Book Review

Judging the Law of Democracy

Yasmin Dawood


It is commonly accepted that there are fundamental differences between the U.S. Constitution and the Canadian Charter of Rights and Freedoms. Not only does the language of the two constitutional texts differ in significant ways, but the two supreme courts have also reached opposite conclusions when considering similar issues. In addition, scholars have argued that important differences exist between the cultures of the United States and Canada—that are both reflected in and reproduced by the distinct political and constitutional structures of the two nations.

In Judging Democracy, Christopher Manfredi, a political scientist at McGill University, and Mark Rush, a professor of politics and law at Washington and Lee University, seek to refute the conventional view about the differences between the constitutional traditions of the United States and Canada. They argue that these differences have been overstated, particularly with respect to election law. The authors' central claim is that there exists a "convergence in thinking between the two supreme courts" in the case law on the democratic process. This timely and provocative book makes important contributions to a number of fields including Canadian constitutional law and politics, comparative constitutional law, election law, and democratic theory. It is engaging and accessible, and it will be of interest to a wide audience. The book's central convergence thesis is a valuable addition to the ongoing debate over the similarities and differences between American and Canadian constitutional law.

Professors Manfredi and Rush contend that a "remarkable convergence" has emerged as the two supreme courts have supervised the democratic process. To provide support for their thesis, the authors offer three case studies that compare American and Canadian judicial decisions on campaign finance, reapportionment, and felon disenfranchisement. They argue that this convergence is most evident in the

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1 See, e.g., Kent Greenawalt, Fighting Words: Individuals, Communities, and Liberties of Speech (1996) (describing the contrasting approaches to freedom of speech in the United States and Canada).
3 Dean of the Faculty of Arts and Professor of Political Science, McGill University.
4 Robert G. Brown Professor of Politics and Law, Head of the Department of Politics, and Director, Williams School Program in International Commerce, Washington and Lee University.
5 Manfredi and Rush, at 11.
6 Id.
two courts’ campaign finance decisions in the 2003–04 term. Not only were the outcomes similar in *McConnell v. Federal Election Commission*\(^7\) and *Harper v. Canada*,\(^8\) but there were also important parallels in the reasoning of the majority and dissenting opinions.

In addition to the convergence in judicial reasoning, the authors argue that both courts have also engaged in a common struggle to define their relationship with the legislative branch of government. Specifically, both supreme courts have become increasingly skeptical about legislative “lock-ups,” which occur when elected officials seek to manipulate the rules of the electoral game so as to perpetuate their hold on power. Scholars of American election law have written extensively about the problem of political self-entrenchment; indeed, the political markets approach is highly influential in the literature on the judicial supervision of democracy.\(^9\)

Professors Manfredi and Rush argue that judicial skepticism about legislative motives creates a problem for courts. They contend that courts should exercise judicial restraint and modesty when deciding cases involving democratic rights.\(^10\) If the courts are not deferential enough, they run the risk of imposing their vision of democracy on the political process; if, however, courts are too deferential, they run the risk of allowing legislative lock-ups to occur. According to the authors, this dilemma presents a special challenge for the Supreme Court of Canada because of the expectation that the Court will engage in “dialogue” with the legislature. According to dialogue theory, as described in Peter Hogg and Allison Bushell’s influential article, judicial review is “part of a ‘dialogue’ between the judges and legislatures.”\(^11\) The basic idea behind dialogue theory is that the risk of judicial supremacy is lessened when a judicial decision can be modified or reversed by the legislature. The authors argue that the Supreme Court of Canada is less disposed to engage in dialogue with the legislative branch than is generally assumed. In addition, they argue that “if one difference still endures between the two supreme courts in this area of the law, it lies in the Canadian Court’s propensity to impose a particular theoretical vision of democracy.”\(^12\) This trend, the authors contend, serves to close the dialogue between the Court and the legislature, thereby challenging Canadian democracy itself.

**RETHINKING THE DIVERGENCE POSITION**

Professors Manfredi and Rush begin by arguing that Canadian scholars have misread the nature of American constitutionalism, and have thereby overstated the differences between the American and Canadian judicial approaches to rights protection.\(^13\) To illustrate the Canadian misperception of American constitutionalism, the authors engage in an extended critique of Patrick Monahan’s classic work *Politics and the Constitution*.\(^14\) In addition to challenging Dean Monahan’s general claims about the differences between the two constitutional traditions, the authors also argue that the U.S. Supreme Court has been “much less individu-

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\(^7\) 540 U.S. 93 (2003).
\(^8\) [2004] 1 S.C.R. 827.
\(^10\) See e.g., Hasen, supra note 9, at 47–72 (articulating a minimalist approach to the judicial review of election law).


13 Professors Manfredi and Rush are careful to specify that their target is the “Canadian misreading” of American constitutional law. Id. at 17. This is an important point because many of the debunking arguments that they make about the U.S. Supreme Court will no doubt appear familiar to scholars of the American constitutional tradition.

alistic” with respect to rights than they portray Monahan as having suggested. The authors provide a brief discussion of the evolution of property rights in American jurisprudence in order to show that individualism was not the sole value at stake in the property rights decisions by the U.S. Supreme Court. In addition, they discuss Justice Stephen Breyer’s argument that the U.S. Constitution promotes active liberty and collective political participation. Canadian scholars, the authors conclude, have tended to overplay the individualism of American constitutionalism.

THE CASE FOR CONVERGENCE

One of the most valuable contributions of this book is the concept of convergence. Professors Manfredi and Rush offer a nuanced and flexible understanding of convergence, one that does not rely solely on the existence of identical judicial outcomes. Instead, they argue for a convergence between “Canadian and American judicial thought concerning the scope and definition of democratic rights.” There are two dimensions to this convergence. The first dimension is that justices on both courts have discussed the issues at stake in similar ways. The second dimension is that both courts have conceived of their role in the regulation of the democratic process in similar ways.

In chapters two through four, Professors Manfredi and Rush offer case studies on three topics: felon disenfranchisement, the scope and definition of the franchise, and campaign finance regulation. The campaign finance case study offers the strongest and most persuasive evidence of the convergence thesis. In 2003, the U.S. Supreme Court upheld campaign finance regulations in McConnell v. Federal Election Commission. A few months later, the Supreme Court of Canada upheld restrictions on third party spending in Harper v. Canada. The authors show that the two supreme courts had very similar views about what was at stake in the campaign finance debate. In addition, the authors note that dissenting justices in both cases were concerned that campaign finance regulations were insulating incumbents from political competition. Elsewhere, I have argued similarly that there were remarkable parallels in the judicial reasoning of both the majority and dissenting opinions in McConnell and Harper, and furthermore that the two courts faced very similar institutional dilemmas in their supervision of the democratic process.

Although the authors describe the next case study as concerning the scope and definition of

15 Manfredi and Rush, at 19. While it is beyond the scope of this review to discuss Dean Monahan’s arguments in detail, it should be noted that he wrote Politics and the Constitution a mere four years after the Charter was adopted in 1982. Clearly Dean Monahan was not making any claims about the similarities and/or differences between American and Canadian constitutional law twenty years into the future. Instead, his principal concern was to offer normative principles for the future interpretation of the Charter by courts. Although Monahan recognized the individualistic aspects of the Charter, he urged that future Charter interpretation should be guided by two normative principles—democracy and community—in addition to traditional liberal principles. See Monahan, supra note 14, at 97–98. He was concerned that Canadian jurists and lawyers may “uncritically embrace American assumptions about the nature and function of judicial review” and adopt such ideas in a “ wholesale and uncritical fashion” when interpreting the nascent Charter. Id. at 95. In addition, Monahan presented a nuanced theoretical understanding of community, which he argued is premised on the idea “that it is only through political communities that individuals define and develop their own individuality.” Id. at 98. He rejected the assumption that “there is an inevitable contradiction between individual and community.” Id. Professors Manfredi and Rush also do not take account of Dean Monahan’s nuanced treatment of the evolution of property rights, in which Monahan described how eighteenth century assumptions about limited government and the sanctity of a private property right “have been demonstrated to be false,” particularly since the legal realist movement of the 1920s and 1930s. Monahan, supra note 14, at 108.
17 Manfredi and Rush, at 43.
20 See Yasmin Dawood, Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context, 4 Isn’t J. Const. L. 269, 270–72, 286–87, 290–93 (2006). In this article, I argue that there are remarkable parallels between McConnell v. FEC and Harper v. Canada with respect to the judicial reasoning used by both courts and the institutional dilemmas they faced. I also claim that this comparison sheds new light on the actual trade-offs that are at stake when courts adjudicate disputes over campaign finance. In this regard, I argue that the decision to regulate campaign finance should be viewed as inevitably involving a trade-off among competing distributions of power in a democracy. See id. at 272, 290–93. It should be noted, however, that I do not make any claims about a general convergence between American and Canadian constitutional law.
the franchise, the cases they discuss are more immediately concerned with reapportionment, electoral redistricting, and minority representation. The main comparison in this case study concerns the reapportionment decisions in the United States and Canada. In Reynolds v. Sims,\textsuperscript{21} the U.S. Supreme Court announced the one-person one-vote standard for apportioning congressional districts. By contrast, the Supreme Court of Canada rejected the one-person one-vote standard for the drawing of provincial electoral boundaries in Reference re Provincial Electoral Boundaries (Sask.) (known as Saskatchewan Reference).\textsuperscript{22} The Court held that the right to vote under section 3 of the Charter "is not equality of voting power per se, but the right to 'effective representation.'"\textsuperscript{23} One-person one-vote was deemed by the Court to be an insufficient standard because it failed to take account of such factors as community interests, geography, history, and minority representation. Professors Manfredi and Rush acknowledge that "the Canadian groundwork differs in important ways from that in the United States" and that the Supreme Court of Canada "arrived at what appears to be a completely opposite conclusion to that of the American Court in Reynolds and Lucas."\textsuperscript{24} Although the two supreme courts "took radically divergent paths concerning the franchise," the authors contend that the "debates in the two courts embodied identical differences of opinion about how best to balance concerns about effective representation with individual voting equality."\textsuperscript{25} The authors note that both courts also emphasized the importance of a meaningful vote in a democracy.

In the third case study, which concerns felon disenfranchisement, the two supreme courts also reached opposite conclusions. In 1974, a six-member majority of the U.S. Supreme Court held in Richardson v. Ramirez\textsuperscript{26} that it was constitutional for states to disenfranchise persons convicted of crimes. Writing for the Court, Justice Rehnquist held that the express language of section 2 of the Fourteenth Amendment countenanced the denial of the vote for "participation in rebellion, or other crime."\textsuperscript{27} Several years later, the Supreme Court of Canada reached the opposite conclusion in Sauvé v. Canada (known as Sauvé 2).\textsuperscript{28} At issue in Sauvé 2 was a provision of the Canada Elections Act that disenfranchised individuals who were imprisoned serving a sentence of two years or more. A five-member majority of the Court held that this provision infringed the right to vote as protected by section 3 of the Charter.

Professors Manfredi and Rush note that these two disenfranchisement cases "provide strong support for the proposition that there are fundamental differences in the text and interpretation of rights under the U.S. and Canadian constitutions."\textsuperscript{29} At the same time, they claim that "the discussions in both courts concerning the nature of the franchise, the nature of democracy, and the grounds on which rights can be denied were strikingly similar in tone and content."\textsuperscript{30} In particular, the authors observe that the majority opinion in each case decided the matter by strictly interpreting the language of the respective constitutional text.

For each case study, Professors Manfredi and Rush also address the institutional dynamics that are at play in the court's supervision of the democratic process. They show that courts in both Canada and the United States are faced with perplexing choices about how to rein in legislative entrenchment, while allowing democratic rights and values to be determined through the democratic process. The political markets theorists in the United States have made these problems a dominant focus of election law. Professors Manfredi and Rush take the nuanced position that the Supreme Court of Canada should defer for the most part to the legislature, but that it should not defer in those instances in which the legislature is creating a lock-up.

This book also engages in an ongoing debate

\textsuperscript{21} 377 U.S. 533 (1964).
\textsuperscript{22} [1991] 2 S.C.R. 158.
\textsuperscript{24} Manfredi and Rush, at 73.
\textsuperscript{25} Id. at 76.
\textsuperscript{26} 418 U.S. 24 (1974).
\textsuperscript{27} Id. at 43.
\textsuperscript{28} [2002] 3 S.C.R. 519.
\textsuperscript{29} Manfredi and Rush, at 50.
\textsuperscript{30} Id.
\textsuperscript{31} For a discussion of the debate between judicial activism and judicial dialogue, see Grant Huscroft and Ian Brodie, eds., CONSTITUTIONALISM IN THE CHARTER ERA 3-131 (2004); Kent Roach, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE 289-96 (2001).
over dialogue theory in Canadian constitutional law. The authors argue that the Canadian Supreme Court is less disposed to engage in dialogue with the legislative branch than is commonly accepted. The Supreme Court of Canada’s decision in Sauvé 2, for example, limits the possibility of dialogue because the terms of the decision make it difficult for the legislature to respond. The authors observe that Chief Justice McLachlin rejected the idea that the dialogue metaphor demanded judicial deference on this issue. They argue that this “activist interpretation of dialogue” reveals the limitations of dialogue theory for constraining judicial review.

CONVERGENCE AND DIVERGENCE: A SETTLED DEBATE?

In Judging Democracy, Professors Manfredi and Rush wish to “refute scholarly assertions of difference by using election case law to demonstrate the commonality of the two courts’ thinking.” The campaign finance case study has certainly demonstrated important commonalities between the supreme courts’ decisions in McConnell and Harper, respectively, and has thereby challenged the claim that the courts’ approaches to campaign finance are dramatically different. This book has also demonstrated that there are important parallels in the two supreme courts’ discussions about the right to a meaningful vote and the values of democracy. In addition, the authors show that the justices in both supreme courts are facing common struggles in deciding how courts should supervise the democratic process.

Proponents of the conventional view—whom I shall refer to as “divergence theorists”—might not be persuaded, however, by how Professors Manfredi and Rush have defined the concept of convergence. The authors argue that a convergence occurred in the felon disenfranchisement and apportionment cases even though, as they noted, the two courts reached opposite conclusions. For the authors, a convergence has occurred if there are similarities in the ways in which the justices (or some subset of the justices) in the two supreme courts have discussed a set of issues in general terms. While divergence theorists would no doubt concede that such commonalities exist, they may argue that a convergence also requires that the justices in the two courts have reached a similar substantive position on how a particular constitutional matter should be treated.

Divergence theorists would likely argue, for example, that the felon disenfranchisement cases (Richardson v. Ramirez and Sauvé v. Canada) are better described as amounting to a divergence rather than a convergence. In addition, they may be puzzled by the authors’ claim that while there were opposite results in the felon disenfranchisement cases, “the two courts engaged in essentially the same debates about the scope and definition of, as well as access to, the franchise.” This assessment downplays the significant differences in the reasoning of the American and Canadian felon disenfranchisement decisions.

Divergence theorists may likewise argue that the reapportionment cases (Reynolds v. Sims and Saskatchewan Reference) illustrate an important difference in the election law jurisprudence of the two countries. Even if the two courts discussed the problem of malapportionment in similar ways, the distinct approach taken by the Supreme Court of Canada in

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32 Manfredi and Rush, at 59.
33 Id. at 12.
34 Id. at 62.
35 The majority opinion in Richardson, for example, engaged in a lengthy analysis of the legislative history of section 2 of the Fourteenth Amendment. Richardson v. Ramirez, 418 U.S. 24, 43-53 (1974). Writing for the majority, Justice Rehnquist also briefly discussed the Supreme Court’s cases on felon disenfranchisement, and the Court’s cases requiring a showing of a compelling state interest to justify exclusion from the vote, but these discussions did not address the franchise as such. Id. at 53-54. Justice Marshall’s dissenting opinion is principally concerned with questioning the majority opinion’s conclusions on first, the justiciability of the case, and second, the legislative history of section 2 of the Fourteenth Amendment. See id. at 52-77 (Marshall, J., dissenting). In addition, Justice Marshall argued that the state had not met its burden under the “compelling state interest” standard. Id. at 78-83 (Marshall, J., dissenting). In Sauvé 2, by contrast, both the majority and the dissenting opinions engaged in a detailed analysis of the benefits and disadvantages of felon disenfranchisement. [2002] 3 S.C.R. 519, at paras. 37-41, McLachlin C.J.C. and at paras. 72-76, 109134, Gonthier J.
Saskatchewan Reference is consistent with the conventional claim that the value of community is a distinctive feature of Charter interpretation. The Court expressly rejected the one-person one-vote standard and established instead a new standard of "effective representation," which would take community interests and identities into account. In addition, the Court accepted up to a 25 percent deviation from the provincial quotient (and in rare circumstance, it allowed for a deviation even greater than 25 percent), which also demonstrates a striking departure from the one-person one-vote standard. Not only do these cases highlight a fundamental difference between the Canadian and American approaches to electoral redistricting, but this difference is arguably more important than the similarities between the two courts' discussions of the problem of malapportionment.

In addition, divergence theorists may question whether three election law case studies (including the campaign finance case study) can be said to refute the divergence theory as it applies to Canadian and American constitutional law in general. It is not clear whether these three election law cases are representative of broader trends within judicial decision-making in both countries. On a related note, it is difficult to know how many examples of convergence are necessary in order to overturn our understanding of broader trends in constitutional law.

Although divergence theorists might not be persuaded that Professors Manfredi and Rush have settled the debate in favor of convergence, there is no doubt that Judging Democracy has shown that conventional accounts at times overstate the differences between the constitutional traditions of the United States and Canada. In so doing, this book has usefully turned our attention to the theoretical underpinnings of the concepts of convergence and divergence, and has pointed the way to promising future research on these questions. For example, how does either the divergence theory or the convergence theory take account of the fact that the laws change over time? On a related note, the existence of a convergence or a divergence might depend not only on the time period that is chosen, but also on the subject matter that is selected; that is, a convergence on some issues could exist contemporaneously with a divergence on other issues. Another potentially fruitful avenue of research is to subject these trends of judicial convergence and divergence to empirical examination to discover whether broader patterns of comparison between the two countries exist. Last but not least Judging Democracy identifies additional questions for ongoing research on dialogue theory as it relates to the Supreme Court of Canada, and it sheds new light on the comparative analysis of the judicial supervision of democracy.

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37 See id. at 183; see also Robert J. Sharpe and Kent Roach, The Charter of Rights and Freedoms 184–86 (3rd ed., 2005) (discussing the deviation allowed by the Supreme Court of Canada in Saskatchewan Reference). The provincial quotient is the "figure determined by dividing the provincial voting population by the number of ridings." Id. at 184.
38 Consider, for example, Dean Monahan's discussion of the convergence between Canada and the United States on the judicial treatment of campaign finance regulation when he wrote Politics and the Constitution in 1987. At that time, courts in both countries had "interpreted constitutional guarantees of free speech so as to prohibit or limit the regulation of campaign finance." Monahan, supra note 14, at 132. This example suggests that the time period selected for comparison is an important aspect of the claims of both convergence and divergence theory.