent partisan self-dealing. I propose three doctrines for courts in majoritarian democracies to apply to minimize self-dealing and address each in turn: a) non-retrogression; b) skeptical review of motives for limiting rights in proportionality analysis; and c) anti-majoritarianism.

\textsuperscript{191} A useful contrast can be made to the decision of the United States Supreme Court in \textit{Crawford}, supra note 14. The \textit{Rowe} majority was much more cognizant than its counterparts of the burden imposed by procedures making it more difficult to vote.

\textsuperscript{192} Orr, “Ratchet”, supra note 129 at 85.
a) The Doctrine of Non-Retrogression

A doctrinal tool that emerges from Rowe can be termed “non-retrogression”. One of the perpetual issues in the law of democracy is how to establish a benchmark against which improper activity can be measured.\textsuperscript{193} Courts have often struggled to find a standard by which to assess whether a law enhances or harms the democratic process. Democracy is a contested concept; there is no agreed upon definition that courts can rely upon. A campaign finance rule that permits unlimited corporate donations will be praise-worthy from a libertarian viewpoint and problematic through an egalitarian lens. Electoral maps that provide for affirmative gerrymandering to increase the likelihood of minorities being elected to legislatures can be seen to enhance democratic participation among previously excluded groups or to erode the principle of the equality of all voters. The problem is particularly acute with regard to preventing partisan self-dealing. How much partisan distortion is acceptable when nearly every election law will have an impact on someone’s electoral prospects? Part of the reluctance of courts to address self-dealing is the fear of how to evaluate existing practices without simply substituting judges’ own preferred version of democracy for those of legislators.

A “non-retrogression” doctrine holds great promise as a way around these difficulties. Non-retrogression first arose from interpretation of s. 5 of the United

\textsuperscript{193} For instance, Kent Roach critiques the minority judgment of Cory J in \textit{Carter} for using the prior electoral map as a baseline against which to judge the fairness of the impugned districts. “Chartering the Electoral Map into the Future” in John C Courtney, Peter Mackinnon, and David Smith, eds, \textit{Drawing Boundaries: Legislatures, Courts, and Electoral Values} (Saskatoon: Fifth House Publishers, 1992) at 205-6: “The problem with Justice Cory’s reasoning is that he does not explain why the [earlier] 1981 map should set the constitutional standard.”
States Voting Rights Act (VRA)\textsuperscript{194} and requires that minority voters not be made worse off by new electoral rules, such as a redistricted map. Interpretation under the VRA applies existing electoral rules as a floor beyond which minority rights may not sink. Non-retrogression provides an easily identifiable standard for courts to apply across different areas of the law of democracy. A non-retrogression doctrine sets the status quo as the benchmark for assessing whether a democratic right has been infringed.

\textit{Rowe} demonstrates the utility of a non-retrogression doctrine in checking self-dealing. Though the Australian High Court majority did not frame its analysis as an application of a non-retrogression standard, the majority’s reasoning in effect results in such a rule. It is easy to see the attractiveness of the concept of the non-retrogression in a constitutional system such as Australia’s where political rights must be read into constitutional provisions that do not on their face contain any explicit protection for modern democratic practices.

In \textit{Rowe}, French C.J. established prior procedures as a baseline against which the need for government action could be assessed and justified. \textit{Rowe} required the Court to balance the legitimate aim (in the abstract) of preventing fraud with the tangible disenfranchisement of citizens who would be otherwise eligible to vote. In his view, the disenfranchisement had to be placed in the context of the success of

prior election administration. The extended time for registration under the procedures in place from 1983-2006 did not get elevated into a constitutional right. French C.J. did not find that the constitutional guarantee of a representative chosen by the people requires a seven-day period to permit registration. Yet the seven-day period gained constitutional significance as the standard against which amendments to the registration rules had to be measured. The legislation limited access to the ballot box below the existing standard and was therefore suspect.

The High Court contemplated that reducing or eliminating the grace period could potentially be constitutionally acceptable, but only if justified by the need to further legitimate democratic purposes. In the absence of evidence of fraud, the requisite justification did not exist. The High Court imposed a “partial shield” to limit legislative discretion over election administration. A non-retrogression standard can act as a shield against self-dealing that harms democratic rights.

French C.J.’s use of a non-retrogression standard flows out of the earlier opinion of Gleason C.J. in *Roach v Electoral Commissioner,* on prisoner’s voting rights. This case is worthy of examination for its clear application of a non-retrogression standard. The *Commonwealth Electoral Act 1918* excluded from voting

---

195 Orr and Williams, supra note 7 at 124 describe the decision in *Roach* as a “partial shield”. There is a lengthy debate in the United States, where the Constitution has no specific or general limitations provision in the text, about whether balancing constitutional rights is legitimate. See Stephen Gardbaum, “Limiting Constitutional Rights” (2007) 54 UCLA L Rev 789 for a summary of this topic at FN 10-12. A view of rights as “shields” or as “trumps” has been a part of this debate. See also T Alexander Aleinikoff, “Constitutional Law in the Age of Balancing” (1987) 96 Yale LJ 943 and Richard H Pildes, “Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism” (1998) 27(2) J Legal Stud 725. By using the term “shield”, I do not intend to take a position in this American dispute about constitutional interpretation. In any event, where balancing must occur due to constitutional text, as is generally the case outside of the United States, this debate has less purchase.

196 Supra note 7. The case was a four to two split decision.
citizens of “unsound mind”, convicted of treason or treachery, or imprisoned for three years or more. Amendments in 2006 extended the prohibition on prisoner voting by banning all those serving full-time prison terms from voting. The effect was to bar those serving sentences of less than three years from voting, even though they had been permitted to do so under the previous scheme. Roach overturned the blanket ban on prisoner voting, but permitted the continuing disenfranchisement of individuals serving sentences of three years or more as was in place prior to 2006.

Gleason C.J. reasoned for the majority that while the words of the 1901 Commonwealth Constitution did not mandate universal suffrage at the time they were written, democratic practices had evolved. In his view, the right to vote is critical to representative government as protected by the Constitution, to participation in the community, and to full citizenship. He held that disenfranchisement of “any group” on a basis that does not constitute a “substantial reason for exclusion for participation” is inconsistent with choice of government by the people. The amendments of 2006 were found to be arbitrary with no rational connection to the government’s objective, because of their blanket treatment disenfranchising all prisoners. Gleason C.J. was critical of the law for failing to take into account that some prisoners were more deserving of voting rights than others based on the type of crimes they had committed. Permitting voting by prisoners serving sentences of less than three years was not in itself a constitutional requirement in his reasoning. This approach provides legislators with considerable

---

197 Act No. 27 of 1918 as amended, s 93 (8).
198 Ibid, s 93 (8AA).
199 Roach, supra note 7 at 7.
discretion. Gleason C.J. would seemingly have allowed disenfranchisement on the basis of more nuanced distinctions, such as between serious and trivial offences. It was the total exclusion of all prisoners that was problematic for him.\footnote{200 Gray, \textit{supra} note 7 at 180-181.}

\textit{Rowe} took this reasoning on the limits of legislative discretion to restrict the franchise and applied it to election administration. Just as the shield in \textit{Roach} prevented the voting rights of prisoners from being reduced in the absence of a compelling reason, so in \textit{Rowe} did it block attempts to curtail access to registration. \textit{Rowe} demonstrated the potential of a non-retrogression standard to be effectively applied outside of the context of simply prisoners’ voting rights.

While forming the basis for a non-retrogression standard applied to check partisan self-dealing in \textit{Rowe}, \textit{Roach} also exposes its limits. The \textit{Roach} majority did not adopt an absolute defence of the right of all citizens to be granted the franchise.\footnote{201 Orr and Williams, \textit{supra} note 7 at 131-132.} Instead, Gleason C.J. accepted a ban on those serving sentence of 3 years or more as narrowly tailored enough to pass constitutional muster. His assumption was that if serious crimes were accompanied by the penalty of disenfranchisement, while prisoners sentenced for less than 3 years retained the right to vote because of their less dramatic transgressions, the law would punish criminals proportionately to their moral blameworthiness. The High Court of Australia protected existing rights that were taken away, but did not guarantee voting rights to those who had always been excluded. A non-retrogression doctrine does not provide the tools necessary to root out a status quo that denies some fundamental democratic right.
Though not a panacea for protecting all democratic rights, a non-retrogression doctrine maintains great potential for limiting partisan self-dealing. A non-retrogression standard, even applied as tentatively as it was in Rowe and Roach, serves as a proxy for actual knowledge of unconstitutional purposes and effects. Such a doctrine flushes out the unconstitutional motive if the government fails to justify why it is necessary to depart from the status quo because its stated purposes for limiting the right are unconvincing or inadequately tied to the means for achieving those ends. In Rowe, there was evidence that the short cut-off would harm opposition voters, but there is always an element of uncertainty when predicting the future behaviour of voters that gives courts caution in pronouncing on the partisan impact of a law. Using the previous electoral practice as a baseline allows a court to ask why an amendment that disenfranchises some is necessary when there was no fraud under the earlier rules. In the absence of definitive proof of an unconstitutional motive from the legislative record or from other evidence, falling below the standard supplied by the prior practice indicates that the state's purported rationale for acting may be mere cover for its true, partisan purpose. A non-retrogression doctrine is biased in favour of pre-existing practices, which themselves may be less than ideal. Such a doctrine, however, allows a court to make a contextual determination about the benefits of a law under review given the functioning of the democratic process prior to its introduction.

The doctrine provides a workable baseline against which to measure a purportedly partisan electoral rule, which responds to doubts regarding the ascertainability challenge. For instance, the Canadian redistricting case of Carter,
covered at length in Chapter 3, involved judicial review of a disputed electoral map. As I argued, the map was the product of a partisan gerrymander. One of the key indicia of this conclusion is that the new electoral map over-represented rural voters, who happened to support the government, to an even greater degree than the previous map. A non-retrogression doctrine would have led the Canadian Supreme Court toward the finding that a gerrymander had occurred contrary to the guarantee of the right to vote.

Recent litigation in Ohio in the 2012 election cycle also indicates the use of a non-retrogression standard to limit unequal application of early voting rules that would have disadvantaged likely Democratic voters. For the 2008 election Ohio introduced early voting to combat excessively long waiting times, but rolled it back in the lead up to 2012. Despite a lack of precedent on its side, and the fact that there is no constitutional right in the abstract to early voting, the Obama campaign successfully argued in Husted that the restrictions violated the Equal Protection clause, because it made minority voters worse off. Richard Hasen claims that the case applied a non-retrogression principle. The court in Husted was well aware that without doctrines limiting self-dealing, “[p]artisan state legislatures could give extra early voting time to groups that traditionally support the party in power and

---

202 Hasen, “The 2012 Voting Wars”, supra note 28 at 1898 argues that such a standard was applied without precedent to do so, as the majority decision was “at least a major stretch of existing precedent.”
203 Id.
204 Husted, supra note 26. The law also extended early voting for military voters, but not others, which the court deemed to be arbitrary. Issacharoff and Pildes, “Epilogue”, supra note 11 at 6-10.
205 Hasen, “The 2012 Voting Wars”, supra note 28 at 1881 and FN 133. Husted relied in part on the much-maligned Bush v Gore decision. The relevant line in Bush v Gore on non-retrogression is: “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” (531 US at 104-5).
impose corresponding burdens on the other party’s core constituents.” In the absence of any constitutional right to early voting, the risk of partisan self-dealing was addressed by application of a non-retrogression standard.

A non-retrogression standard has broad applicability across the law of democracy. In redistricting, it can stifle attempts to dilute the voting power of specific groups by requiring the government to justify why a new map should be allowed to decrease the representation of an aggregation of voters. Political party funding schemes would also benefit from the application of the standard, as they are particularly liable to fall prey to attempts at incumbency protection. A government would be obliged to defend why it is legitimate to pass a set of party funding rules that deviates from the status quo, acts to its own benefit, and harms its competitors. A non-retrogression doctrine can be used to prevent manipulation of rules on matters such as absentee ballots, polling station hours and locations, and identification requirements, or other matters touching on the integrity of election administration.

b) Proportionality Analysis: Skepticism About Motives

Proportionality analysis also has the promise to limit partisan self-dealing. While proportionality tests may be well suited to revealing improper motives and assessing the impact of the partisan effects of legislation, courts have often shied away from using them in this way. Courts rarely embark on careful scrutiny of the

---

stated purposes for limiting a right or the relationship between those goals and the partisan effects of a law.

A doctrine designed from scratch to “flush out” improper purposes in assessing whether a right was legitimately limited by the government would have several elements. Such a doctrine would consider whether the stated purpose is sufficiently important to justify a rights infringement. Because of the risk of a pretextual motive designed to hide the state’s real intent, the stated purpose behind the limitation of the right would be investigated skeptically. One would want to consider whether the actual infringement was a logical result of furthering the purpose of the legislation, because if there was no such nexus it might indicate that the law functions for an end other than that advanced by the state. A court would then want to investigate whether the right was infringed as little as possible, because an overly expansive intrusion might signal that there were ulterior motives for the limitation. Evidence of the efficacy of the infringement in furthering that goal would be required, so that the state had to face a stringent but not insurmountable test. If the legislation did not achieve its stated goal or had perverse effects, this would be evidence of an unconstitutional motive. Given the likelihood of legislators

---

207 Kagan, supra note 1 at 414.
209 Pildes, “Constitutionalization”, supra note 33 at 134-5 makes a similar argument in relation to assessing whether the Bi-Partisan Campaign Reform Act (BCRA) was an illegitimate attempt at incumbent entrenchment: “In many contexts, the Court might test whether stated purposes are pretextual masks for impermissible ones by examining how well a law’s means fit its asserted purposes.”
210 See Choudhry, supra note 208 at 524 on the requirement of evidence justifying a rights restriction given the “practical reality that public policy is often made on the basis of incomplete knowledge” and the discussion at 525-530.
acting in their own interests rather than those of voters, and the presumption of rights protection in a democracy, the burden would be shifted onto the state to demonstrate that the infringement was justified.\footnote{Kagan, \textit{supra} note 1 at 414, 442 and Ely, “Motivation”, \textit{supra} note 1 at 1279-1282 advocate for burden shifting as a response to improper motives in constitutional law. Ely argues that improper motives mean “triggering demands for legitimate deference which would not otherwise attach” at 1279. Pildes, “Constitutionalization”, \textit{supra} note 33 at 137 critiques “presumptions of legitimacy associated with ordinary laws” as inapplicable due to the “obvious self-interest” of elected representatives on election law. Barak, \textit{supra} note 63 at 131; Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47 Colum J Transnat’l L 73 at 76 identify a similar template for proportionality analysis around the globe. In their template, first the government must have a constitutionally legitimate purpose (the “legitimacy stage”), second the means must be “rationally related to stated policy objectives” (the “suitability stage”), third is the least restrictive means analysis (the “necessity stage”), and fourth is balancing \textit{stricto sensu}. On the relationship between rights and proportionality analysis more generally, see Robert Alexy, \textit{A Theory of Constitutional Rights} (Oxford: Oxford University Press, 2002) and Mattias Kumm, “Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice” (2004) 2 ICON 574.} \footnote{\textit{Supra} note 208.}

These various considerations of course look like a rough sketch of the proportionality test applied in many constitutional democracies. Aharon Barak identifies four parts to proportionality analysis: 1) proper purpose, 2) rational connection, 3) necessary means, and 4) and balancing between the benefits and the harm ("proportionality \textit{stricto sensu}").\footnote{Barak, \textit{supra} note 63 in Chapter 7, beginning at 174 onwards. Alec Stone Sweet and Jud Mathews \textit{id} at 75 conclude that “[b]y the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of proportionality} The \textit{Oakes} test applied in Canada for example assesses the importance of the government’s objective, investigates whether there is a rational connection between the purpose and means chosen to achieve it, considers whether the means chosen restrict the right as little as possible, and then assesses whether the benefits outweigh the harm.\footnote{\textit{Supra} note 208.}

Proportionality tests, including assessments of legislative purpose, are applied in democracies spanning North America, Europe, Latin America, Africa, and Asia,\footnote{Barak, \textit{supra} note 63 in Chapter 7, beginning at 174 onwards. Alec Stone Sweet and Jud Mathews \textit{id} at 75 conclude that “[b]y the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of proportionality} through the use of general, rights specific, or implied limitations clauses.\footnote{\textit{Supra} note 208.}
including notably in South Africa, Israel, India and the European Court of Human Rights. Proportionality tests are well-suited to assessing whether a law limiting a right was passed for a proper purpose and efficaciously achieves its stated end, whether the means chosen appear to fulfill other illegitimate ends, or whether the goal of the law is insufficiently important to justify the infringement. I do not wish to argue that the sole purpose of proportionality tests generally is to flush out improper motives, as they serve many important goals, but in the law of democracy, they have the potential to do so.

---

analysis]. Stone Sweet and Mathews identify proportionality analysis as “one of the defining features of global constitutionalism” at 75. See generally Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Cambridge: Harvard University Press, 2004).

215 Barak, id at 143 points out that proportionality tests have been read into all democracies with general limitation clauses.

216 South Africa’s Constitution permits limitation of rights “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose,” (emphasis added).

217 The Basic Law, Human Dignity and Liberty, 5752 - 1992, H 1391 (Isr), s 8 states: “There shall be no infringement of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.” (emphasis added). See Stone Sweet and Mathews, supra note 212 at 135-6. The central case in Israel’s adoption of a proportionality test is Mizrachi Bank Ltd v Migdal Cooperative Village [1995] IsrSC 49(4) 221 where Chief Justice Barak held that a proportionality test formed part of s 8.

218 A proportionality test was definitively established in Union of India v G Ganayutham, AIR 1997 SC 3387. There is no general limitations clause, but rights-specific ones that allow only reasonable limits: Barak, supra note 63 at 200.

219 Appropriate limits are assessed through a proportionality test: Barak, ibid at 183, FN 49. There is no general limitations clause in the European Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4 XI 1950 (the "European Convention"), but limitations clauses specific to certain rights. See Barak at 134-5, 141. A small number of select, fundamental freedoms are not subject to limitation, such as freedom from torture (Article 3 of the European Convention) and slavery (Article 4 of the European Convention); Barak, ibid at 183 and Stone Sweet and Mathews, supra note 212 at 147. Limits on rights in the European Convention in the absence of a specific limitations clause are implied by the judiciary where not stated explicitly in the text: Golder v United Kingdom, App No 4451/70, 11 EHRR 524 (1979-80). The text of Article 3 of the First Protocol mandates “free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” On the limitation of democratic rights contained in Article 3, see Mathieu-Mohin and Clarfayt v Belgium, App No. 9267/81, 10 ECHR 1 (1987). The ECHR applied a proportionality analysis in Hirst, supra note 7 at paras 48-52 in assessing the United Kingdom’s prisoner disenfranchisement law.

220 The European Court of Human Rights generally does not apply the first stage investigating a government purpose: Stone Sweet and Mathews, id at 76, FN 8. The European Convention permits
The under-use of proportionality analysis as a tool to flush out self-dealing has serious consequences. Where courts are overly deferential to the government’s stated purposes for which a right is allegedly being infringed, there is a risk that improper motives will remain hidden\textsuperscript{221} and rights will be unduly limited. If courts do not connect failure at the rational connection or minimal impairment stages to the alleged purpose behind the law, then the partisanship that motivated legislators may remain hidden. Partisan gain for the governing party or legislative majority is an illegitimate reason for limiting democratic rights. On the law of democracy, deferential application of proportionality analysis permits legislatures to limit rights for partisan reasons.

Take the Canadian jurisprudence for example. \textit{Oakes} established that to limit a right or freedom protected by the Charter, a legislative objective must be sufficiently important and timely as to be classified as “pressing and substantial” and must be consistent with a “free and democratic society”\textsuperscript{222}. Rights may only be limitations of many rights only for specific purposes listed in the Convention according to Article 18. For example, freedom of expression protected by Article 10 permits limitations that are “prescribed by law and are necessary in a democratic society”, only for listed purposes such as “national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals...” and so on: Stone Sweet and Matthews at 147-8. The UK House of Lords adopted a proportionality requirement under the \textit{Human Rights Act, 1998}, c 42 incorporating a test for legislative objectives in \textit{de Freita v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing}, 1 AC 69, 80 (PC 1998). The first part of the proportionality analysis asks if “the legislative objective is sufficiently important to justify limiting a fundamental right....”.\textsuperscript{221} Kumm, “Proportionality Review”, \textit{supra} note 212 at 168-169 argues that, “When courts apply the proportionality test, they are in fact assessing whether or not legislation can be justified in terms of public reasons, reasons of the kind that every citizen might reasonably accept, even if actually they don’t.” Courts are deficient in their duty to permit the limitation of rights only where justifiable according to public reasons if they are overly deferential to legislative motives. Kumm also connects the right to vote and proportionality analysis as basic commitments of liberal democracy and constitutionalism at 170-171.\textsuperscript{222} \textit{Oakes, supra} note 208 at 138-139; Peter W Hogg, \textit{Constitutional Law of Canada} (Toronto: Carswell, 2012) at 38-25; Lorraine E Weinrib, “The Supreme Court of Canada and Section One of the Charter” (1988) 10 Sup Ct L Rev 469 at 500.
limited to meet objectives that are consistent with the reasons for constitutionally guaranteeing rights in the first place.\(^\text{223}\)

The state must technically establish a pressing and substantial objective pursuant to \textit{Oakes}, but it is not an exaggeration to say that this requirement has been nearly uniformly disregarded. In the s. 1 analysis across all areas of constitutional jurisprudence, there is a near 100% success rate at passing this hurdle.\(^\text{224}\) There have been very few instances to date of the Canadian Supreme Court finding an improper legislative purpose. Peter Hogg’s analysis reveals there has only been one instance where the Court “unequivocally rejected the legislative objective”,\(^\text{225}\) which involved a religiously motivated law requiring stores to be closed on Sundays in \textit{R v Big M Drug Mart}.\(^\text{226}\) Even if Hogg’s is an overly conservative count,\(^\text{227}\) there have been at most a handful of cases that reject the government’s stated motive.

Where the law of democracy is at issue, the Supreme Court has not recognized the likelihood of sham or fictional motives being advanced to disguise laws designed to have a partisan impact. The Court has only very rarely questioned whether the explicit purpose of the government is pressing and substantial enough

---

\(^{223}\) Lorraine Weinrib, “The Postwar Paradigm and American Exceptionalism” in Sujit Choudhry, ed, \textit{The Migration of Constitutional Ideas} (New York: Cambridge University Press, 2006) 84 at 94 on the limitation of rights after initial proof of their infringement: “…these rights cede if and when the state demonstrates that encroaching on the right promotes the principles that inform the objective normative order from which the rights spring. This legal structure and sequence of legal argument reflects the idea that the objective normative order generates both the crystallized rights and the grounding of justification for their limitation.” See also Gardbaum, “Limiting Constitutional Rights”, \textit{supra} note 195.

\(^{224}\) Hogg, \textit{supra} note 222 at 38-25 - 38-26 (s 38.9 (d)-(e)).

\(^{225}\) \textit{Ibid} at 38-25.

\(^{226}\) \([1985]\) 1 SCR 295, though it does pre-date \textit{Oakes} by a year.

\(^{227}\) Hogg, \textit{supra} note 222 at FN 119 does suggest that cases of discriminatory under-inclusion in social benefits programs may also be interpreted as rejecting legislative motive. He lists \textit{Vriend v Alberta}, \([1998]\) 1 SCR 493 at para 116; \textit{Rosenberg v Canada} \([1998]\) 38 OR (3d) 577 (CA) at para 31, and \textit{Canada v Hislop}, \([2007]\) 1 SCR 429 at paras 45-55. \textit{Sauvé No.2}, \textit{supra} note 7 is raised as another possibility.
to justify a limitation of the right to vote or freedom of political expression. It does not ask whether there is some motive at play other than the purported one. For example, the state frequently advances the purpose of enhancing “confidence in the electoral system” when it limits the right to vote or freedom of political expression. This purpose has recently been used to justify restrictions on the transmission of early electoral results and limits on third party political spending, and has found judicial favour in the past. The Court accepts this justification as legitimate as a matter of course and does not investigate in any robust way whether this is the true motive underlying the legislation.

The Court’s recent jurisprudence on s. 1 suggests a very low bar for the state to clear to justify infringements in general, and particularly on the law of democracy. This deferential state of affairs has led Yasmin Dawood to argue that

---

228 R v Bryan, supra note 18 at para 13 per Bastarache J for the majority. Even the sharply worded and vigorous dissent of Abella J accepted the objective as pressing and substantial at para 104.
229 Harper, supra note 77 at para 47 per McLachlin CJ in dissent (accepting the pressing and substantial objective but finding the limit not justified under s. 1) and para 133 per Bastarache J for the majority.
230 See Harvey, supra note 92 at paras 38-39 per LaForest J for the majority.
231 Alberta v Hutterian Brethren of Wilson Colony, [2009] 2 SCR 567 at para 35 (a case on freedom of religion). The majority’s s 1 analysis begins on an auspicious note for judicial deference to legislative limitation of rights with its emphasis on reasonableness rather than a more searching standard. “This Court has recognized that a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the Charter. Often, a particular problem or area of activity can reasonably be remedied or regulated in a variety of ways…The primary responsibility for making the difficult choices involved in public governance falls on the elected legislature…”. The majority was concerned that too wide a scope for freedom of religion “could seriously undermine the universality of many regulatory programs” at para 36. The focus on the universality of programs rather than the need to infringe on freedoms only when necessary represents a step backward in the idea of s 1 entailing robust scrutiny. One way to read the case was that without any hint of an invidious motive, s 1 will be applied with a light touch.
s. 1 does not provide much promise for preventing self-dealing by elected partisans. Arguing for the need to prevent self-dealing, she writes that,

One of the main difficulties with the current section 1 Oakes test is that there is no built-in mechanism for the Court to raise the issue of partisan rule-making. Although the Oakes test is designed to identify false and nefarious objectives in the rational connection stage of the test... in practice the Court is unlikely to consider the partisan objectives at issue... This is because government legislation in the election law arena may simultaneously advance the public interest and partisan interests. (emphasis in original)

She goes on to conclude, “It is also unlikely that the problem of partisan self-dealing would be raised in the first three stages of the proportionality analysis.”

There are certainly ample grounds for being skeptical of the promise of proportionality tests to check self-dealing on the basis of the existing jurisprudence as the case law undeniably reflects a reluctance to interpret s. 1 robustly. I am optimistic, however, that proportionality analysis can act as a check against partisan self-dealing if courts act pursuant to a broad framework of motive-based review. Dawood rightly points out that, “The government...is unlikely to identify the reduction of partisan self-entrenchment as an objective,” which makes it difficult under current doctrine to interpret the rest of s. 1 with this in mind. Courts should not be stymied in preventing self-dealing, however, simply because governments are duplicitous in the justification provided for the limitation imposed on the right. With motive-based judicial review as the framework, proportionality analysis provides the basic tools for ferreting out unconstitutional purposes and effects driven by the search for partisan advantage. It squarely obliges a court to

---

234 Ibid at 554-555.
235 Id at 555.
236 Id.
wrestle with the state’s purpose and means of achieving that end. As long as a court is willing to consider that the objective provided by the state may not be the actual one motivating the law, and is aware of the risks stemming from the principal-agent problem, then proportionality analysis can be effective in checking self-dealing. The requirement of a proper, pressing, and substantial purpose in the first stage of the Oakes test should be interpreted to prevent partisan motivated laws. Where there is a lack of a rational connection or minimal impairment, in the law of democracy context this may indicate that the goal of the majority passing the law was to diminish political accountability.

Analysis of how the High Court of Australia has considered legislative motives provided for limiting the right to vote is complicated by judicial imprecision in establishing which test should be adopted. All opinions of the High Court in Rowe paid lip service to the test established in earlier jurisprudence, including in Roach, that the law must be “reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of a constitutionally prescribed system of representative government.” Kiefel J. interpreted Roach as striking down the blanket ban on prisoner voting because “there was no evident reason or purpose beyond the obvious intention to remove a prisoner’s ability to vote.” This interpretation indicates that the lack of a legitimate purpose for disenfranchising all prisoners doomed the legislative amendments. Disenfranchising

---

237 Greenwood, supra note 52 summarizes the various tests proposed by the parties in Rowe at 125-7.
239 Rowe, ibid at para 473.
all prisoners, including those in prison for short periods of time for minor crimes, was not supported by any reason compatible with representative government.

The justification for disenfranchising citizens put forward in Rowe was to prevent fraud, which was a purpose that had some roots in the case law. In Roach, Gummow, Kirby, and Crennan J.J. had reasoned that the related end of protecting the integrity of the electoral process could legitimately justify disenfranchisement of some voters. Those Justices in Roach differentiated the provisions taking the vote away from prisoners from the legislation disenfranchising those of unsound mind. Excluding from the franchise individuals not able to appreciate their own actions was deemed to enhance the legitimate purpose of ensuring the integrity of the electoral process. The Justices concluded, “[t]hat end, plainly enough, is consistent and compatible with the maintenance of the system of representative government.”

To assess whether preventing fraud was a similarly legitimate purpose, the various opinions in Rowe adopted a curious mix of tests and factors, likely designed to preserve maximum flexibility for the Court going forward. The “reasonably appropriate and adapted” test co-existed with a proportionality test and a test of necessity, without clear differentiation between them. French C.J. held that there must be a substantial reason for disenfranchisement and that such a substantial reason must be consistent and compatible with representative government.

---

240 Roach, supra note 7 at para 88 per Gummow, Kirby and Crennan JJ; Rowe, ibid at para 474 per Kiefel J quoting that earlier opinion.
241 For a summary of the approaches, I rely here on Greenwood, supra note 52 at 133-135.
242 Ibid at 133; Rowe, supra note 5 at paras 23-25; French CJ cited to the opinions of Gleeson CJ and Gummow, Kirby and Crennan JJ in Roach.
justification for the law must on balance be beneficial to the people’s right to choose their government. Gummow and Bell J.J. found that preventing fraud was not a substantial reason. The judgment of Kiefel J. in _Rowe_ employed an altogether different approach, re-interpretating the reasonably appropriate test to one of reasonable necessity.\(^{243}\) On this test, Kiefel J. found there was a legitimate reason to limit the right, as closing the rolls early preserved their integrity.\(^{244}\) The absence of systematic fraud did not show the lack of a legitimate purpose in the view of Kiefel J., because fraud was still an ongoing possibility.

We can glean from the main opinions in _Rowe_ engaging with legislative motives that some purposes will be improper for being incompatible with representative government. Partisan gains are presumably not a legitimate purpose for limiting democratic rights under this interpretive approach. Partisan-minded diminishment of political competition or incumbent entrenchment that makes it harder for voters to hold elected representatives accountable cannot be said to further representative government. The High Court in _Rowe_ did not spell this out or extend its analysis to consider improper partisan motives. Rather than confront partisans motives head-on, the High Court, like the Canadian Supreme Court in _Figueroa_ and American courts faced with restrictive laws on early voting and voter ID, chose to duck. Neither the Canadian nor the Australian judicial approach to the limitation of democratic rights has fully incorporated the possibilities inherent in proportionality analysis to check partisanship.

\(^{243}\) _Rowe_, ibid at para 443; Greenwood, _id_ at 136.

\(^{244}\) _Rowe_, ibid at paras 481-489, esp at para 482.
Colin Feasby has engaged with the potential of the Canadian s. 1 to limit self-dealing. Feasby has argued that s. 1 should operate differently than it normally does where the law of democracy is at issue. Feasby’s proposal is that in reviewing the law of democracy under s. 1, courts should show deference to legislative objectives, but not to legislative means. I take Feasby to endorse something like strict scrutiny over whether the law actually furthers its stated purpose, but relatively little investigation as to whether the objective itself is pressing and substantial or in fact the real motive underlying the rights limitation at all. This is a valuable contribution to the debate as it highlights the uniqueness of the law of democracy in comparison to other areas of constitutional law and shows some needed skepticism regarding the chosen means. Iacobucci J. for example seems to adopt something close to this approach in Figueroa in his s. 1 analysis on the least restrictive means for achieving the legislature's stated aims. He held that concerns for the public treasury are valid, but that eliminating or reducing tax rebates would be a more effective and fairer way of protecting the public purse than targeting the finances of small parties.

We should be more skeptical than Feasby, however, not just of legislative means, but also of legislative objectives. Taking Figueroa as an example, courts should give little weight to the rationales offered by the government when the interests of the most successful parties are so clearly in diminishing electoral threats from small parties. If there was no rational connection between the provisions of the Elections Act at issue and the purposes provided, then this suggests improver motives were at play. The finding of a lack of a rational connection

---

indicates that Iacobucci J. was cognizant of the partisan motives that animated the rules entrenching a two-tier party system.

_Sauvé No. 2_ is one example where the Supreme Court comes very close to rejecting the stated objective of the government as improper or perhaps not the actual motive underlying the law.\(^{246}\) The Court is not clear on this point, however, as the majority critiques the government’s objective in detail but then goes on to the proportionality analysis, when failing the first step of _Oakes_ should alone be fatal. Like _Roach_, _Sauvé_ did not involve a partisan purpose, but instead a discriminatory attempt to disenfranchise the prison population. In _Sauvé No. 1_, the Court in very brief reasons upheld a lower court decision striking down a blanket federal ban on voting by prisoners.\(^{247}\) The government responded with more narrowly tailored legislation designed to meet the proportionality test of _Oakes_ by preventing only prisoners serving sentences of two years or more from voting.\(^{248}\) In _Sauvé No. 2_, the Court eventually struck down even these restrictions as infringements of the right to vote. The majority ruled that as democratic legitimacy rests on the consent of the governed, elected representatives should not be permitted to disenfranchise those to whom they are accountable.\(^{249}\) Majorities should not be able to deprive minorities of democratic rights, simply because it is popular to do so.\(^{250}\) The Canadian Supreme Court took a much firmer stand in favour of prisoners’ voting rights in _Sauvé No. 2_ than the Australian High Court did in _Roach_ when faced with similar legislation.

\(^{246}\) _Sauvé No. 2_, supra note 7.

\(^{247}\) _Sauvé No. 1_, supra note 7.

\(^{248}\) The High Court of Australia in _Roach_ accepted a longer period of disenfranchisement than the Canadian Supreme Court was faced with in _Sauvé No. 2_.

\(^{249}\) Amyot, supra note 232 at 17-19; _Sauvé No. 2_, supra note 7 at paras 31-35.

\(^{250}\) _Sauvé No. 2_, ibid at paras 37-44.
In its s. 1 analysis, the majority “grudgingly accepted the government’s purported objectives”,251 and out of “prudence” went on to the proportionality analysis.252 The majority found that the legislation failed the other three aspects of the proportionality test.253 The majority held that “vague and symbolic” objectives are insufficient, as they are subject to “distortion and manipulation”254 and incompatible with the “vigorous justification analysis” appropriate in s. 1.255 The Sauvé No. 2 majority rejected the purpose of “enhancing civic responsibility and respect for the law” as merely “rhetorical”256 and too “abstract”257 to satisfy s. 1. The second objective advanced by the government was the need to impose added criminal sanctions. While more specific than the first, this objective was still characterized by vagueness, as it did not explain why prisoners serving two years or more were singled out or why additional punishment was needed.258

The majority’s strongly worded disapproval of the government’s objectives and the means chosen to achieve those goals, reflected in the language on “vague and symbolic objectives”, serves as an example of what a more searching investigation into the government’s motives in limiting rights might look like. The majority did not go as far as it could have, as the Justices did not fully inquire into what the alternate motive for the legislation would be. The majority merely implied

251 Amyot, supra note 232 at 6-7.
252 Sauvé No. 2, supra note 7 at para 26.
253 Amyot, supra note 232 at 14; see also Manfredi, “Dialogue”, supra note 7.
254 Sauvé No. 2, supra note 7 at para 22.
255 Ibid at para 23.
256 Id at para 24.
257 Id at para 23.
258 Id at para 25.
that since the means were discriminatory and the stated objectives of the law unpersuasive, the true purpose behind them may have been discriminatory as well.

This analysis in *Sauvé No. 2* represents the high water mark for judicial skepticism of the government's stated objectives when democratic rights are at stake. Because of the incentives facing elected representatives, and the concentration of power in majoritarian systems, courts must be on guard for improperly motivated government action. A more robust interpretation of the need for an objective to be pressing and substantial in the limitations analysis would be a welcome step in this direction. Skepticism about legislative objectives on laws engaging the law of democracy has a vehicle in the doctrines designed to structure justifications for limiting rights. The promise of proportionality or justification analysis to check partisan self-dealing through skepticism about both legislative motives and means has not yet been realized.

c) Democratic Accountability in Majoritarian Systems: Anti-Majoritarianism

A third doctrine to limit partisan self-dealing can be termed anti-majoritarianism. Courts in majoritarian constitutional systems must be aware of the risk that partisans will attempt to reinforce pre-existing majoritarian tendencies to their own advantage. Courts should therefore check majoritarianism rather than permitting partisan-motivated electoral rules that compound it. This is not to say that the power-sharing of consensual systems is superior, but that courts should reject partisan election laws that governments seek to justify by virtue of their reinforcement of majoritarianism.
Take for example Lebel J.’s concurrence in *Figueroa*, which understands the judicial role as facilitating rather than checking majoritarianism. The federal government had argued that harming small parties was acceptable, because the Canadian majoritarian system was designed to aggregate many diverse interests into centrist brokerage parties, facilitate majority government formation, and sideline fringe parties. Lebel J.’s concurrence can be read as a defence of those values. Lebel J.’s analysis contemplates that the goal of ensuring a functioning majoritarian democracy, with a majority government and a clear potential governing alternative as official opposition, could potentially outweigh the harm caused to individual citizens by discriminating against small political parties. He opined that,

> [t]he 50-candidate rule tends to channel voter support towards parties that engage in internal compromise and consensus building so as to emerge as mainstream, broadly based political movements. I would identify the value enhanced by this measure as the aggregation of political preferences, or the promotion of cohesion over fragmentation.  

Lebel J. noted that functioning political parties are the “foundation of responsible government”, as party affiliation determines who will form government under constitutional convention. He considers the generation of “mainstream political movements” an intentional feature of Canada’s constitutional design. He lauds the majoritarian features of the political system as integral aspects of Canadian history and institutions. His opinion acknowledges that Single Member Plurality (“SMP”) systems encourage a small number of parties, rather than

---

259 *Figueroa*, supra note 4 at para 137.
260 *Ibid* at paras 141 and 153.
261 *Id* at para 153.
proportional representation ("PR") or mixed systems’ production of multiple parties.\textsuperscript{262} The tendency to translate electoral pluralities into legislative majorities is a clear advantage of SMP over PR, which produces coalitions and minority government, in his view.\textsuperscript{263} He claims that aggregating individual preferences into majorities is a democratic value that must be respected because it is embedded in Canadian institutions.\textsuperscript{264}

This approach is misguided. The SMP electoral system, single-party cabinet-formation, pattern of executive dominance over Parliament, and party system all contribute to Canada’s majoritarian system. The electoral system favours large parties focused on forming government of the type that Lebel J. lauds. As the electoral system already nearly guarantees two-party alternation in power, any attempts to justify electoral rules as necessary to aid major parties are likely to be covert attempts to reach partisan ends. Parties that benefit from majoritarianism have incentives to attempt to augment their advantage by further raising the barriers to entry and cost of competing for small parties. It is the role of courts to counter-balance the excesses of majoritarianism, rather than to enable their expansion. The fact that a country has a majoritarian system implies courts should be vigilant in checking partisanship disguised as laws advancing majoritarian values. Along with a non-retrogression standard and skeptical application of proportionality analysis, courts should act to limit partisan self-dealing by

\footnotesize{\textsuperscript{262} Id at para 154.}  
\footnotesize{\textsuperscript{263} Id.}  
\footnotesize{\textsuperscript{264} Id at para 159.}
frustrating rather than enabling the further entrenchment of the large political parties that already benefit in majoritarian democracies.

VI. Conclusion

While EMBs play a significant role in the democratic architecture, courts will still be faced with directly reviewing the actions of elected representatives on the law of democracy. This chapter has argued that in overseeing the actions of legislatures, courts should carefully scrutinize the motives behind election laws. Motive-based analysis should play a larger role in judicial review of the law of democracy, because of the likelihood of improper, partisan purposes. Partisan effects in this analysis are evidence of the improper motive. Consciousness of the likelihood of improper motives exists already in American doctrines surrounding the First Amendment and Equal Protection clauses, as well as in the justification tests applied in many countries to assess the legitimacy of rights limitations.

Courts remain reluctant at times, however, to engage with the partisan motivations behind laws and their partisan effects. Major cases in the law of democracy involve judicial reasoning that is unpersuasive, because the unacknowledged rationale behind the conclusion to strike down a law is a concern about partisan motives. Figueroa and Roach are two such cases. I have advanced several doctrinal approaches emerging from motive-based review that are consistent with the role of courts in checking agency costs generated by majorities in legislatures seeking to gain a partisan advantage in future elections. Non-retrogression, skepticism about legislative motives and means within tests of
justification, and seeing the role of courts as checking rather than facilitating majoritarian concentrations of power can all aid in minimizing legislative self-dealing.

Chapter 5 will conclude the dissertation by summarizing the central arguments made in these pages, expanding on their implications, and framing directions for future research.
Chapter 5: Conclusion

I. Institutions and the Law of Democracy

This concluding chapter briefly synthesizes the central arguments of the dissertation, highlights the main implications flowing out of the claims made in the preceding chapters, and proposes directions for future research. The dissertation sought to place the problem of partisan manipulation as a central challenge in the comparative law of democracy. The overarching theme in this endeavour has been a focus on institutions. The central argument is that the institutional patterns in democracies are not simply important to recognize in order to have accurate descriptions of the comparative democratic architecture, but have implications at the normative level for how judicial review should proceed. I focused on institutions as relevant in three distinct ways: 1) how different types of democratic systems structure partisan self-dealing; 2) how the presence of electoral management bodies (EMBs) should affect judicial oversight of the law of democracy; and 3) how the actual, rather than ideal, performance of legislatures and EMBs factors into the legitimacy of judicial attempts to restrict partisan self-dealing.

First, while the principal-agent relationship underlies representation across democracies, partisanship is channeled through the particular type of democratic system in place. Checks on self-dealing in the form of judicial review or administration by EMBs must adapt to that fact in order to be successful in limiting agency costs. Arend Lijphart’s distinction between majoritarian and consensual democracies has implications for the law of democracy, because how self-dealing operates and the success of strategies to combat it will have common links across
types of democracies. In majoritarian democracies, which are the subject of this dissertation, the tendency to concentrate political power in the hands of a single party with few effective checks has long been recognized. Public administration and constitutional scholars have identified the extreme concentration of power in recent years in South Africa, the United Kingdom, Australia, and Canada, in particular, and argued that such a degree of authority in the hands of a single party subverts democratic governance.\footnote{See the discussion in Chapter 1 regarding majoritarian systems.}

I have argued that this concentration of power in a single party and lack of effective checks on legislative majorities controlled by the executive also permits extensive partisan interference in the democratic process. In majoritarian democracies, incentives for partisan self-dealing generally take the form of changes to electoral laws to aid the governing party. There may be instances of collusion among multiple parties, but the incentives that would make oligopolistic behaviour desirable are less likely to be present. Judicial review must account for the particular manner that partisan self-dealing is likely to be channeled in majoritarian systems. Courts must be alive to the possibility of partisan gamesmanship that targets the opposition and aids the governing party. EMBs must also be responsive to this context in their roles of making and interpreting electoral rules. Within their spheres of authority, these institutions should structure the democratic process to prevent advantages from flowing exclusively to the governing party.

Second, new institutional patterns beyond the usual presence of the legislature, executive, and judiciary in the tripartite separation of powers must also
be taken into account. EMBs have too often been absent from the stories told about the law of democracy. The prevalence and importance of EMBs implies that current theories of judicial review of the law of democracy that do not integrate these institutions into their analysis are incomplete and are an inadequate base from which to generalize an approach to the comparative law of democracy. Along with the legislature, executive, and judiciary, EMBs should be considered essential components of the democratic architecture. The approach advocated for here of deference to an EMB where it is independent and impartial is designed to be an institutionally sensitive step forward in thinking about judicial oversight of the law of democracy.

Third, a focus on institutions must take into account their actual performance rather than their ideal form. Theories of judicial review have often proceeded by assuming an ideally performing legislature, rather than one with warts and all. Legislative action on the law of democracy should not be presumed to be deliberative, public-minded, and accountable, as it is in Waldron’s argument. Political actors have the incentive and the authority to manipulate the agent selection process in their favour when they set election laws. We should not be overly deterministic. Political actors will not always engage in self-dealing. Yet the risk is a live one whenever democratic representatives have control over the rules of the game. The contrast between Waldron’s approach and the principal-agent model is quite stark.2 The implication of the principal-agent understanding of

---

2 Waldron has recently adopted a principal-agent view of representation to further his argument about the need for accountable representatives to make decisions of moral importance to society. Jeremy Waldron, “Accountability: Fundamental to Democracy” March 10, 2014, Paris [unpublished]. He does not fully
legislative behaviour is that courts\(^3\) should be active participants in overseeing the actions of elected representatives on the law of democracy, because of the likely inability of politics to justly regulate politics. An idealized appreciation of how legislatures operate is misleading when considering how judicial oversight should proceed.

This need to concentrate on the actual performance of institutions, rather than an idealized view of their functions, extends to EMBs. Courts must be sensitive to the institutional difference between EMBs and legislatures. I have argued that courts should treat EMBs differently than legislatures because of the decreased likelihood of partisan self-dealing by EMBs. The caveat is that the EMB must be sufficiently independent and impartial. This caveat arises because of the variation in patterns of the institutional design of EMBs. Some are models of independence and impartiality, while others replicate partisan pathologies either by design or as the result of capture. We cannot simply assume that they are all independent and impartial and worthy of deference, because the accuracy of this assumption will vary depending on the particular EMB at issue and would at times lead to deference being granted to partisan bodies. A more sophisticated understanding of EMBs as an institution is necessary in calibrating the appropriate level of deference to be shown by courts.

\(^3\)The important caveat is that courts must be functional and something less than tools of the governing party. In other words, the separation of powers, while under contestation, must be viable. I assume that this will be the case in established democracies.
To establish whether an EMB replicates partisan pathologies, a fine-grained look at the institution is required, including investigation of its appointment and tenure rules, authority and responsibilities, internal procedures, relationship to the partisans in the political branches, and behaviour. Judges have been reluctant to engage in this type of analysis, perhaps because it enmeshes them in issues of institutional design that could be considered within the legislative purview. Investigation of the functioning of EMBs is imperative, however, if courts are expected to meet the twin goals of overseeing the democratic process and staying within their sphere of appropriate responsibility.

II. Implications for Future Research

The arguments made in this dissertation signal new ways forward for research in the comparative law of democracy focused on institutions. This section plants the seeds for future projects through initial consideration of four avenues for research that flow out of the dissertation: a) investigation of partisan self-dealing in consensual democracies or transitional democracies, as opposed to majoritarian, established ones; b) arguments in favour of viewing EMBs as a fourth branch of government; c) a claim for the existence of a constitutional right to impartial election administration; and d) oversight of voter suppression through motive-based judicial review.

a) Partisanship in Consensual and Transitional Democracies
This dissertation has considered majoritarian democracies, but patterns of partisan self-dealing may be different in consensual democracies. Characterized notably by proportional electoral systems and the ensuing tendency for coalition government, rather than plurality systems and single-party majority government, consensual democracies seem likely to produce a different set of incentives to structure partisan behaviour. In majoritarian systems a governing party will have concentrated political power and few checks on its actions. The resulting tendency is therefore toward partisan self-dealing that aids the governing party, at the expense of other parties in the legislature. Two-party contests for political power will create strong incentives to take measures that directly harm the largest opposing party.\(^4\)

The strong likelihood of coalition governments in consensual systems, however, means that more than one party will be exercising public power. Coalitions are likely to fragment if the party with the most seats seeks to gerrymanders a map or pushes campaign finance legislation that harms its partners. Strong incentives will exist for coalition partners to ensure electoral rules that harm their ideologically aligned opponents existing in multiple parties. Collusion between multiple parties against others is likely to be the predominant partisan consideration in consensual democracies, in contrast to the search for the advancement of the partisan interests of a single party in majoritarian systems.

There is evidence from political scientists suggesting that partisan self-dealing has

---

\(^4\) There will be exceptions, of course, under specific political dynamics. The rules struck down in *Figueroa v Canada* 2003 SCC 37, which were the product of collusion between the Liberals and Conservatives in Canada against small parties, are one such example.
been extensive in consensual systems in Eastern Europe and Asia and been geared to enhance the prospects of governing coalitions at the expense of their ideological opponents.\(^5\) Expanding research on partisanship into consensual democracies requires analysis sensitive to the incentives and likely patterns facing political actors in these jurisdictions, because judicial review must be tailored to respond to this form of self-dealing.

Another category not considered in this dissertation is transitional democracies, though India is perhaps a borderline case.\(^6\) The incentives toward partisan manipulation are a constant of democratic representation whether established or transitional. There will be unique considerations in transitional democracies, however, in comparison to established democracies. Arguments for how to understand and combat partisan self-dealing must be filtered through the special circumstances of democratic transitions. The need to consolidate democratic institutions,\(^7\) ethnic, religious or linguistic\(^8\) cleavages,\(^9\) complex relationships with former colonial powers who may have bequeathed institutional patterns, grievances

---


\(^{6}\) I understand India to be an established democracy given its relative stability, though its early experiences could be useful in developing an approach for transitional democracies. See Alistair McMillan, “Deviant Democratization in India” (2008) 15(4) Democratization 733 for an assessment of India’s democratic trajectory. South Africa, which is touched in passing in this dissertation, is another potential borderline case.


over past oppression, the need to build institutional capacity and state legitimacy, and the risk that democratically elected governments will choose to end the democratic experiment\textsuperscript{10} may all shape the transitional environment.

While there is an extensive institutional design literature on the appropriateness of federalism to manage conflict and the relative merits of proportional or majoritarian electoral systems,\textsuperscript{11} and the content of bills of rights,\textsuperscript{12} among other concerns, election law and election administration have not been seen as central to the debates on transitional democracies. How to design EMBs in transitional democracies, what institutional makeup is best for resolving electoral disputes given incomplete democratic consolidation, how to insulate EMBs from partisan interference while also facilitating the building of institutional capacity and popular legitimacy, and how to ensure a fair democratic process when courts themselves are less than independent and impartial are all puzzles deserving of further investigation.

b) EMBs as a Fourth Branch of Government

Future research should also be directed investigating the constitutional protection of EMBs as a fourth branch of government. I have argued that 1) theories of the law of democracy that consider only the traditional tripartite separation of powers of the legislature, executive, and judiciary ignore the important role played

\textsuperscript{10}Samuel Issacharoff, “The Democratic Risk to Democratic Transitions” (2013) 5 Con Ct Rev 1.
\textsuperscript{11}See the Lijphart-Horowitz debate on these topics in Sujit Choudhry, “Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies” in Choudhry, Constitutional Design, supra note 9 at 15-26.
\textsuperscript{12}But see Sujit Choudhry, “After the Rights Revolution: Bills of Rights in the Postconflict State” (2010) 6 Annual Review of Law and Social Science 301 for an overview that argues bills of rights have been less central of late to constitution-making in transitional democracies.
by EMBs; and 2) the principal-agent problem and the delegation of authority to administer the democratic process to EMBs suggest that partisan capture of these institutions is a live risk. Put together, these two insights have implications for the separation of powers. The risk of partisan capture of such a fundamental institution as EMBs implies that they should be given protected constitutional status similar to the three traditional branches of government, in order to safeguard a fair democratic process.

Calls for recognition of a fourth branch of government have periodically surfaced in constitutional analysis of the post-war state. Administrative law scholars have asserted that the administrative state as a whole should be viewed as a fourth branch of government. Bruce Ackerman has recognized the creation of agencies designed to monitor the political branches as a fourth branch of government, which he names the “democracy branch”.

New constitutional arrangements have often explicitly recognized EMBs as a fourth branch of government or implicitly done so by granting constitutionally protected status to election commissions. Election commissions in many South American democracies recognize EMBs as a fourth branch of government. India and South Africa notably constitutionalize the existence and powers of their election

---


15 The second type of EMB - the redistricting commission - is also often excluded from the constitutional protection given to election commissions, which opens up the potential for gerrymandering. Sometimes, of course, the election commission itself conducts redistricting, thereby negating the omission.
commissions, including broad authority over the electoral process. The experience with constitutionalizing election administration is far from perfect, as demonstrated by the sections of this dissertation engaging with partisan capture of the Election Commission of India by successive Indian governments. Courts in India have not interpreted the granting of authority to the Election Commission as necessarily requiring them to be independent and impartial, or at least have struggled with how to ensure that the EMB functions that way.

Yet constitutional protection, if constructed in a robust manner, is a promising direction in which to tread. The broad trend among democracies is toward EMBs rather than control of election administration by the legislature or executive, as outlined by the survey of patterns of EMBs in Chapter 2. These EMBs, however, are susceptible to the attacks of political majorities who find their independence and impartiality inconvenient. EMBs in Canada, Australia, and the United Kingdom exist by virtue of simple statutes without explicit constitutional guarantees of their existence or role. As a result, political majorities can choose to neuter an EMB or even eliminate it and reassume direct control over election administration if they so choose, without explicit constitutional language to prevent them. Governments have recently targeted election commissions in Hungary\(^{16}\) and the Maldives\(^{17}\) to name two prominent and egregious examples.\(^{18}\)

\(^{16}\) Kim Lane Scheppele, “Hungary, An Election in Question, Part 3”. Available at: [http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-3/?_php=true&_type=blogs&_r=0](http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-3/?_php=true&_type=blogs&_r=0). Last accessed April 25, 2014. A Fidesz government was elected in 2010 and has sought to rework the electoral system and election laws to its partisan advantage, including manipulation of the election commission. As Scheppele writes, “Twice since the 2010 elections, the Election Commission was reorganized and all members…were fired before they completed the ends of their terms.” In 2010 the Commission “was replaced by a new Commission elected by the Fidesz parliamentary majority which included no members from the political opposition.” In 2013, a new structure
The elimination of an inconvenient EMB, or re-annexation of part of their powers, is unfortunately not a far-fetched scenario even in established democracies with reputations for electoral integrity. The Canadian federal government recently launched an unprecedented assault on Elections Canada that should be understood as an attempt at partisan capture of election administration.\textsuperscript{19} Some functions previously within the ambit of Elections Canada, such as appointing non-partisan poll workers, would fall to political parties under the proposed legislation.\textsuperscript{20} The enforcement wing of the regulator would be moved out from Elections Canada and under the supervision of a bureaucrat who reports directly to a cabinet minister.\textsuperscript{21} The Conservative government and Elections Canada have clashed repeatedly.\textsuperscript{22} It is not difficult to imagine that a government that has waded this deeply into the waters of partisanship might reduce the powers of Elections Canada even further or, perhaps, legislate the EMB out of existence.\textsuperscript{23}

These experiences with EMBs suggest that the underlying constitutional foundations of EMBs should be looked at afresh. If partisan tampering with EMBs is


\textsuperscript{18} Low thresholds for constitutional amendment or dramatically large political majorities able to surpass super-majority thresholds for amendment may also permit even constitutionally entrenched EMBs to be undermined.


\textsuperscript{20} Ibid at ss 18-21, 44.

\textsuperscript{21} Id at s 108.

\textsuperscript{22} See the discussion in Chapter 3 of the “In and Out” case and the controversy surrounding veiled voters as prominent examples.

a constant across these democracies, then courts may need more robust ways of ensuring fair elections. The constitutionalization of election administration in new constitutions, such as South Africa’s, and relatively new ones, such as India’s, should be taken as promising ways of expanding our understanding of the separation of powers. Recognizing EMBs as a fourth branch of government alongside the legislature, executive, and courts is an idea that should be further explored. Just as we would expect courts to protect the erasure of any of the traditional three branches by a temporary political majority, so could EMBs be considered constitutionally protected as foundational elements of democratic government.

c) The Right to Impartial Election Administration

Related to the idea of EMBs as comprising a fourth branch of government is the claim that courts should recognize a right to impartial election administration. A right to impartial election administration would imply that any partisan process, such as elections managed by the executive or an EMB that has been designed to reflect the interests of a political party, would be constitutionally suspect.24 There are a variety of textual anchors for a potential right to impartial election administration, including the right to vote, freedom of political speech or expression, guarantees of representative or republican government, or equal

24 Samuel Issacharoff anticipates this argument about a right to impartial election administration in his claim that purposeful redistricting by legislatures is constitutionally problematic. See “Gerrymandering and Political Cartels” (2002) 116 Harv L Rev 593 at 600 (“the harm to be avoided may not be limited to wrongful districting but rather must encompass purposeful districting”) (emphasis in original), at 647 (“…reinforcing political competition by taking the process of redistricting out of the hands of partisan officials offers the prospect of realizing our constitutional values”), and his “Surreply: Why Elections” (2002) 116 Harv L Rev 684 at 695 (“When the governors begin to make the ultimate decisions as to proper electoral outcomes prior to the participation of the governed, the entire edifice of representative democracy begins to crumble”).
protection guarantees. Recognizing such a right would be a departure of sorts. To date, these provisions have generally not been interpreted to require impartial election administration.

Yet reading impartial election administration into one or more of these guarantees is consistent with how democratic rights have been interpreted, writ large. Constitutional protections for democratic rights have long been interpreted broadly and purposively as protecting something more than the bare right to cast a ballot. Section 3 of the Canadian Charter protects on its face only the right to vote and to stand as a candidate, but has been interpreted to apply to rules as diverse as those surrounding political party registration, third parties, and spending limits. The Canadian jurisprudence understands the reach of the provision to encompass the rules necessary to ensure free and fair elections. Elections cannot be free or fair if they are tainted by partisan election administration. The textual guarantees of democratic rights and freedoms should therefore be interpreted broadly and purposively to entail the right to impartial election administration. Such a right would provide courts with ammunition both to prevent partisan capture of existing EMBs as well as to require that non-partisan EMBs be put in place to administer elections and redistricting. Under a right to impartial election administration, the administration of elections within the bureaucracy accountable to a minister or by the legislature itself would be constitutionally problematic. The redistricting commissions in American states that are populated by Democrats and Republicans would be equally suspect.
The need for a right to impartial election administration stems from the normative failings of partisan election administration. As discussed in Chapter 2, EMBs fulfill a broad range of essential functions, from redistricting to the enforcement of electoral rules and the counting of ballots among many others. It is difficult to conclude that an election is legitimate if political actors with direct interests in shaping and interpreting the rules of the game carry out these functions. The search for partisan gain is a private regarding rather than a public minded purpose and constitutes an illegitimate reason for the exercise of public power. If the agents are permitted to control the agent selection process, and to warp it in ways that work in their own favour, then voters cannot hold elected representatives accountable. Without democratic accountability, then representatives can no longer be said to possess the legitimacy necessary to wield public power.

Requiring independent and impartial EMBs as part of a right to impartial election administration undoubtedly removes discretion that has traditionally rested with the political branches. Legislatures and executives would no longer be able to choose whether to put in place an EMB or to design one in a partisan fashion. It also pushes the judiciary to enforce a particular type of institutional design, which courts are often reluctant to do. A right to impartial election administration, however, would achieve the important goal of cementing a non-partisan democratic process. Such a doctrine would have purchase in jurisdictions without EMBs, such as American states lacking redistricting commissions, as well as in democracies with EMBs that have been captured or designed to act as partisans. The boundaries of
and justifications for a right to impartial election administration should be further explored.

d) The Law and Politics of the New Voter Suppression

Chapter 4 engaged with the problem of unconstitutional motive. It argued that motive-based analysis is a way forward for judicial oversight of changes to the democratic process by the political branches in the sub-set of cases where EMBs are not involved. The chapter argued that partisanship is an improper motive for which to exercise public authority. The partisan effects of election laws must be understood in conjunction with the motives underlying them, especially given that legislatures will attempt to hide their illegitimate actions under the cover of otherwise legitimate democratic goals. It proposed that a non-retrogression standard, proportionality analysis, and an anti-majoritarian doctrine be harnessed to reduce partisan manipulation. Non-retrogression sets a baseline level for a fair democratic process and shifts the onus on the government, which may have improper motives, to justify changes to the law of democracy. Proportionality analysis provides a method for smoking out improper motives if used to its potential. Anti-majoritarianism ensures that the basic features of majoritarian democracy are not used as justifications for partisan abuse.

The urgency for the application of motive-based analysis can be seen in the growing tendency for voter suppression initiatives in established democracies. Voter suppression looks increasingly like a cross-national phenomenon, filtered through local political conditions and constitutional rules. Voter suppression has
long been a feature of American election law, with poll taxes and other devices employed to limit turnout and eligibility of African Americans. Recent restrictive rules on voter identification and early voting, discussed in this dissertation through the *Crawford v Marion County*\(^\text{25}\) and *Husted*\(^\text{26}\) cases in particular, demonstrate that this tendency to exploit the lack of explicit protection of the American right to vote persists.

Voter suppression is also a live phenomenon in other democracies. *Rowe v Electoral Commissioner*\(^\text{27}\) can be understood as an example of voter suppression shaped by Australia’s rules on mandatory voting. If each registered voter is required to cast a ballot, then there is little room for tactics like poll taxes or voter identification that discourage people from turning up to vote. The pressure point instead emerges in the rules around voter registration. The Howard government in the legislation struck down in *Rowe* was attempting to cut from the pool of registered voters some of those likely to support other parties.

The recent Canadian *Fair Elections Act* discussed above can be characterized in a similar light.\(^\text{28}\) The package of amendments includes restricting the practice of “vouching”, which had permitted those without proof of identification or residence

\(^{26}\) *Obama for America v Husted*, 697 F 3d 423 (6th Cir 2012).
\(^{27}\) 2010 HCA 46.
\(^{28}\) Another recent Canadian example is of vote suppressing “robocalls” (i.e. automated calls) that contained misleading information regarding polling locations from the 2011 federal election: *McEwing v Canada (Attorney General)* 2013 FC 535. The calls directed voters to incorrect polling locations and some purportedly came from individuals impersonating Elections Canada. The case found that misleading robocalls were made, but it could not be proven that they affected the results of the election. Criminal charges are pending against a single individual in a riding in the city of Guelph. The Commissioner of Elections Canada declined to recommend prosecution for the robocalls against other individuals due to a failure to establish the requisite intent required by the *Canada Elections Act*: [http://www.elections.ca/content.aspx?section=com&document=apr2414&dir=pre-com&lang=e](http://www.elections.ca/content.aspx?section=com&document=apr2414&dir=pre-com&lang=e). Last accessed April 29, 2014.
to vote if vouched for by another individual residing in the same polling district.\textsuperscript{29} Students, the poor, new citizens, and the elderly, particularly those in nursing homes, are the most likely to be disenfranchised by the elimination of vouching.

With the exception of the elderly, few of these groups are reliable supporters of the governing Conservatives. The removal of vouching smacks of voter suppression, when considered in combination with the more stringent rules on photographic identification introduced in 2007 by the same government.\textsuperscript{30} The government made it harder to vote by requiring identification for the first time in 2007, justified the change by saying vouching existed as a safeguard to prevent disenfranchisement, and has now attempted to cut out this protection in the \textit{Fair Elections Act}.

Vote suppression will adapt to take new forms beyond those at issue in \textit{Crawford}, \textit{Rowe}, and the \textit{Fair Elections Act}. Attempts at voter suppression across democracies display many similar tendencies that indicate motive-based analysis and the doctrinal tools that I have advocated in this dissertation will be increasingly relevant. Further research should be done to understand the causes and consequences of voter suppression. I outline some preliminary lines of inquiry here.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{30} These voter identification rules were challenged in \textit{Henry v Canada (Attorney General)} 2014 BCCA 30. The trial judge and the appellate court both agreed that the rules violated the right to vote in s. 3 of the Charter, but were saved as reasonable limits under s. 1. Part of the justification for the stricter identification requirements constituting a reasonable limit was the availability of vouching. See paras 40-43, 88, 91 and 93.
\end{itemize}
\end{footnotesize}
First, the new voter suppression can be characterized as a second generation phenomenon. The advent of rights protecting documents with specific protections for democratic participation, such as the Charter in Canada, European human rights instruments, or new constitutions in India and South Africa, limited the ability of governments to disenfranchise voters outright. The United States did not have a similar constitutional transformation, but the Voting Rights Act arguably played a similar role. Even in Australia, with no entrenched bill of rights, the courts have moved incrementally to reading in protections for democratic activity into existing provisions.

The new voter suppression therefore does not attempt to bar citizens from voting entirely, but takes a more subtle approach to achieve the same end. A ban on voting by the poor or indigenous peoples would never be permitted under the new bills of rights, judicially imposed constitutional doctrine, or quasi-constitutional statutory protections in these democracies. Even prisoners, a reviled group, have seen their right to vote protected by courts in South Africa, Australia, the United Kingdom, and Canada among other examples. The new voter suppression tactics therefore take action short of explicitly banning a sub-group from voting, which would be impermissible. Parties interested in voter suppression instead take measures to discourage some voters from turning up at the polls by making it as difficult as possible to do so.

33 Hirst v United Kingdom (2006) 42 ECHR 41.
Second, and related, voter suppression measures appear on their surface to be general regulation of the electoral process, but in reality target specific sub-sets of voters with a tendency to support parties other than the governing one. General rules on voting hours, the required identification to prove eligibility to cast a ballot, or voter registration do not explicitly target minorities, but are intended to have just that effect. In *Rowe*, immigrants, new voters, and the poor all disproportionately bore the burden imposed under the harsh registration rules. All were likely to vote for Labour or the Greens over the Liberals that put the law in place. The rules in the Canadian *Fair Elections Act* amending the vouching provisions for voter identification also appear to target a sub-set of voters (in addition to the elderly) likely to support parties other than the governing one. Voter ID rules in America states look deliberately targeted at the Democratic coalition of African American and Latino voters, students, and the poor. None of these attempts at voter suppression directly targeted a minority of voters or the identified supporters of a political party. Their goal and effect, however, was to discourage turnout among specific sets of voters.

Third, these voter suppression initiatives are styled as tackling flaws in the democratic process that require urgent attention, but these rhetorical and legal claims serve mainly to cover up the improper partisan motive behind the changes. In nearly all cases, the claim made by incumbents is that harsher rules on voter identification, registration, vouching or the like are necessary to combat electoral fraud. To put it charitably, the consistent theme is that such evidence is fleeting or non-existent. That partisan motives are at play is often revealed by the weight the
political actors put on solving a non-existent problem, while tangible harm to voters disenfranchised by the measures is ignored.

Fourth, these attempts at suppression are designed to exploit the loopholes in judicial reasoning regarding partisanship and improper motives. The reluctance of courts to explore beyond the superficial justifications provided (usually to prevent fraud) or to attempt to smoke out the actual motives (usually partisan gain for the governing party) provides few resources by which to limit self-dealing. The doctrinal tools that I propose address the particular form that attempts at voter suppression have taken. Motive-based judicial review through proportionality analysis and a non-retrogression standard in particular can limit voter suppression by highlighting the disconnect between the stated purposes for a law and its actual motives and effects.

Motive-based judicial review will be more urgently needed as the cross-national phenomenon of voter suppression appears likely to continue. The structural conditions of established majoritarian democracies make suppression a successful tactic. Majoritarian electoral systems have the virtue of making each vote count, but also correspondingly provide electoral advantage to those able to discourage individual voters from casting ballots in ridings where the results are likely to be close. Voter suppression is aided by new sophisticated databases about voters collected by political parties, which allow them to target voters very likely to support other parties with great precision. Low turnout in elections means that suppressing a vote is just as effective a technique as getting a supportive voter to the ballot box. Absent a move to mandatory voting of the type implemented in Australia,
elections are likely to continue to feature low turnout and this provides incentives to engage in voter suppression.

As political conditions shift, the form that voter suppression takes will likely evolve in ways that cannot be anticipated. Motive-based review has the potential to identify and limit voter suppression, in whatever particular form it takes within a given political and constitutional system. Courts must be willing, however, to confront partisan self-dealing head on.

III. Conclusion

This dissertation sought to place the principal-agent problem of representation as a central challenge in the law of democracy and to trace the implications of partisan self-dealing for judicial review in majoritarian systems. A recognition of the importance of institutional patterns has wended its way through this dissertation. A sustained focus on the role of institutions also represents a fruitful vein to be mined for future research on the comparative law of democracy. In consensual and transitional democracies, how partisan self-dealing operates and how judicial review should proceed are topics worthy of further consideration. The role played by EMBs across types of democracies should be further explored. Treating EMBs as forming a fourth branch of government alongside the legislature, executive, and judiciary would be appropriate given their fundamental role in democracies. Interpreting existing constitutional protections as guaranteeing a right to impartial election administration would further cement a fair democratic process against partisan self-dealing. Motive-based judicial review has the potential to limit
partisan self-dealing and will continue be relevant as attempts at voter suppression evolve.

Partisanship will remain a challenge as long as there is representative government. As James Madison observed with regard to the separation of powers:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.35

These sentiments could not be more apt as well with regard to the law of democracy.

---

Selected Bibliography

Literature


Aroney, Nicholas, “Democracy, Community and Federalism in Electoral Apportionment Cases: The United States, Canada and Australia in Comparative Perspective” (2008) 58 UTLJ 421.


Australian Electoral Commission, Submission to the Joint Standing Committee on Electoral Matters Inquiry into the Integrity of the Electoral Roll (Submission No 26 of October 17, 2000).


Besley, Timothy, “Political Selection” (2005) 19 Journal of Economic Perspectives 19


Cameron, Jamie, “Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on Vancouver Sun and Harper” (2005) 17 NJCL 71.


Constituent Assembly Debates, India, Vol VIII.


Daly, Paul, “The Unfortunate Triumph of Form over Substance in Canadian Administrative Law” (2012) 50(2) Osgoode Hall LJ 1.


Dyzenhaus, David, “Proportionality and Deference in a Culture of Justification” (Paper delivered at the Conference on Proportionality, University of Western Ontario, 2010) [unpublished].


Geddis, Andrew, “Resolving Disputed Elections in Canada and New Zealand” (2013) [unpublished].


Gray, Anthony, “The Guaranteed Right to Vote in Australia” (2007) 7(2) QUTLJ 178


Hiebert, Janet, “Interpreting a Bill of Rights: The Importance of Legislative Rights Review” (2005) 35(2) BJPS 235


Hirschl, Ran, Constitutional Theocracy (Cambridge: Harvard University Press, 2010).


Johnston, RJ, David Rossiter and Charles Pattie, “How well did they do? The Boundary Commissions at the Third and Fourth Periodical Reviews” in Iain MacLean and David Butler, eds, Fixing the Boundaries: Defining and Redefining


Ostberg, CL and Matthew E Wetstein, Attitudinal Decision Making in the Supreme Court of Canada (Vancouver: University of British Columbia Press, 2007).


Twomey, Anne, “Rowe v Electoral Commissioner – Evolution or Creationism?” (2012) 31(2) UQLJ 181


Jurisprudence

A-G (Commonwealth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1.

AC Jose v Sivan Pillai and Others, 1984 SCR (3) 74.

Adams v Commission on Appellate Court Appointments (Arizona Supreme Court) (2011), No CV-10-0405-SA.

Ainsley Financial Corp v Ontario (Securities Commission), (1994) 21 OR (3d) 104.


Anisminic Ltd v Foreign Compensation Committee, [1969] 2 AC 147 (HL).


Associated Provincial Picture Houses Ltd v Wednesbury Corp, [1948] 1 KB 223 (CA).


Bowman v United Kingdom, 1998-I Eur Ct HR 175.


Calaghan et al v the Chief Electoral Officer, 2010 FC 43.

Calaghan et al v the Chief Electoral Officer, 2011 FCA 74.


Colegrove v Green, 328 US 549 (1946).

Communist Party of India (Marxist) v Bhara Kumar, AIR (1998) SC 184.


de Freita v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing, 1 AC 69 (PC 1998).


Figueroa v Canada (AG) (1999), 43 OR (3d) 728 ONSC (Gen Div).

Figueroa v Canada (AG) (2000), 50 OR (3d) 161 (ONCA).

Figueroa v Canada (AG), 2003 SCC 37.

Frank et al v Canada (AG) 2014 ONSC 907.


Golder v United Kingdom, App No 4451/70, 11 EHRR 524 (1979-80).

Ha v Canada (Minister of Citizenship and Immigration), 2004 FCA 49.


Harper v Canada (AG), 2004 SCC 33.


Indira Gandhi v Raj Narain, (1975) SC 2299.

Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927.

Kanhia v Trivedi, 1986 SCC 111.


Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.


Mathieu-Mohin and Clarfayt v Belgium, App No. 9267/81, 10 ECHR 1 (1987).

Mayor of Tucson v Royal, 20 Arizona Appeal 83 (1973).

McEwing v Canada (Attorney General) 2013 FC 535.

McGinty v Western Australia (1996) 186 CLR 140.


Mizrachi Bank Ltd v Migdal Cooperative Village [1995] IsrSC 49(4) 221.

MS Gill v Chief Election Commissioner (1978) SCR (3) 272.


National Director of Public Prosecutions v Zuma 2009 2 SA 277 (SCA).

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.

Obama for America v Husted, 697 F 3d 423 (6th Cir) (2012).

Operation Dismantle v the Queen, [1985] 1 SCR 441.

Opitz v Wrzesnewskyj, 2012 SCC 55.

Paramaguru v Tamil Nadu, 2006 (2) CTC 241.

Perry v Perez, 132 S Ct 934 (2012).

R (Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15


R v Bryan, 2007 SCC 12.


R v Pearson; Ex parte Sipka (1983) 152 CLR 254.
Raîche v Canada (AG), 2004 FC 679.


Reference re Provincial Electoral Boundaries (Saskatchewan), [1991] 2 SCR 158.


Roach v Australian Electoral Commissioner, [2007] HCA 43.

Roncarelli v Duplessis, [1959] SCR 121.

Rosenberg v Canada (1998), 38 OR (3d) 577 (CA).

Rowe v Electoral Commissioner, [2010] HCA 46.

Sauvé v Canada (Chief Electoral Officer), [2002] 3 SCR 519.


SS Dhanoa v Union of India, 1991 AIR 1745; 1991 SCR (3) 159.

Stephens v West Australian Newspapers Ltd, (1994) 182 CLR 211.


Texas v Holder, _ F Supp 2d_, 2012.

Thamotharem v Canada (Minister of Citizenship and Immigration) 2007 FCA 198; leave to appeal refused, 2007 CanLII 55338.


Union of Civil Liberties (PUCL) v Union of India, AIR (2003) SC 2363

Union of India v Association for Democratic Reforms 2002 (3) SCR 294.
Union of India v G Ganayutham, AIR 1997 SC 3387.

