Democracy and Deference: The Role of Social Science Evidence in Election Law Cases

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The use of social science evidence presents one of the most challenging issues in the Supreme Court's election law cases, in large part because social science evidence is often inconclusive, ambiguous and even unavailable in the electoral realm. This article argues that, as a result of the insufficiency of social science evidence, the Supreme Court is facing a dilemma in its law of democracy cases. This dilemma is illustrated by its decisions in two recent cases, Harper and Bryan. On the one hand, judicial deference to the government's social science evidence will result, in practical terms, in the approval of the challenged electoral law despite the resulting rights infringement. Although judicial deference is understandable given the insufficiency of social science evidence, a highly deferential approach significantly impairs the Court's ability to hold Parliament to account for its election laws and to protect democratic rights. On the other hand, judicial scepticism of social science evidence produces challenges of its own. Although a sceptical approach is more protective of democratic rights, it has the effect of establishing too high a bar for Parliament to overcome in the section 1 test. Given the insufficiency of social science evidence, Parliament will find it almost impossible to justify the regulation in the face of heightened judicial scrutiny.

This article therefore argues that social science evidence should play a less central role in future law of democracy cases. I claim that courts should also evaluate regulations with respect to key democratic values, such as political equality, participation, legitimacy and fairness. This proposed "democratic-values approach" will enable the Court to better supervise Parliament's regulation of the democratic process. This article shows that the Court has used democratic values to assess the reasonableness of electoral laws in earlier cases, including Libman, Figueroa and Sauvé II. Instead of deferring to Parliament with respect to election laws, I argue that the Supreme Court should actively protect the fairness and legitimacy of the democratic process.

L'utilisation des preuves en sciences sociales présente l'un des plus grands défis à l'égard des décisions de la Cour suprême en matière de droit électoral, en grande partie parce que les preuves en sciences sociales sont souvent non concluantes, ambiguës et même non disponibles dans le domaine du processus électoral. Dans cet article, l'auteure soutient qu'en raison de l'insuffisance des preuves

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en sciences sociales, la Cour suprême est aux prises avec un dilemme dans ses décisions en matière de droits démocratiques. Ce dilemme est illustré dans deux décisions récentes, soit celles de Harper et Bryan. D’une part, la retenue judiciaire à l’égard des preuves du gouvernement en sciences sociales se traduira, en termes pratiques, par l’approbation de la loi électorale contestée en dépit de la violation des droits qui en résulte. Bien que la retenue judiciaire soit compréhensible compte tenu de l’insuffisance des preuves en sciences sociales, une attitude de grande retenue réduit de façon importante la capacité de la Cour à tenir le Parlement responsable de ses lois électorales et de la protection des droits démocratiques. D’autre part, le scepticisme judiciaire par rapport aux preuves en sciences sociales produit ses propres défis. Même si une approche sceptique est plus protectrice des droits démocratiques, elle a pour effet de placer la barre trop haute pour être surmontée par le Parlement dans le test de l’article 1. Compte tenu de l’insuffisance des preuves en sciences sociales, il sera presque impossible pour le Parlement de justifier la réglementation relativement au contrôle judiciaire accru.

L’auteure soutient donc que les preuves en sciences sociales doivent jouer un rôle moins important dans les décisions futures en matière de droits démocratiques. Elle soutient que les tribunaux doivent également évaluer les règlements par rapport aux valeurs démocratiques comme la participation, la légitimité, l’équité et l’égalité politique. Cette approche proposée axée sur les valeurs démocratiques permettra à la Cour de mieux superviser les règlements du Parlement relativement au processus démocratique. L’auteure démontre que la Cour a utilisé les valeurs démocratiques pour évaluer le caractère raisonnable des lois électorales dans des décisions précédentes, notamment Libman, Figueroa et Sauvé II. Plutôt que de s’en remettre au Parlement en ce qui concerne les lois électorales, l’auteure soutient que la Cour suprême doit protéger activement l’équité et la légitimité du processus démocratique.

INTRODUCTION

Social science evidence is playing an increasingly visible and important role in Charter cases. As Justice Frank Iacobucci has observed, social science evidence is required because Charter litigation “often involves an inquiry into the operation and effect of broad social policies.”¹ F.L. Morton and Ian Brodie note that the presentation of social science evidence can “occur at every stage of Charter argument: defining rights, identifying their violation, justifying their restrictions, and tailoring judicial remedies.”² Yet the use of social science evidence is raising a multitude of challenges for litigants and courts alike.

The challenges posed by the use of social science evidence are particularly acute for the Supreme Court’s law of democracy cases. The law of democracy re-

fers to the pre-existing ground rules that constitute democratic government. The Court’s law of democracy cases have arisen under s. 3 (the right to vote), s. 2(b) and 2(d) (freedoms of expression and association), and s. 15 (equality guarantee) of the Charter. The Court has decided a number of cases in the law of democracy field including such issues as electoral boundary drawing, political party regulation, rules regulating referenda, political finance, opinion polls, inmate voting rights, the transmission of election results, and contested elections.

The Supreme Court has recently developed a new approach to social science evidence in its law of democracy cases. In Harper v. Canada and R v. Bryan, a majority of the Court adopted a highly deferential posture towards Parliament’s regulation of the electoral system. These recent cases can be contrasted to the Court’s earlier election law decisions, including Libman v. Quebec, Thomson Newspapers Co. v. Canada (Attorney General), Reference re Provincial Electoral Boundaries, Bełczowski v. R., Haig v. R., Harvey v. New Brunswick (Attorney General), Sauvé v. Canada (Chief Electoral Officer), Libman c. Québec (Procureur général), Harvey v. New Brunswick (Attorney General), Haig v. Canada, Haig v. Canada, Sauvé v. Canada (Chief Electoral Officer), Thompson Newspapers Co. v. Canada (Attorney General), Figueroa v. Canada (Attorney General), Opitz v. Wrzesnewskyj.

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4 Colin Feasby, “Constitutional Questions About Canada’s New Political Finance Regime” (2007) 45 Osgoode Hall LJ 514 at 539 (defining the law of the political process as encompassing decisions that fall under sections 3, 2, and 15).
6 Harper, ibid.
7 Bryan, supra note 5.
8 Libman, supra note 5.
Newspapers Co v. Canada,9 Sauvé v. Canada,10 and Figueroa v. Canada,11 in which the Court was far less deferential about the means used by the government to achieve its objectives.12

This article focuses on the implications of the Court’s new approach to social science evidence for election law cases, and it advances three main claims. First, I argue that there exists a “dual challenge” with respect to the use of social science evidence in law of democracy cases. The dual challenge arises first, because courts are not institutionally well-equipped to evaluate social science evidence, and second, because social science evidence itself is usually insufficient in the electoral context. Democratic systems involve highly complex and multi-faceted interactions among a wide array of institutions and actors. As a result, social science evidence with respect to the effects of electoral laws is often inconclusive, conflicting, and even unavailable.

Second, I claim that as a result of certain doctrinal developments, courts now face a dilemma with respect to their treatment of social science evidence. As various commentators have noted, the Court was very deferential to Parliament in the Harper and Bryan decisions.13 The Court not only deferred to Parliament’s choice of electoral rules, it was also highly deferential to the social science evidence provided by the government. I argue that as a result of certain changes to the section 1 analysis in Harper, judicial deference has now become synonymous with an almost unquestioning acceptance of the social science evidence. This deference to the government’s social science evidence has meant, in turn, that the section 1 analysis is now heavily weighted in the direction of finding that the infringement of the right is justified.

As a result of this emerging nexus between judicial deference and social science evidence, courts are now facing a dilemma in the law of democracy arena. On the one hand, judicial deference to the government’s social science evidence, while beneficial in some respects, has the effect of significantly diminishing the Court’s ability to hold Parliament to account for the content of its election laws. Given the current structure of the section 1 analysis, judicial deference to social science evidence will result, in practical terms, in the approval of the challenged electoral law despite the resulting rights infringement. On the other hand, a less deferential approach to

9 Thomson Newspapers, supra note 5.
10 Sauvé II, supra note 5.
11 Figueroa, supra note 5.
the government's social science evidence, while providing greater protection for rights, has the effect of establishing too high a bar for Parliament to overcome in the s. 1 test. Given the inconclusive, conflicting and ambiguous social science data in the electoral realm, Parliament will find it almost impossible to justify the regulation in the face of heightened judicial scrutiny. Parliament must, however, be in a position to regulate the electoral process. The majority and dissenting opinions in Harper and Bryan provide an illustration of the dilemma posed by judicial deference and social science evidence.

Third, this article considers how the Court should handle future election law cases. Given the insufficiency and unavailability of social science evidence in the democratic realm, I argue that social science evidence should play a less central role in future law of democracy cases. Instead of focusing exclusively on the social science evidence, I argue that courts should also evaluate regulations with respect to key democratic values, such as political equality, freedom of speech, legitimacy and fairness. I claim that this proposed "democratic-values approach" will enable the Court to better supervise Parliament's regulation of the democratic process. This article uses the example of spending limits to illustrate how the Court could use a democratic-values approach to adjudicate future law of democracy cases. I also show how the Court paid considerable attention to democratic values in its earlier election law decisions, including Figueroa, Libman and Sauvé II.

In addition, I claim that the Supreme Court should revert to its position in earlier cases of holding Parliament to account for its regulation of the democratic process. The Supreme Court plays a vital role in ensuring the fairness and legitimacy of the democratic process. The Court's majority recent turn to a highly deferential posture, as evidenced by its decisions in Harper and Bryan, significantly impairs the Court's ability to supervise the democratic process. I have argued previously that the Court's earlier approach in Sauvé II is preferable. In Sauvé II, McLachlin CJ stated that "it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the Charter that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system." In addition, she asserted that the "right to vote is fundamental to our democracy and the rules of law and cannot be lightly set aside. Limits on it require not deference, but careful examination." The Supreme Court majority's new approach to social science evidence, however, constrains its ability to assess the constitutionality of electoral laws. In future cases, the Court should place less weight on social science evidence and should subject election laws to greater scrutiny.

This article proceeds in four parts. In Part 1, I argue that there exists a dual challenge with respect to the use of social science in law of democracy cases. Part 2 focuses on the doctrinal developments in the Harper and Bryan cases, and analyzes the nexus that has emerged between judicial deference and social science evidence.

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15 Ibid. at 560–61.
16 Sauvé II, supra note 5 at para. 15.
17 Sauvé II, ibid. at para. 9.
Part 3 shows that courts now face a dilemma with respect to their treatment of social science evidence. In Part 4, I argue that social science evidence should play a less prominent role in future law of democracy cases, and I propose that the Court should evaluate regulations with respect to key democratic values including political equality, participation, legitimacy and fairness.

1. THE DUAL CHALLENGE: THE INSTITUTIONAL LIMITATIONS OF COURTS AND THE INSUFFICIENCY OF SOCIAL SCIENCE EVIDENCE

There are a number of challenges that arise when social science evidence is brought into a courtroom. As Carl Baar observes, “the judicial process presents special and difficult challenges to the way in which social scientific knowledge is transmitted.”\(^\text{18}\) The judicial process is formal and fixed and does not provide ready channels for remedying misunderstandings about the nature of the evidence. Baar argues, for example, that courts should not consider social science evidence after oral argument because there is no way for the evidence to be tested.\(^\text{19}\) It is also difficult for a court to absorb “voluminous social science materials.”\(^\text{20}\) In addition, as Katherine Swinton notes, social science evidence is costly and time-consuming for the parties to gather and for the courts to assess.\(^\text{21}\)

Although courts are institutionally capable of assessing adjudicative facts (which concern the historical relationship between the two parties before the court), they are not well-equipped to assess social science facts (which relate to broader societal patterns of behaviour). Swinton argues, for instance, that judges are not well-positioned to question the quality of social science evidence.\(^\text{22}\) Judges have been criticized for “their failure to discuss the assumptions underlying the social science studies or to consider the limitations of the conclusions because of the limited sample or the ambiguity of the questions asked in a survey.”\(^\text{23}\) In a similar vein, Philip Lochner notes that lawyers are not usually trained in social science and are “ill-equipped to evaluate social science research.”\(^\text{24}\)

Not only are courts ill-equipped to process and assess social science evidence, it is also the case that social science evidence itself is often ambiguous, contradictory, inconclusive or unavailable with respect to a given topic. As Sujit Choudhry argues, “[p]ublic policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even

\(^{18}\) Carl Baar, “Court Delays Data As Social Science Evidence: The Supreme Court of Canada and “Trial Within a Reasonable Time,”” (1997) 19 Just Sys J 123 at 138.

\(^{19}\) Ibid. at 128.

\(^{20}\) Ibid. at 136.


\(^{22}\) Ibid. at 203–204.

\(^{23}\) Ibid.

In addition, as John Hagan observes there are three problems that arise when applying scientific knowledge in legal settings: admissibility, probability and causality. Instead of providing certitude, social science evidence is concerned with probabilities. Compounding these challenges is the fact that there are very few empirical studies that assess the social consequences of the Charter.

The twin limitations described above — the institutional incapacities of courts and the unavailability of conclusive social science evidence — are particularly acute in the electoral arena. Democratic systems are immensely complex with a wide array of institutions and actors. It is very difficult, if not impossible, to scientifically test the effects of many of the laws that regulate the political system. For example, it would be hard to conduct a randomized controlled trial to measure the effects of certain kinds of laws. The regulation of the democratic process is a quintessentially polycentric inquiry that involves policy determinations which will likely be made in the absence of the kind of social science data required to satisfy the Oakes test. Although social science evidence can provide very precise data for certain issues that pertain to the electoral process, it is less helpful for broader questions concerning the system-wide distribution of power or equality.

Yet the Court’s decisions about the constitutionality of various electoral rules often have to consider these broader systemic questions about the distribution of power and equality. Consider, for instance, the controversy over spending limitations on third parties in the context of an election — the law that was at issue in Harper. Laws that limit spending are often challenged on the ground that they impermissibly infringe the s. 2(b) freedom of expression guarantee of the Charter. Such laws are often justified on the basis that they help to establish a level playing field by preventing the wealthy from dominating the electoral process — and this justification involves an assessment of the system-wide distribution of power and equality.

Colin Feasby argues that both the supporters and the opponents of spending limits make the mistake of thinking that the validity of these limits is dependent upon actual proof of the effect of wealth on elections. He argues that “this debate cannot be resolved because of the present inability of social science to divine from the entrails of an election the impact of third party activities with any certainty.”

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27 Ibid. at 219–220.
Feasby’s argument that social science is unable to demonstrate with certainty the
effect of third party spending on an election is particularly relevant when consider­
ing the Supreme Court’s recent decisions in the electoral realm.

2. THE SUPREME COURT, SOCIAL SCIENCE EVIDENCE, AND
ELECTION LAW

The Harper and Bryan decisions ushered in a highly deferential approach to the
Supreme Court’s adjudication of its law of democracy cases. Judicial deference
has two manifestations in these decisions. First, the Court majority is highly defer­
tential to the choices Parliament makes with respect to the electoral system. In Harper, the Court asserted that since Parliament has the right to “choose Canada’s electoral model,” it is incumbent on the Court to defer to Parliament.31 The Court also stated that the workings of the electoral system are a “political choice, the
details of which are better left to Parliament.”32 Similarly, the Court majority stated in Bryan that “courts ought to take a natural attitude of deference toward Parlia­
ment when dealing with election laws.”33 Second, as discussed below, the Court
majority is highly deferential to the social science evidence presented by the
government.

(a) Legal Standards and Social Science Evidence in Harper v. Canada

At issue in Harper was the constitutionality of third party spending limits as
provided for in the Canada Elections Act.34 Third party spending refers to cam­
paign spending that is conducted by individuals, groups, corporations or institu­
tions; in short, any person or entity that is neither a candidate nor a political party. The provisions of the Act had been struck down by the lower courts as violations of the Charter’s guarantee of freedom of expression.35 The Supreme Court, however, upheld the constitutionality of the third party spending limits in a six-to-three decision. In an opinion for the majority, Justice Bastarache held that while the spending limits infringed the freedom of expression guarantee in section 2(b) of the Charter, the provisions were nonetheless justifiable under section 1.36 In a dissenting opin­
ion, Chief Justice McLachlin and Justice Major found that the spending limits
failed the minimal impairment stage of the Oakes test because they imposed a “vir­
tual ban” on citizens who wished to participate in the political deliberation during the election period.37

A central issue for the Court majority was the nature and sufficiency of the
social science evidence. The majority stated that Court may rely on a “reasoned

31 Harper, supra note 5 at para. 87.
32 Ibid.
33 Bryan, supra note 5 at para. 9.
36 Harper, supra note 5 at paras. 66, 121.
37 Ibid. at para. 35, McLachlin CJ and Major J, dissenting.
apprehension of harm” standard when the social science evidence is either inconclusive or conflicting. Referring to prior decisions including *R. v. Butler*, *R. v. Keegstra*, *RJR-Macdonald Inc. v. Canada*, and *Thomson Newspapers*, the majority noted that it had relied on “logic, reason and some social science evidence” in the absence of concrete scientific proof.38

The *Harper* majority also expanded the section 1 test by engaging in an analysis of four contextual factors from *Thomson Newspapers*.39 In *Thomson Newspapers*, the Court identified these contextual factors but did not engage in a detailed analysis. By contrast, in *Harper*, the majority engaged in an extensive assessment of the social science evidence. In its analysis of these four factors, the Court was notably deferential to the government’s view that the social science evidence supported the objective of electoral fairness. The four factors are: (i) the nature of the harm and the inability to measure it, (ii) the vulnerability of the group, (iii) subjective fears and apprehension of harm, and (iv) the nature of the infringed activity.

With respect to the first factor, the majority acknowledged that “the nature of the harm and the efficaciousness of Parliament’s remedy in this case is difficult, if not impossible, to measure scientifically.”40 The majority noted that various studies including the Lortie Commission had found that third party advertising can undermine electoral fairness by enabling the wealthy to dominate the public discourse. The majority also pointed to studies which show that Canadians believe that limitations on third party spending promote electoral fairness. With respect to the second factor, the vulnerability of the group protected, the majority identified the Canadian electorate, candidates and political parties as the groups protected by the spending limits. In terms of the third contextual factor, the majority referred to studies which show that Canadians support spending limits. With respect to the fourth contextual factor, the majority stated that the infringed activity is political expression, which is important to the public discourse.41

The Court’s treatment of these four factors set the stage for its section 1 analysis of the sufficiency of the government’s social science evidence. Unsurprisingly, the majority was highly deferential to the government at every stage of the *Oakes* analysis. The Court held that the main objective of the spending limits — electoral fairness — was pressing and substantial, as were the three narrower objectives: promoting equality in the political discourse, protecting the integrity of the financing regime, and maintaining confidence in the electoral process.42 The Court relied on

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39 *Thomson Newspapers*, supra note 5 at paras. 90–91.

40 *Harper*, supra note 5 at para. 79.

41 Ibid. at para. 80–84.

42 Ibid. at para. 92.
the conclusions of the Lortie Report for this determination. The Court also found that rational connection was met. Although there is no direct proof of a link, the Court stated that "surely, political parties, candidates, interest groups and corporations for that matter would not spend a significant amount of money on advertising if it was ineffective." With respect to minimal impairment, the Court found that the spending limits allow for a modest amount of electoral speech, and they also ensure that a candidate will have sufficient resources to respond in the event of an attack by a third party. In the proportionality stage, the majority found that the benefits of increased equality, integrity, fairness and confidence in the electoral process outweighed the deleterious effect of preventing third parties from engaging in unlimited political expression.

(b) A Parallel Decision — R v. Bryan

The Court adopted a similar approach to judicial deference and social science evidence in R v. Bryan. This case concerned the constitutionality of s. 329 of the Canada Elections Act which prohibited the transmission of election results between electoral ridings before the closing of all polling stations in Canada. The claimant had posted election results from Atlantic Canada on a website while polls were still open in other electoral ridings. A 5-4 majority of the Supreme Court held that although the provision infringed the freedom of expression as protected by s. 2(b), it could nonetheless be upheld under s. 1. In a dissenting opinion, Justice Abella argued that the provision violated the freedom of expression in addition to not meeting the proportionality test under s. 1. Given the effect of staggered voting hours on reducing informational imbalance, Abella J. concluded that the publication ban was an "excessive response to an insufficiently proven harm."

In Bryan, the majority adopted the evidentiary standards of the Harper decision, stating that the Court may rely on the reasoned apprehension of harm standard when the social science evidence is conflicting or inconclusive. The majority also relied on Harper for the position that "logic and reason assisted by some social science evidence" would be sufficient to justify the measure. As before, the majority front-loaded the s. 1 test by engaging in a detailed analysis of the four contextual factors and the government's social science evidence. The Court analyzed each factor with respect to the government's two objectives of ensuring informational equality, and maintaining public confidence in the electoral process.

In its analysis of the four contextual factors, the majority was highly deferential in its assessment of the government's social science evidence. On behalf of the

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43 Ibid. at para. 104.
44 Ibid. at para. 116.
45 Ibid. at paras. 120-121.
46 Bryan, supra note 5 at para. 2.
47 Ibid. at para. 133.
48 Ibid. at para. 16.
49 Ibid. at paras. 16-30. The government stated that the first objective, while an inherently important goal, would be difficult to establish as an evidentiary matter. The second objective, by contrast, was based on actual fact. Ibid. at para. 4.
majority, Bastarache J acknowledged that it is "almost impossible" to measure the effect of the s. 329 ban on voting patterns, and for this reason, the Court is "forced to resort to logic and common sense applied to the Attorney General's evidence as proof of the harm of loss of public confidence in the electoral system as a result of premature release of results."\textsuperscript{50} The majority cited Professor MacDermid's evidence that in the United States there has been a decline in participation measured by voting rates, and that a similar result could be expected in Canada.\textsuperscript{51} In addition, the Court referred to a 2005 Decima Research/Carleton University Poll which showed that 70 percent of Canadians "thought people should not be able to know election results from other provinces before their polls close."\textsuperscript{52} The Court also relied on the Lortie Report for the idea that western voters may feel that the election has already been decided and would therefore abstain from voting.\textsuperscript{53}

Under the s. 1 analysis, Bastarache J. found that the objective of ensuring informational equality was pressing and substantial, and that the provision satisfied the proportionality stage of the \textit{Oakes} test.\textsuperscript{54} The Court also concluded that s. 329 is rationally connected to the objective of maintaining public confidence in the electoral system.\textsuperscript{55} The majority asserted that the government's evidence, including the Lortie Report and the Decima Research/Carleton University Poll, showed, albeit inconclusively, that there was some reason to think that public confidence in the electoral system would be harmed by the premature availability of poll results. For the minimal impairment stage, the majority once again relied on the Lortie Report for the idea that Canadians do not approve of the information imbalances that arise when election results are prematurely released. The Court majority stated that staggered hours do not on their own remedy the problem of informational imbalances and that Parliament was therefore justified to devise its own solution. In the final stage, the Court noted that s. 329 promotes fairness and confidence in the electoral process, while the harms are fairly negligible in that the ban is in effect for only two or three hours on election day.\textsuperscript{56} As in \textit{Harper}, the Court majority engaged in a highly deferential analysis of the government's social science evidence at every stage of the \textit{Oakes} test.

3. THE DILEMMA OF JUDICIAL DEFERENCE

As a result of an emerging nexus between judicial deference and social science evidence, courts now face a dilemma with respect to their treatment of election law cases. On the one hand, judicial deference to the government's social science evidence significantly diminishes the Court's ability to hold Parliament to account for the content of its election laws. Given the current structure of the s. 1 analysis, judicial deference to social science evidence will result, in practical terms,

\begin{itemize}
\item \textsuperscript{50} \textit{Ibid.} at para. 19.
\item \textsuperscript{51} \textit{Ibid.} at para. 18.
\item \textsuperscript{52} \textit{Ibid.} at para. 25.
\item \textsuperscript{53} \textit{Ibid.} at para. 25.
\item \textsuperscript{54} \textit{Ibid.} at paras. 35, 41, 44, 49.
\item \textsuperscript{55} \textit{Ibid.} at para. 41.
\item \textsuperscript{56} \textit{Ibid.} at paras. 41–51.
\end{itemize}
in the approval of the challenged electoral law despite the resulting rights infringement. On the other hand, a lack of judicial deference to the government’s social science evidence will establish too high a bar for Parliament to overcome in the s. 1 test. Given the inconclusive, conflicting and ambiguous social science data in the electoral realm, Parliament will find it almost impossible to justify a given regulation in the face of judicial scepticism. Parliament must, however, be in a position to regulate the electoral process.

(a) Judicial Deference to Social Science Evidence

Judicial deference in the Harper and Bryan decisions, at least by a majority of the justices, has come to mean an almost unquestioning acceptance of the social science evidence. Indeed in the Bryan decision, Bastarache J stated that “[w]hat is referred to in Harper and Thomson Newspapers as a “deferential approach” is best seen as an approach which accepts that traditional forms of evidence (or ideas about their sufficiency) may be unavailable in a given case and that to require such evidence in those circumstances would be inappropriate.”

Not only does this statement explicitly link judicial deference and social science evidence, it also suggests that the Court should neither expect nor require traditional forms of evidence. In addition, the new structure of the s. 1 analysis is front-loaded by a highly deferential assessment of the contextual factors and the social science evidence.

As a result, the Court’s deference to the government’s social science evidence is effectively determinative of its conclusion that the government has justified the rights infringement. At a conceptual level, the Court’s deference to Parliament is understandable given the insufficiency of the social science evidence in the electoral context. An overly deferential approach, however, significantly diminishes the Court’s ability to hold Parliament to account for its election laws. In addition, judicial deference to the government’s social science evidence deprives the Court of the capacity to protect rights such as the freedom of expression.

Consider, for example, the Harper majority’s statement that political speech (here, third party advertising) “will be less deserving of constitutional protection” if it manipulates the political discourse. This is a remarkable statement given the importance of political speech. The Court admitted that there was no evidence of manipulation and no evidence that third parties will “smear candidates or engage in other forms of non-political discourse.”

Deference to the government was nonetheless warranted because there exists a “danger that political advertising may manipulate or oppress the voter.”

This suggests that the Court will defer to the government’s infringement of a right even in the absence of any harm and any evidence of a harm. Indeed, the Court majority was deferential to the government’s position when faced with the contrary evidence of the Johnston Report, which found that third party advertising did not affect the outcome of the 1988 election. The Court stated that this report

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57 Bryan, supra note 5 at para. 28.
58 Harper, supra note 5 at para. 85.
59 Ibid.
60 Ibid.
does not address the possibility that advertising in future elections might have an impact on elections. The majority stated that “surely, Parliament does not have to wait for the feared harm to occur before it can enact measures to prevent the possibility of the harm occurring or to remedy the harm, should it occur.” Jamie Cameron describes this statement as a “moment of truth,” one that is both worrying and surprising given the Court's earlier decisions in Thomson Newspapers and Figueroa.

An overly deferential approach also prevents the Court from holding Parliament to account for its regulation of the democratic process. A central challenge in the law of democracy arena is that political actors engage in partisan self-dealing by crafting electoral laws that benefit their political interests. The “political markets” or “structural” approach is concerned with the manipulation of electoral laws by public officials. A number of scholars in the Canadian law of democracy literature have focused on structural problems posed by partisan self-dealing --- a development that I have referred to elsewhere as the “structural turn.” One difficulty with electoral laws that instantiate partisan self-dealing is that these laws can be simultaneously beneficial to the public interest. For example, third party spending limits, which are justified on the basis that they level the electoral playing field, could insulate political parties and candidates from criticism by citizens. Christopher Manfredi and Mark Rush argue, for instance, that the spending restrictions in Harper “insulated incumbent political powers (parties or individuals) from political competition.” They observe that “[u]nder the guise of promoting equality within civil society (by constraining the influence of the more wealthy or powerful), the spending restrictions constrain the capacity of all political actors to challenge entrenched incumbents.” The Court’s deference to social science evidence thus has the potential for shielding partisan self-dealing from judicial review.

(b) Judicial Scepticism of Social Science Evidence

A less deferential approach to the social science evidence raises its own set of benefits and problems. On the one hand, a lack of deference means that the right to freedom of expression is likely to receive greater protection. At the same time, a less deferential approach raises the problem that Parliament will not be in a position

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61 Ibid. at para. 98.
62 Ibid.
63 Cameron, supra note 13 at 97.
65 Dawood, supra note 14, at 502–503.
68 Ibid.
to defend its regulation of the democratic process in the s. 1 analysis. Social science evidence in the electoral realm is often inconsistent, conflicting, ambiguous and unavailable. Requiring the government to reach a higher standard of proof will mean, in effect, that the government will likely fail the s. 1 analysis.

The dissenting opinions in *Harper* and *Bryan* provide an illustration of this difficulty. In a dissenting opinion in *Harper*, Chief Justice McLachlin and Justice Major agreed that “reason or logic” may provide the necessary causal link between the limits on third party spending and electoral fairness. But the dissenting justices found that the spending limits did not minimally impair the right to freedom of expression. Here the dissenting justices argued that the Attorney General had not shown that a “serious problem” requiring “serious measures” even existed. The “dangers posited are wholly hypothetical” because there is no evidence “that wealthier Canadians — alone or in concert — will dominate political debate during the electoral period absent limits.” The government should provide some evidence that “wealthy Canadians are poised to hijack this country’s election process”; in the absence of such evidence, the spending limits could well be “an overreaction to a non-existent problem.”

In a similar vein, Justice Abella argued in *Bryan* that the evidence provided by the government was not sufficient to justify infringing the freedom of expression. The dissent closely examined the three sources of social science evidence. First, Abella J noted that Professor MacDermid had relied on American studies for his conclusion that informational imbalances can affect a voter’s behaviour. Abella J found that this evidence was of limited use because Canada, unlike the United States, has staggered hours. The dissent cited Professor MacDermid for the view that voter turnout is affected only if the outcome of the election is known or predictable. Although there may be some impact on Western voters if they know the results from Atlantic Canada, the evidence does not show that the impact will be harmful because voters would not be able to predict the outcome of the election with only 11 percent of the results. Abella J also rejected the Lortie Report’s survey data about Canadians’ views on informational imbalances on the basis that this survey was taken before the introduction of staggered hours. The dissenting opinion noted with respect to the Decima Research/Carleton University Poll that it involved a “very general response to a very general question” about electoral fairness in the abstract. The question did not address the issue of staggered hours, nor did it address the specific question of whether Canadians would view the elec-

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69 *Harper*, supra note 5 at para. 29, McLachlin CJ and Major J, dissenting.
70 Ibid. at para. 32, McLachlin CJ and Major J, dissenting.
71 Ibid. at para. 33, McLachlin CJ and Major J, dissenting.
72 Ibid. at para. 34, McLachlin CJ and Major J, dissenting.
73 Ibid., McLachlin CJ and Major J, dissenting.
74 *Bryan*, supra note 5 at para. 107, Abella J, dissenting.
75 Ibid. at para. 112, Abella J, dissenting.
76 Ibid., Abella J, dissenting.
77 Ibid. at para. 118, Abella J, dissenting.
78 Ibid. at para. 122, Abella J, dissenting.
tion as being unfair unless there was a ban on the results of the 32 ridings in Atlantic Canada.\footnote{Ibid., Abella J, dissenting.}

Abella J’s main point is that the government must provide specific evidence about the particular information imbalance that is caused by the premature release of the Atlantic election results.\footnote{Ibid. at para. 107, Abella J, dissenting.} It is hard to imagine, though, how the government could possibly provide this kind of evidence. It would be very difficult to design a study that could measure the effects of the premature release of election results on voting behaviour, and even if such a study could be done, it is unlikely that any social scientist would undertake it.\footnote{I am grateful to Robert MacDermid for a very helpful conversation on this point.} In the same way, it is hard to imagine a social science study that could ever satisfy the Harper dissent’s requirement of proof that unlimited spending will result in the domination of the wealthy. Yet there are good reasons to support some limits on spending, not least of which is the risk of the reality and appearance of corruption that would arise if citizens engage in massive independent spending in order to support or oppose candidates for office.

These unrealistic demands for social science evidence will mean, in practical terms, that Parliament will be unable to overcome the s. 1 test. Social science evidence in the electoral realm will almost never amount to conclusive proof. A lack of deference to the government’s social science evidence will impair Parliament’s ability to regulate the democratic process. The dilemma posed by judicial deference and social science evidence is illustrated by the majority and dissenting opinions in Harper and Bryan.

4. SOCIAL SCIENCE EVIDENCE AND ELECTION LAW: NEXT STEPS

Given the insufficiency of social science evidence in the democratic realm, and the resulting dilemma described above, I argue that social science evidence should play a less central role in future law of democracy cases. Instead of focusing exclusively on social science evidence, courts should also evaluate regulations with respect to key democratic values, such as political equality, participation, legitimacy and fairness.

I use the example of spending limits to illustrate how a focus on democratic values would enable the Court to circumvent the current emphasis on social science evidence. I suggest that the debate over spending limits should not be reduced to a choice between an unquestioning acceptance of spending limits or a wholesale rejection of spending limits. The real question, I argue, is the level at which spending limits are set. Ideally, spending limits should be set so that they promote key democratic values, including equality, participation, legitimacy and fairness.

Limits on spending are important for the democratic value of equality. The problem with unlimited spending is that disparities in wealth would be translated into disparities in political power. As Cass Sunstein argues, restrictions on spending “promote political deliberation and political equality by reducing the distorting effects of disparities in wealth. On this view, such laws promote the system of free
expression by ensuring that less wealthy speakers do not have much weaker voices than wealthy ones.” 82

The dangers posed by unlimited spending are evident in the United States in the wake of the U.S. Supreme Court’s decision in Citizens United. 83 This decision has been criticized for undermining political equality because corporations can now spend unlimited sums from their general treasuries. 84 The majority opinion in Harper is to be commended for its support of the egalitarian model of elections, under which wealth is the main obstacle that prevents individuals from enjoying an equal opportunity to participate in the electoral process. 85 According to the majority, spending limits are required to prevent the most affluent citizens from “monopolizing election discourse” and thereby preventing other citizens from participating on an equal basis. 86

At the same time, participation by citizens in the public discourse is an important democratic value. In Harper, the dissenting justices argued that the spending limits violate free expression where it warrants the greatest protection — the sphere of political discourse.” 87 The dissenting opinion contended that these low spending limits meant that citizens “cannot effectively communicate with their fellow citizens on election issues during an election campaign.” 88 Given the low spending limits, the only participants during the election period are political parties and their candidates. 89 The spending limits thereby diminish the diversity of perspectives available to the citizenry. 90

One way for the Court to better protect democratic participation and political speech is to reconsider the use of the reasoned apprehension of harm test in the electoral context. Christopher Bredt and Margot Finley argue, for instance, that this test was developed with respect to peripheral speech, such as obscenity and hate speech. 91 In Butler, there was no scientific proof that demonstrated that obscene materials were harmful to women and other disadvantaged groups. A similar line of reasoning was followed with respect to hate speech in Keegstra, commercial advertising of tobacco products in RJR-MacDonald, and child pornography in Sharpe. 92 Bredt and Finley argue that the reasoned apprehension of harm standard should not be applied to high value political speech which lies at the core of the freedom of expression guarantee. 93 In a similar vein, Robert Charney and Zachary Green note

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85 Harper, supra note 5 at para. 62.
86 Ibid. at para. 61.
87 Ibid. at para. 87, McLachlin CJ and Major J, dissenting.
88 Ibid. at para. 2, McLachlin CJ and Major J, dissenting.
89 Ibid., McLachlin CJ and Major J, dissenting.
90 Ibid. at para. 19, McLachlin CJ and Major J, dissenting.
91 Bredt & Finley, supra note 13 at 84.
92 Ibid.
93 Ibid. at 81.
that the political speech at issue in Harper “fared no better than obscene pornography or commercial advertising directed at children, and rather worse than tobacco advertising.” 94 Legislation that limits political expression should be subject to careful scrutiny. 95

The democratic-values based approach proposed here would enable the Court to temper its reliance on social science evidence. In addition, I argue that this approach is in keeping with some of the Court’s earlier law of democracy cases. In Figueroa, for instance, the value of democratic participation played an important role in the decision. In that case the Court struck down a requirement that political parties nominate candidates in at least fifty electoral districts in order to register as a political party. 96 The Court interpreted the s. 3 right to vote as protecting the “right of each citizen to participate in the electoral process.” 97 In Libman, the Court emphasized the democratic value of political equality. The Court struck down the third party spending limits in Quebec’s Referendum Act on the basis that these limits infringed the freedom of expression and could not be justified under s. 1 of the Charter. 98 As noted by Colin Feasby, the Court adopted an egalitarian approach to the rules governing spending during a referendum or an election. 99 The Court stated that it was important to prevent “the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources.” 100 The Court has often used democratic values to assess the reasonableness of electoral laws.

Under a democratic-values approach, Parliament would be required to show that it has struck a balance between allowing genuine participation by citizens, promoting a diversity of political viewpoints, enhancing political equality in the electoral discourse, preventing the monopolization of the political process by the wealthy, and promoting fairness and legitimacy. To be sure, the regulation of the democratic process involves complex trade-offs among multiple factors. But if Parliament is aware that the Court will be engaging in a non-deferential review of its electoral laws, it would likely ensure that its regulations are reasonable. In the case of spending limits, for example, Parliament could set the limits somewhat higher to enable citizens to participate in the public discourse. This approach would enable the Court to review the content of electoral laws while sidestepping the dilemma posed by the insufficiency of social science evidence.

The Supreme Court plays a vital role in ensuring the fairness and legitimacy of the democratic process. 101 An overly deferential posture on the part of the Court, as evident in the Harper and Bryan decisions, significantly diminishes the Court’s

94 Charney & Green, supra note 13 at 267–268.
95 Ibid.
96 Figueroa, supra note 5 at para. 3.
97 Ibid.
98 Libman, supra note 5 at paras. 35, 85.
100 Libman, supra note 5 at para. 41.
101 Dawood, supra note 14 at 504.
ability to hold Parliament to account for its regulation of the democratic process. The Court has greater competency to evaluate legislative self-interest than does Parliament. In addition, the Court can ensure that electoral laws comport with key democratic values. As I have argued elsewhere, the Court’s lack of deference in Sauvé II is a preferable approach. In Sauvé II, McLachlin CJ stated that the limits on the right to vote “require not deference, but careful examination.” The Supreme Court’s overly deferential approach to the government’s social science evidence limits its ability to fully assess legislative choices about the ground rules of democracy. While social science evidence can be relevant and helpful, the Court’s supervision of the democratic process should not wholly depend upon it.

CONCLUSION

The use of social science evidence presents significant challenges in election law cases. Not only are courts institutionally ill-equipped to evaluate social science evidence, but social science evidence itself is usually insufficient in the electoral context. The interaction between judicial limitations and the insufficiency of social science evidence gives rise to a dual challenge — one that is particularly acute in the law of democracy arena.

This dual challenge is compounded as a result of certain doctrinal changes in two recent election law decisions. In Harper and Bryan, a majority of the Court adopted a highly deferential approach to the social science evidence presented by the government. As a result of this emerging nexus between judicial deference and social science evidence, courts are now facing a dilemma in the law of democracy arena. One the one hand, judicial deference to social science evidence will result, in practical terms, in the approval of the challenged electoral law despite the resulting rights infringement. At a conceptual level, the Court’s deference to Parliament is understandable given the insufficiency of the social science evidence in the electoral context. An overly deferential approach, however, significantly diminishes the Court’s ability to hold Parliament to account for its election laws. In addition, judicial deference to the government’s social science evidence deprives the Court of the capacity to protect rights such as the freedom of expression.

On the other hand, judicial scepticism of social science evidence produces challenges of its own. Although a sceptical approach is more protective of democratic rights, it has the effect of establishing too high a bar for Parliament to overcome in the section 1 test. Given the inconclusive, conflicting and ambiguous social science data in the electoral realm, Parliament will find it almost impossible to justify the regulation in the face of heightened judicial scrutiny. The dissenting opinions in Harper and Bryan, for example, demanded that the government provide specific evidence about the effects of a given regulation. It would be difficult, and perhaps impossible, for the government to provide this kind of evidence. Social science evidence in the electoral realm will almost never amount to conclusive proof, particularly when the inquiry concerns the system-wide effects of rules on power and equality. These unrealistic demands for social science evidence will mean, in practical terms, that Parliament will be unable to overcome the section 1

102 Ibid. at 560–61.
103 Sauvé II, supra note 5 at para. 9.
test. As a result, Parliament will find it difficult to justify its regulation of the democratic process.

With respect to future law of democracy cases, this article has suggested that social science evidence should play a less prominent role in the Court’s decision-making. Instead of focusing exclusively on social science evidence, courts should also evaluate regulations with respect to key democratic values, such as political equality, participation, legitimacy and fairness. This democratic-values approach would enable the Court to temper its reliance on social science evidence. Indeed, the Court often used democratic values to assess the reasonableness of electoral laws in its earlier cases, including Libman, Figueroa and Sauvé II. Instead of deferring to Parliament, the Supreme Court should actively protect the fairness and legitimacy of the democratic process.