Editor's Preface

On behalf of the *Review of Constitutional Studies*, I wish to say how pleased we are to publish this Special Issue on "Politics and the Constitution: A Comparative Approach," a collection of papers presented at a workshop held at the University of Ottawa in July 2015.

The "Politics and the Constitution: A Comparative Approach" workshop came together principally as the result of the efforts of Professor Vanessa MacDonnell of the Faculty of Law (Common Law) at the University of Ottawa and Professor Richard Albert of the Boston College School of Law, both of whose contributions at the workshop appear in this volume, working in association with the Younger Comparativists Committee of the American Society of Comparative Law and the University of Ottawa.

Given our ongoing interest in making the *Review* a locus for contemporary scholarship and debate in constitutional studies, we at the *Review* welcomed the opportunity to work with the organizers to produce this Special Issue, bringing together perspectives from law, political science, and the humanities generally. In this regard, we were especially pleased to have the participation of Ran Hirschl, Professor of Political Science and Law at the University of Toronto. Professor Hirschl's introductory essay graces this collection, and emphasizes the value of interdisciplinary and comparative approaches to the study of constitutional affairs.

As Editor-in-Chief for this volume of the *Review*, I would like to personally thank the contributors for their interesting work, and for their friendly cooperation throughout the process of integrating comments received at and after the workshop into their finished manuscripts, all in a timely fashion. I would also thank the anonymous reviewers for consistently helpful comments and suggestions, Managing Editor Patricia Paradis, and our staff of copy and citation editors, for their assistance. I extend special thanks to my colleague Professor Richard Bauman of the Faculty of Law at the University of Alberta, a member of the *Review's* Advisory Board, for his support and advice throughout.

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Introduction: Politics and the Constitution — the Ties that Bind

*Ran Hirschl**

One of the perplexing oddities of contemporary constitutional studies is the disciplinary divide and consequent lack of communication between constitutional law — arguably the most overtly political branch of law, public or private — and the social sciences, in particular political science, scholarship on constitutions and constitutionalism.

Maintaining the disciplinary divide between constitutional law and other closely related disciplines that study various aspects of the same constitutional phenomena artificially and unnecessarily limits our intellectual horizons. It restricts the kind of questions we ask as well as the range of answers we may provide. A court- or text-centric approach — focusing on constitutional provisions, high-court jurisprudence, or modes of reasoning alone, without taking into account the social and political context within which constitutional law and courts evolve, operate, and affect — risks impeding the development of constitutional studies as an ambitious, coherent, and relevant area of inquiry.[1] The future of constitutional studies, I suggest, lies in relaxing the sharp divide between constitutional law and the social sciences, in particular political science.

As in many other academic and vocational fields adamant about protecting their disciplinary turf, resistance persists among key actors within the constitutional domain against accepting the notion that constitutional law is, at least

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1 I develop this argument in greater length, in Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014).

to some extent, a species of politics, albeit one with a distinct dialect, symbolism, and interpretive hierarchy. Consider, for example, social science work on judicial behaviour. Whereas the prevalent view in law schools in North America (and even more widespread in Europe, where legal formalism reigns supreme) privileges legal doctrine, an overwhelming body of evidence suggests that extrajudicial factors play a fundamental role in constitutional-court decision-making patterns. Constitutional courts and judges may speak the language of legal doctrine, but consciously or not, their actual decision-making patterns correlate with policy preferences and attitudinal tilts, and sometimes reflect strategic considerations vis-à-vis their political surroundings, national and international audiences, and the public as a whole.

Fifty years after the pioneering work of Glendon Schubert, Walter Murphy, Robert Dahl, and Robert McCloskey, theories of judicial behaviour and decision-making have now reached a new level of analytical sophistication and empirical robustness, such that they can no longer be ignored by anyone who professes to master the constitutional domain. Unfortunately, very little of this scholarship has found its way into constitutional-law course syllabi. While not all of the discoveries produced by the social-scientific study of judicial behaviour are equally germane to explaining decision-making patterns of constitutional courts and judges, insights from political science, social psychology, behavioral economics, and network and organizational theory are increasingly relevant to the study of constitutional courts, their jurisprudential output and modes of reasoning and operation.

The social sciences have also influenced heavily the study of constitutional design and constitution-making. Virtually all the grandmasters of 20th-century constitutional-design literature are political scientists by education or by vocation.[2] The same holds true with respect to more recent empirical work on constitution-making, where interdisciplinary scholars such as Tom Ginsburg lead the way. Here, social science research methods have been deployed to examine supposed "common knowledge truths" in constitutional theory, such as the endurance of national constitutions, the efficacy of constitutional amendment rules, or the actual involvement of "the people" in constitution making.[3] Social

2 Arend Lijphart, Donald Horowitz, Juan Linz, Alfred Stepan, Giovanni Sartori, and Jon Elster, to mention a few names that come to mind.

3 See e.g. Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009).

science research is also prominent in the in-depth constitutional "ethnographies" that explore constitutional development as part of broader collective identity formation and nation-building processes (c.f. social scientists Kim Scheppele, Mark Graber, Keith Whittington, Gary Jacobsohn, or Peter Russell).

This is not a coincidence. Constitutional design as an intellectual enterprise has at least as much to do with social and political realities as with legal or constitutional principles. The root causes of ethnic, religious, or linguistic strife in any given setting are, more often than not, social, economic, and political; constitutional design is often invoked as a proposed remedy for such discord. Likewise, constitutional innovation or stagnation is often reflective of broader processes that have little to do with constitutional language per se. For example, the development of the so-called "dialogue" thesis, as well as "weak-form" and "commonwealth" models of judicial review, may not be fully understood without considering Canada's long-standing Westminster-style government prior to the introduction of the *Constitution Act, 1982*.[4]

What is more, a given nation's legal constitution does not always mirror that nation's political constitution. In Canada, for example, a curious gap exists between the polity's long-standing commitment to a relatively generous version of the Keynesian welfare-state model and the exclusion of subsistence social rights from the purview of rights provisions and jurisprudence. A similar trend is evident in the Nordic countries, where a long-term commitment to social welfare and egalitarianism does not stem from American-style high-voltage constitutionalism, but from deeply engrained social norms and cultural propensities.

Political-constitutionalism elements are also reflected in the status of religion and secularism in various countries. American and Indian constitutional jurisprudence, for example, advance strict separation of church and state; yet the U.S. and India are frequently mentioned as the two most religious polities in the world, as measured by how significant religion is in public discourse and in private lives.

The political-constitution aspect is also reflected in the area of formal and informal amendments or in cases where procedurally lawful constitutional amendments are deemed unconstitutional by courts (or the court of public

4 See e.g. Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013).

opinion) since they run against deeply engrained aspirations, ideational platforms, and political values that often precede and supersede the plain constitutional text. The *de facto* political constitution also plays a role in explaining variance in voluntary judicial reference to foreign sources. The stark difference between the controversy in the United States over reference to the constitutional jurisprudence of others, and the Canadian antidote — open engagement with constitutive laws of others — cannot be understood solely by intra-constitutional factors. It is linked to America's culture wars and vision of its central place in the world, just as it is linked to Canada's openness to the world, sense of "soft power," and its commitment to multiculturalism, inclusiveness, and diversity as trademarks of the new Canadian ideational platform of the last four decades.

The difference between legal constitutionalism and political constitutionalism are acknowledged by critical constitutional theorists, from the left and right, who disapprove of what they regard as excessive reliance on constitutionalism and judicial review at the expense of democratic political deliberation.[5] However, the deeply rooted sociological and political dimensions of that distinction remain beyond the purview of canonical constitutional discourse with its traditional text- and court-centric analyses.

Related to this is what Tom Ginsburg termed the "seventh-inning problem": a fan who arrives at the baseball field just before the seventh inning begins and leaves when it concludes. "Focusing too much on court cases in the constitutional 'game,'" Tom Ginsburg suggests, "has precisely the same structure as the baseball fan who watches only one late inning. It means that we miss many of the most important questions — where does constitutional order come from? Who are the parties and what are they really fighting about? How does the court have the power it does? And what is the impact of the decision on real outcomes? These questions can only be examined by broadening our temporal and conceptual frame."[6] Not only is such a seventh-inning snapshot unrepresentative of the entire game from a descriptive, "captain's log" standpoint, but it also obscures the deep origins or reasons behind what we see, as well as the consequences that ensue. In other words, what happens prior to or after a court ruling is important not just for "setting the record straight" but

5 See, e.g., Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); Mark S Harding & Rainer Knopff, "Constitutionalizing Everything: The Role of '*Charter* Values'" (2013) 18:2 Rev Const Stud 141.

6 Tom Ginsburg, "Comparative Constitutional Law: The Seventh Inning Problem" *University of Maryland Digital Commons* (February 2012), online: <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1140&context=schmooze_papers>.

also for understanding the place of a given court case in a broader causal story that has a social context and root causes that predate a court case and may or may not be affected by it.

Current newspaper headlines offer ample additional examples of why a more contextual or holistic understanding of constitutional battles would be timely. It is obvious, for example, that politics is one of the main driving forces behind the recent constitutional wars in the United States (the so-called "Obamacare" reform or the appointment of a new Supreme Court Justice following the death of Antonin Scalia); Poland (where a newly elected populist right-wing government attempts to reconfigure and limit the jurisdiction of the Polish Constitutional Tribunal); Brazil (where the opposition has launched, and the Supreme Court reviewed an impeachment process against elected President Dilma Rousseff); or in Thailand (where the Constitutional Court has repeatedly backed the army and the old elites in their efforts to oust elected prime ministers Thaksin Shinawatra and later Yingluck Shinawatra). One could easily extend that list to include fierce politically driven constitutional struggles elsewhere — from Hungary, Turkey and Romania, to Venezuela, Pakistan and Egypt. In all of these instances, a court-centric approach or doctrinal analysis of constitutional law seems inherently limited.

I would also argue that the value of the study of constitutional jurisprudence — absent study of its actual capacity to induce material, on-the-ground change, either independently or in association with other factors — is limited. Decision compliance and implementation, whether speedy or protracted, is part of the constitutional enterprise and must be treated as such. In that respect, studies show considerable variance in the demonstrable application of constitutional-court decisions. Here, too, social science research may help assess the impact of constitutional law at both the macro and micro levels. In the real world, a constitutional court ruling is not the final word, however important or groundbreaking the ruling may be. The strict distinction between jurisprudence and implementation seems somewhat artificial, and based on academic disciplinary boundaries that the real, intermingled world does not reflect or accept.

This does not detract from the power of doctrinal analysis per se. Comparative constitutional-law professors hold a clear and undisputed professional advantage in their ability to identify, dissect, and scrutinize the work of courts and to critically assess the persuasive power of a given judge's opinion. Understanding jurisprudence on its own terms or explicating modes of judicial reasoning and interpretation has traditionally been the domain of law profes-

sors. No one is better positioned to trace the relationship between patterns of convergence or persisting divergence in constitutional jurisprudence across polities, or to advance the research on how constitutional courts interact with the broader, transnational legal environment within which an increasing number of them operate. However, theorizing about the constitutional domain of a broader world requires closer engagement with and openness towards disciplines that study the broader context with which constitutions and constitutional institutions constantly and organically interact.

Many of the doctrinal biases commonly reflected in the legal analysis of constitutional law and courts are also mirrored in social science — in particular, political scientists' lack of serious attention to legal doctrine and the role of legal reasoning: judgments are often treated as merely post-hoc rationalization, and as little more than professional dialect that thinly covers what is "really" going on.[7] Most leading political-science departments in North America devote limited attention to public law and courts as an independent area of research. In Canada, public law has been largely subsumed by the "Canadian politics" sub-field, akin to the U.S. where it has been incorporated into "American politics." Such a deficiency is alarming considering the ever-increasing significance of constitutional law and courts, regional and transnational human rights regimes, and international tribunals to politics and policy making worldwide.[8] How many political scientists in Canada have actually read the full text of, not merely commented on, the recent landmark Supreme Court rulings on the right to die with dignity,[9] on extending federal protection under section 91(24) to the Métis,[10] on judicial appointments to the Supreme Court,[11] and on a government-proposed Senate reform (the latter two rulings addressing the amending formula enshrined in Canada's constitution head on)?[12] Far less can they be expected to consider developments on other continents, be they landmark rulings on German constitutional sovereignty (e.g. the German Federal Constitutional Court ruling in the Lisbon Treaty case), on the place of

7 See, e.g., Barry Friedman, "Taking Law Seriously," (2006) 4:2 Perspectives on Politics 261.

8 See, Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," (2008) 11 Annual Review of Political Science 93; Martin Shapiro & Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002); Björn Dressel ed, *The Judicialization of Politics in Asia* (Milton Park, UK: Routledge, 2012); Javier Couse et al, eds, *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2013).

9 *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] SCR 331.

10 *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 395 DLR (4th) 381.

11 *Reference re Supreme Court Act*, 2014 SCC 21, [2014] SCR 433 [*Supreme Court Reference*].

12 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

Hindu nationalism in political campaigns (for example, the Supreme Court of India rulings in the "Hindutva" cases), or on the constitutionality of breaching presidential term limits in Bolivia (for example, the Constitutional Court of Bolivia's ruling that President Evo Morales could run for a third term even though the Bolivian constitution includes a two-term limit).

One area of constitutional law particularly neglected by political science is that of electoral processes, an area in which deep-rooted constitutional rules commonly affect political outcomes. Likewise, political scientists tend to downplay or overlook the significance of constitutional jurisprudence that addresses issues such as voter registration rules, candidate eligibility, party and platform legitimacy, limits of campaign financing, electoral district boundaries, election-day procedures, ballot recounts, (the *Bush v. Gore* scenario is now anything but an outlier in comparative constitutional politics) and, increasingly, the validity of changes to constitutionally entrenched term-limits and the legality of regime change.

Political scientists also discount the pertinence of constitutional law when it comes to matters such as restorative and transitional justice (where constitutional courts and international tribunals have become crucial decision-making bodies); the so-called "war on terror" (where constitutional rights provisions and their judicial interpretation are said to counterbalance governments' trigger-happy policies); secession and devolution (where, from Quebec, to Scotland, to Catalonia, politics *and* constitutional law jointly govern the terrain); or the European debt crisis (where supreme and constitutional courts throughout the continent have issued landmark rulings on the legitimacy of various austerity measures and bailout plans initiated by struggling governments or imposing supranational technocrats).[13] The volatility of constitutional wars on a broad range of issues — from hotly contested social policies to the scope of judicial intervention in high politics — suggests that nowadays, anyone who overlooks comparative constitutional law and courts does so at his or her own peril.

As Aharon Barak, former President of the Supreme Court of Israel, noted, "The world is filled with law; anything and everything is justiciable." The ever-increasing political significance of constitutional law and constitutional courts is one of the hallmarks of 21st-century government. Yet the inexplicable disciplinary divide between law schools and political-science departments, in conjunction with perceptions of the constitutional sphere as non-autonomous,

13 See Cristina Fasone, "Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective" (2014/15) EUI Working Paper Law.

render full grasp of constitutional rulings, or even awareness of their existence and acknowledgment of their importance, virtually unattainable for most political scientists.

A political science Ph.D. student interested in any of these topical subjects would need to enroll in a comparative constitutional law course at a nearby law school in order to grasp the full significance of constitutional discourse on any and all of these issues, and indeed to many others. The need for scholars of comparative politics to understand constitutional vocabulary and its comparative practice and implications may equal the urgency for comparative constitutional law scholars to appreciate the social and political context within which the constitutional realm is embedded and operates. It is unfortunate that many (though admittedly not all) of the leading departments of political science in Canada and elsewhere overlook this plain truth. By so doing, they cede the constitutional arena to legal scholars, who in turn rely all too often on the case-law method of instruction at the expense of understanding constitutional law in its broader social and political setting. This regrettable situation has much to do, I suspect, with various training, vocational, and sociology of knowledge factors. However, as engrained as these factors may be, in virtually all leading universities and research institutes around the world, conventional disciplinary barriers in other areas in both the sciences and humanities are giving way to new, interdisciplinary areas of research (e.g. ecology, neuroscience, religious and ethnic diversity). The time has come to consider a similar move in constitutional studies.

The contributions to this symposium issue, all written by intellectually curious young scholars of Canadian and comparative constitutional law, signal an important step in that direction. Politics and constitutional law, their collective voice suggests, are intertwined domains that affect each other in various intricate ways that are seldom acknowledged by doctrinal analyses. Timothy Kuhner offers a critical take on party-finance law in the United States, and argues that it has promoted concentration of power and control of democracy by economic elites ("plutocracy") and party elites ("partyocracy"). Michael Pal explores the role of electoral management bodies, whether statutory or constitutionally enshrined, in contemporary constitutional democracies, and suggests that these election-monitoring bodies may be conceptualized as an emerging fourth branch of government. Vanessa MacDonnell considers that, unlike the conventional understanding of constitutional practice in the Charter era, some variant of British-style parliamentary sovereignty continues to subsist in Canadian constitutional law. Cristina Fasone undertakes a comparative exploration of what she terms "parliamentary obstructionism" (e.g. excessive

filibustering) and how it hinders the constitutional role and legitimation of legislatures, and advocates for judicially enforced constitutional limitations of this practice. Kate Glover argues that Canada's constitutional imagination and, in particular, its understanding of the constitutional character of the Supreme Court, is richer and less definitive than the account offered in the majority opinion in the *Supreme Court Act Reference*.[14] Richard Albert sheds light on the often overlooked temporal dimension of constitutional amendments — the timeframe within which a formal constitutional amendment must be approved — and probes the trade-offs between political brinkmanship and contemporaneity in amendment ratification.

Taken as a whole, the articles included in this collection extend a timely invitation for Canadian constitutional scholars and political scientists alike to engage more closely with each other's insights and methodologies. It is a welcome invitation not only because of constitutional law's key role in regulating politics, but also because the complex symbioses of today's world admit neither constitutionalism-free political systems nor apolitical constitutional law.

14 *Supreme Court Reference, supra* note 11.

The New Parliamentary Sovereignty

*Vanessa MacDonnell**

*Is parliamentary sovereignty still a useful concept in the post-*Charter *era? Once a central principle of Canadian constitutional law, parliamentary sovereignty has come to be viewed by many as being of little more than historical interest. It is perhaps not surprising, then, that the doctrine has received relatively little scholarly attention since the enactment of the* Charter. *But while it is undoubtedly true that the more absolute versions of parliamentary sovereignty did not survive the* Charter*'s entrenchment, we should not be too quick to dismiss the principle's relevance entirely. In this paper I suggest that some variant of parliamentary sovereignty continues to subsist in Canadian constitutional law. I also suggest that the study of parliamentary sovereignty reveals an important connection between the intensity of judicial review and the degree to which Parliament focusses on the constitutional issues raised by a law during the legislative process. Parliament can expand its sphere of autonomous decision-making power relative to courts by showing that it is proactive about securing and promoting constitutional rights.*

La souveraineté parlementaire est-elle toujours un concept utile dans l'ère postérieure à la Charte*? Jadis un principe central du droit constitutionnel canadien, la souveraineté parlementaire est maintenant considérée, par plusieurs, comme ayant rien de plus qu'un intérêt historique. Il n'est donc peut-être pas surprenant que la doctrine a fait l'objet de relativement peu d'attention savante depuis l'adoption de la* Charte. *Mais quoiqu'il soit sans aucun doute vrai que les versions les plus absolues de la souveraineté parlementaire n'ont pas survécu à la validation de la* Charte*, il ne faudrait pas rejeter trop rapidement l'intérêt du principe tout à fait. Dans cet article, je suggère qu'une variante de la souveraineté parlementaire continue de subsister dans le droit constitutionnel canadien. Mon opinion est que l'étude de la souveraineté parlementaire révèle un lien important entre l'intensité de la révision judiciaire et le degré auquel le Parlement se concentre sur les questions constitutionnelles soulevées par une loi pendant le processus législatif. Le Parlement peut élargir la sphère de son pouvoir décisionnel autonome par rapport aux tribunaux en montrant qu'il est proactif quant à la protection et la promotion des droits constitutionnels.*

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I. Introduction

Is parliamentary sovereignty still a useful concept in the post-*Charter*[1] era? Once a central principle of Canadian constitutional law, parliamentary sovereignty has come to be viewed by many as being of little more than historical interest.[2] *Charter* rights place clear limits on Parliament's law-making powers, and the *Charter*'s "notwithstanding clause," a device ostensibly intended to preserve parliamentary sovereignty by allowing legislatures to enact laws inconsistent with *Charter* rights, has been invoked in only the rarest and most controversial of circumstances.[3] This suggests that, as a matter of both law and practice, parliamentary sovereignty has been severely limited.[4]

It is perhaps not surprising, then, that the doctrine has received relatively little scholarly attention since the enactment of the *Charter*. But while it is undoubtedly true that the more absolute versions of parliamentary sovereignty did not survive the *Charter*'s entrenchment, there are at least two reasons why we should not be too quick to dismiss the principle's relevance entirely. First, the Supreme Court of Canada continues to decide cases on the basis of the doctrine of parliamentary sovereignty. Second, parliamentary sovereignty raises important questions about "the reality of Parliament's place within the constitutional order."[5] While it may not be useful to speak of Parliament as being "sovereign" in the traditional Diceyan sense,[6] engaging with some of the questions that parliamentary sovereignty raises can help us develop a more

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

2 On the historic centrality of parliamentary sovereignty, see *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72. See also Anne Bayefsky, "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the *Canadian Charter of Rights and Freedoms*" (1983) 31:2 Political Studies 239 at 239. For a contrary view, see John D Whyte, "The *Charter* at 30: A Reflection" (2012) 17:1 Review of Constitutional Studies 1 at 5 [Whyte]. Of course, parliamentary sovereignty was not absolute even before the entrenchment of the *Charter*, because of the division of powers and the state's commitment to the rule of law: see Bayefsky, *supra* note 2 at 239; Janet Hiebert, "*Charter* Evaluations: Straining the Notion of Credibility" (June 2015) (unpublished; copy on file with author) at 3.

3 Mark Tushnet, "*Marbury v Madison* around the World" (2004) 71 Tenn L Rev 251 at 268 [Tushnet, "*Marbury*"]. See also Barbara Billingsley, "Section 33: The *Charter's* Sleeping Giant" (2002) 21 Windsor YB Access Just 331 at 337 [Billingsley].

4 Elliot speaks of there being "practical political" limits on sovereignty in the British context: see Mark Elliot, "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention" (2002) 22:3 LS 340 at 342 [Elliot, "New Constitutional Order"]. I am grateful to Grégoire Webber for prompting me to make this distinction.

5 Elliot, *ibid*. See also Peter C Oliver, "Sovereignty in the Twenty-First Century" (2003) 14:2 King's College LJ 137 [Oliver, "Sovereignty"].

6 Nicholas W Barber suggests as much in "The Afterlife of Parliamentary Sovereignty" (2011) 9:1 Intl J Const L 144 [Barber].

coherent account of Parliament's "constitutional functions."[7] A similar process of reflection has generated important new insights about institutional roles in the United Kingdom.

In this paper I suggest that some variant of parliamentary sovereignty continues to subsist in Canadian constitutional law. I also suggest that the study of parliamentary sovereignty reveals an important connection between the intensity of judicial review and the degree to which Parliament focusses on the constitutional issues raised by a law during the legislative process.[8] Parliament can expand its sphere of autonomous decision-making power relative to courts by showing that it is proactive about securing and promoting constitutional rights.[9]

I begin this paper by describing some of the insights that have emerged from recent debates about parliamentary sovereignty in the United Kingdom. In Part III, I examine how Canadian courts have invoked the concept of parliamentary sovereignty since the *Charter*'s entrenchment. Part IV discusses the relationship between parliamentary sovereignty and the *Charter*'s notwithstanding clause. In Part V, I show how questions about parliamentary sovereignty being examined in the UK might help Canadian scholars generate new insights about Parliament's role as a constitutional actor. I elaborate on what this means for the relationship between Parliament and the courts in constitutional matters, before concluding in Part VI.

II. Parliamentary sovereignty in the United Kingdom

In this section I describe AV Dicey's original account of parliamentary sovereignty and outline some of the critiques that have been levelled against it over time in the UK. While the Diceyan account continues to exert a gravitational pull — some would even say an "emotional pull"[10] — over much of the

7 Scott Stephenson distinguishes between "Parliament's constitutional… [and] political functions": Scott Stephenson, "Rights, Disagreement and Norms" (unpublished; copy on file with the author) at 14 [Stephenson] I will use the term "constitutional functions" throughout this article.

8 Others have also noted such a connection: see Janet L Hiebert, "The Human Rights Act: Ambiguity about Parliamentary Sovereignty" (2013) 14:12 German L J 2253 at 2272-73 [Hiebert, "Parliamentary Sovereignty"]; Aileen Kavanagh, "Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory" (2014) 34:3 Oxford Journal of Legal Studies 443 [Kavanagh, "Forbidden Territory"].

9 For a similar argument about institutional dynamics in a slightly different context, see Mark Tushnet, "The Political Institutions of Rights Protection" in Tom Campbell, KD Ewing & Adam Tomkins, eds, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011) 297 at 301.

10 Barber, *supra* note 6 at 152.

scholarship, it is by no means the only or most convincing theory of parliamentary sovereignty.

Dicey explains that parliamentary sovereignty has these essential components: (1) Parliament has "the right to make or unmake any law whatever;" (2) "No person or body" is authorized "to override or set aside the legislation of Parliament;"[11] and (3), parliamentary sovereignty is "absolute and continuing,"[12] meaning that Parliament cannot impose legal limits, whether substantive or procedural,[13] on its own authority or on the authority of subsequent Parliaments.[14]

This definition of parliamentary sovereignty can be criticized on several grounds. While Dicey suggests that Parliament's law-making power is unlimited, he also says that Parliament may not enact laws that curtail its authority to legislate. These statements are difficult to reconcile.[15] Moreover, as his critics point out, Dicey's theory is descriptively inaccurate because it does not account for non-legal limits, including political and moral limits, which constrain parliamentary sovereignty. It also fails to provide a "normative justification" for sovereignty.[16] Dicey's theory is thus ill-equipped to respond to the argument that since "the polity embraces certain principles as fundamental, [...] those principles therefore trace the perimeter of the legislature's competence."[17]

To be fair, Dicey's theory of parliamentary sovereignty was only ever intended to be legal in nature. He was aware that non-legal limits might well constrain Parliament.[18] Parliament could not enact laws for which it was unable

11 AV Dicey, *Introduction to the Study of the Law of the Constitution,* 10th ed (London: Macmillan & Co, 1965) at 39-40 [Dicey].

12 Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (New York: Oxford University Press, 2005) at 70 [Oliver, *Constitution of Independence*].

13 Oliver, "Sovereignty", *supra* note 5 at 154.

14 Dicey, *supra* note 11 at 64-65; Oliver, "Sovereignty," *supra* note 5 at 153.

15 I am grateful to Peter Oliver for pointing this out to me. See also John Lovell, "Legislating against the Grain: Parliamentary Sovereignty and Extra-Parliamentary Vetoes" (2008) 24:1 National J Constitutional L 1 at 6.

16 Elliot, "New Constitutional Order", *supra* note 4 at 342, 367.

17 Elliot refers to Diceyan sovereignty as "normatively barren": *ibid.* See also HLA Hart, *The Concept of Law,* 3rd ed (Oxford: Oxford University Press, 2012) at 69-70 [Hart]. There is some relationship here to Whyte's argument in the Canadian context that "the tide of history — as well as the tide of popular conceptions of political legitimacy — is against the idea that political majorities provide all the legitimacy that political power requires": Whyte, *supra* note 2 at 5.

18 Elliot, "New Constitutional Order", *supra* note 4 at 341; Oliver, "Sovereignty", *supra* note 5 at 138; Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Portland, OR: Hart Publishing, 2009) at 3, 17 [Young, *Parliamentary Sovereignty*].

to obtain sufficient political support, for example, and certain laws are simply too morally odious to ever be proposed.[19]

Dicey's view can be contrasted with the more limited conception of sovereignty described by HLA Hart.[20] On this view of sovereignty, "legal limitations on legislative authority consist not of duties imposed on the legislator to obey some superior legislator but of disabilities contained in rules which qualify him to legislate."[21] Scholars have tended to treat these so-called "manner and form"[22] requirements — that is, procedures to be followed in the enactment of legislation — differently than "substantive" limits on parliamentary sovereignty.[23] Even adherents of the more rigid variants of parliamentary sovereignty tend to accept that manner and form requirements may be imposed on Parliament without it losing its essential sovereignty.[24]

The scholarship therefore recognizes that while descriptions of parliamentary sovereignty tend to originate in the Diceyan account, the concept can take different forms. "Whatever the history of the Westminster Parliament's sovereignty," Peter Oliver observes, "an array of possible approaches to it emerged in the twentieth century."[25] Oliver and Mark Elliot's work, in particular, has sought to explain how limited sovereignty is compatible with a commitment to fundamental rights.[26]

Oliver and Elliot both emphasize the need to articulate a "normatively rooted"[27] conception of parliamentary sovereignty. Oliver explains that "[f]rom the perspective of morality, sovereignty clearly relates to the ability, collectively and individually to determine one's own destiny."[28] But Parliament is

19 I am thinking here of the "blue-eyed baby" example: Young, *ibid.* See also Jeff Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010) [Goldsworthy].

20 Hart, *supra* note 17; Young, *Parliamentary Sovereignty, supra* note 18 at 15; Oliver, *Constitution of Independence*, *supra* note 12 at 6-7; Oliver, "Sovereignty", *supra* note 5 at 148-49.

21 Hart, *supra* note 17 at 70. For a judicial statement to this effect, see the remarks of Lord Steyn in *Jackson v Attorney General*, [2005] UKHL 56.

22 Young, *Parliamentary Sovereignty, supra* note 18 at 5-6; Oliver, "Sovereignty", *supra* note 5 at 150-51; Goldsworthy, *supra* note 19 at ch 7.

23 Oliver, "Sovereignty", *supra* note 5 at 154. See also Goldsworthy, *supra* note 19 at ch 7.

24 Goldsworthy, *supra* note 19.

25 Oliver, *Constitution of Independence, supra* note 12 at 7.

26 See also Stephen Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism" (2010) 8:2 Intl J Const L [Gardbaum, "Reassessing"]; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) [Tushnet, *Weak Courts Strong Rights*].

27 Elliot, "New Constitutional Order", *supra* note 4 at 367.

28 Oliver, "Sovereignty", *supra* note 5 at 138, n 2.

not free to determine the political community's destiny in any manner whatsoever. Parliament's "democratic legitimacy" is only assured when it respects those "enabling conditions" which are "implicit in the very idea of a democratic constitution."[29] In other words, "an empirically credible understanding of legal institutions in the democratic era must involve the recognition that sovereignty is only enabled (for law to be law rather than brute power, i.e., valid and legitimate law) where certain rights or limitations are already in place."[30]

In a similar vein, Elliot argues that theoretical accounts of parliamentary sovereignty must do more than state that sovereignty is a "political fact."[31] They must provide some explanation for why Parliament ought to be vested with sovereign authority. The search for a normative justification for parliamentary sovereignty leads Elliot to conclude that parliamentary sovereignty is necessarily a qualified concept.[32] Parliamentary sovereignty can only be defended as a theory if Parliament is constrained by fundamental rights.

Oliver also takes issue with Jeff Goldsworthy's suggestion that courts should never enforce limits on Parliament's sovereignty. While sovereignty concerns might arise from courts constraining Parliament of their own motion, he says, it is far less controversial for Parliament to ask the courts to perform this function.[33] This, in a manner of speaking, is what occurred when the *Canadian Charter of Rights and Freedoms* was enacted. Certainly Lamer J (as he then was) adopted this view of the historical record in *Reference Re BC Motor Vehicle Act*.[34] Through a Joint Resolution of the House of Commons and the Senate, the federal Parliament requested that the British Parliament enact legislation patriating the constitution and entrenching a *Charter of Rights and Freedoms*.[35] Section 24(1) of the *Charter* states clearly that "[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied *may apply*

29 *Ibid* at 150. See also Whyte, *supra* note 2 at 5.

30 Oliver, "Sovereignty", *supra* note 5 at 138, n 2.

31 Elliot, "New Constitutional Order", *supra* note 4 at 367.

32 *Ibid.*

33 Oliver, "Sovereignty", *supra* note 5 at 144.

34 *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 496-500, 24 DLR (4th) 536. I am grateful to Leo Russomanno for reminding me of this.

35 As Slattery explains, "The new Constitution is formally an enactment of the British Parliament proceeding on a joint resolution of the Canadian House of Commons and Senate.": see Brian Slattery, "Canadian Charter of Rights and Freedoms: Override Clauses Under Section 33 — Whether Subject to Judicial Review Under Section 1" (1983) 61:1 Canadian Bar Review 391 at 396. See also Barry L Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 204-06. I am grateful to Peter Oliver for pointing this out to me.

to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[36]

Contemporary scholars hold a range of views on whether parliamentary sovereignty continues to subsist in the UK and, if so, in what form.[37] Indeed, debates about the status of parliamentary sovereignty have become commonplace since the enactment of the *European Communities Act, 1972* [ECA] and the *Human Rights Act, 1998,* both of which incorporate EU obligations into UK law.[38] Barber proclaimed the "death"[39] of the concept in the wake of the House of Lords' decisions in *Factortame I* and *II*,[40] which appeared to accept that parliamentary sovereignty had been substantively limited by the ECA.[41] Other scholars are more circumspect. Elliot suggests that recent events have opened up a "gap" between "the theory of parliamentary sovereignty and the political reality of limited legislative competence,"[42] while Janet Hiebert notes that there is "ambiguity" around the current status of parliamentary sovereignty.[43] Still others argue that more traditional notions of parliamentary sovereignty have been preserved.[44]

Gardbaum classifies the UK as falling within the "new Commonwealth model of constitutionalism."[45] His theory posits that Canada, the UK, New Zealand and some Australian states have developed a unique set of constitutional arrangements which incorporate elements of both parliamentary and judicial rights protection. In the UK, these arrangements are set out in the *Human Rights Act*. The new Commonwealth model ". . . is normatively appealing to the extent it effectively protects rights while reallocating power between courts and the political institutions in a way that brings them into greater balance than under the two more lopsided traditional models."[46] Gardbaum's

36 *Charter*, *supra* note 1 [emphasis added].

37 For a review of the landscape, see Janet L Hiebert & James B Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge: Cambridge University Press, 2015) at 257 [Hiebert & Kelly]; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge: Cambridge University Press, 2013 at 23, 41 n 66 [Gardbaum, *New Commonwealth*]; Barber, *supra* note 6.

38 See Elliot, "New Constitutional Order", *supra* note 4.

39 Barber, *supra* note 6 at 144.

40 *Factortame Ltd. v Secretary of State for Transport* (1990), 2 AC 85 (HL); *R v Secretary of State for Transport, ex parte Factortame Ltd. (No 2)* (1991), 1 AC 603 (HL).

41 Barber, *supra* note 6 at 146.

42 Elliot, "New Constitutional Order", *supra* note 4 at 341, 346.

43 Hiebert, "Parliamentary Sovereignty", *supra* note 8.

44 Young, *Parliamentary Sovereignty*, *supra* note 18, referring to the impact of the *Human Rights Act* on parliamentary sovereignty.

45 Gardbaum, *New Commonwealth, supra* note 37.

46 Gardbaum, "Reassessing", *supra* note 26 at 168.

theory thus suggests that UK constitutional law is not governed by a pure form of parliamentary sovereignty. In this respect, his theory is similar to the version of parliamentary sovereignty Oliver and Elliot advance. Parliamentary sovereignty is bounded by an *a priori* commitment to rights. While courts play some role in determining whether Parliament has legislated in a manner consistent with its commitments, the "final word" on constitutional questions rests with the legislative branch.[47]

It is important to note, then, that there is no single account of parliamentary sovereignty, and no consensus on the concept's current status in the UK. The robust academic discussion about this concept in the UK has drawn out a number of thoughtful perspectives on Parliament's constitutional functions; the limitations on its authority; the prerequisites for valid parliamentary decision-making;[48] and the interaction between the political and the judicial branches of government. The relative paucity of scholarship on parliamentary sovereignty in Canada since the entrenchment of the *Charter* has meant that not all of these questions have been probed to the same extent. In the remainder of this paper I attempt to do so in a limited way.

III. Post-*Charter* parliamentary sovereignty according to the Supreme Court of Canada

The principle of parliamentary sovereignty has a lengthy but distinct history in Canada. Because of the division of powers, limited sovereignty has always been a reality in this country. As the Judicial Committee of the Privy Council explained in *Hodge v The Queen*,

> When the *British North America Act* enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred ... authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances ... [49]

47 *Ibid* at 169-70.

48 Oliver, "Sovereignty", *supra* note 5.

49 *Hodge v The Queen* (1883), 9 App Cas 117 (UK). See also *Amax Potash Ltd. et al. v Government of Saskatchewan*, [1977] 2 SCR 576 at 590. I am grateful to Mark Walters and Warren Newman for pointing out the historical pre-cursors in this section to me.

The enactment of the *Canadian Bill of Rights*[50] in 1960 raised new questions about the nature of parliamentary sovereignty.[51] The subsequent entrenchment of the *Charter* placed further limits on the legislatures' sovereign spheres. Although the Supreme Court of Canada stated in the 1998 *Secession Reference* that "with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy,"[52] the *Charter* did not render the concept of parliamentary sovereignty obsolete. On the contrary, courts continue to give the concept legal and constitutional weight.

In *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*,[53] a case decided after the enactment of the *Charter* but before the *Secession Reference*, the Auditor General (an officer of Parliament) applied to court seeking to compel the executive to provide him with documents held by a Crown corporation and Cabinet. The Supreme Court concluded that the Auditor General's only remedy under the *Auditor General Act* was to report the failure to turn over the documents to Parliament. For institutional reasons, the matter was not justiciable.[54] In response to the argument that the executive in a majority government could simply impose its will on Parliament, thereby rendering the remedy of little use, the Court stated that "[t]he *grundnorm* with which the courts must work in this context is that of the sovereignty of Parliament. The ministers of the Crown hold office with the grace of the House of Commons and any position taken by the majority must be taken to reflect the sovereign will of Parliament."[55]

In the *Secession Reference*, the Supreme Court referred again to the "sovereign will" but did not invoke parliamentary sovereignty as an unwritten constitutional principle.[56] Instead, it referred to the principle of *democracy*, which it explained co-exists alongside other unwritten constitutional principles, including constitutionalism and the rule of law.[57] "Viewed correctly," the Court observed, "constitutionalism and the rule of law are not in conflict

50 SC 1960, c 44.

51 Luc Tremblay, *The Rule of Law, Justice* (Montreal & Kingston: McGill-Queen's University Press, 1997) [Tremblay].

52 *Reference re Secession of Quebec* [1998] 2 SCR 217 at para 72, 161 DLR (4th) 385 [*Secession Reference*].

53 [1989] 2 SCR 49, 61 DLR (4th) 604.

54 *Ibid* at 109-10.

55 *Ibid* at 103. As Peter Oliver has pointed out to me, the word "grundnorm" is inaccurate here. What is clear is that the Court intended to convey the centrality of parliamentary sovereignty in the Canadian constitutional order.

56 *Secession Reference*, *supra* note 52 at para 67.

57 *Ibid* at paras 49, 78.

with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined."[58] The Court's opinion traced the "legitimacy of democratic institutions" to the fact that they "rest on a legal foundation."[59] The Court explained that "[i]t is the law that creates the framework within which the 'sovereign will' is to be ascertained and implemented."[60] Parliament's legitimacy is also grounded in its connection to popular will and "on an appeal to moral values," some of which are expressed as unwritten constitutional principles.[61]

In *Babcock*, decided after the *Secession Reference,* the respondents argued that the provisions of the *Canada Evidence Act*[62] which permit evidence to be withheld in legal proceedings because the evidence contains cabinet confidences violated the unwritten constitutional principles of the rule of law, the separation of powers, and judicial independence.[63] The Court explained that these "unwritten principles must be balanced against the principle of Parliamentary sovereignty."[64] It then went on to conclude that in the circumstances, parliamentary sovereignty should prevail: "It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government."[65]

In reaching its decision in *Babcock*, the Court relied heavily on *Singh v Canada (Attorney General)*, a decision of the Federal Court of Appeal.[66] In *Singh*, the Court of Appeal concluded that the cabinet confidence provisions of the *Canada Evidence Act* could not be invalidated by invoking the rule of law. "It appears that the appellants' arguments are largely based on the premise that parliamentary sovereignty is not one of the principles of the Constitution, or at least ceased to be at sometime around 1982 when the *Charter* was adopted and section 52 of the *Constitution Act, 1982*," the Court of Appeal explained.[67] This argument could not be sustained: "Both before and after 1982 our system

58 *Ibid* at para 78.
59 *Ibid* at para 67.
60 *Ibid.*
61 *Ibid.*
62 *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 at para 5 [*Babcock*], citing *Canada Evidence Act,* RSC 1985, c C-5, s 39.
63 *Babcock, ibid* at para 54.
64 *Ibid* at para 55. See also Vincent Kazmierski, "Draconian but not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada" (Spring 2010) 41:2 Ottawa L Rev 245 [Kazmierski].
65 *Babcock, supra* note 62 at paras 54, 57. See also Kazmierski, *ibid.*
66 *Singh v Canada (Attorney General)* [2000] 3 FC 185, 183 DLR (4th) 458 [*Singh*].
67 *Ibid* at para 14.

was and is one of parliamentary sovereignty exercisable within the limits of a written constitution."[68]

When the Supreme Court was faced with a similar challenge to legislation on rule of law grounds three years later in *British Columbia v Imperial Tobacco Canada Ltd.*,[69] it referred once more to the principles of democracy and constitutionalism, holding that the rule of law could not be invoked to render inoperative validly enacted legislation. The Court explained that

> ... [S]everal constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms).[70]

What are we to make of the Supreme Court's treatment of parliamentary sovereignty since the entrenchment of the *Charter*? One striking feature of the jurisprudence is the unpredictable way in which the Court has applied the principles of constitutionalism, democracy, and parliamentary sovereignty. The relationship and degree of overlap between these principles remains uncertain.

The *Secession Reference* is one of the most significant constitutional cases in Canada's history, both because of its subject matter and because the Court took the opportunity to describe "the underlying principles animating the whole of the Constitution."[71] Given the case's importance, it would be easy to conclude that some significance should be attached to the fact that the Court did not explicitly recognize parliamentary sovereignty as an unwritten constitutional principle. We must be cautious about inferring too much from this omission, however. The parties did not argue that parliamentary sovereignty was a relevant constitutional principle in that case.[72] Moreover, the Court referred to parliamentary sovereignty as a constitutional principle four years later in *Babcock*, before relying once again on the principles of constitutionalism and democracy to defeat the appellants' claim in *Imperial Tobacco*.

Ultimately, the jurisprudence does not shed much light on the continued relevance of parliamentary sovereignty under the *Charter*. The cases make plain

68 *Ibid* at para 16.

69 2005 SCC 49, [2005] 2 SCR 473.

70 *Ibid* at para 66.

71 *Secession Reference*, *supra* note 52 at 220.

72 I am grateful to Warren Newman, counsel for the Government of Canada on the Reference, for this information. I am also grateful to Carissima Mathen for raising the question of whether parliamentary sovereignty would have been a relevant principle.

that some form of parliamentary sovereignty continues to subsist in Canada, but provide little detail about the nature of this sovereignty. The Federal Court of Appeal's statement in *Singh* is perhaps the most helpful one found in the case law. The Court of Appeal explains that Parliament exercises sovereign authority "within the limits of a written constitution."[73] This view of parliamentary sovereignty — a limited sovereignty — is in my view the one that prevails in Canada today.

IV. The notwithstanding clause

At this stage, it is appropriate to say something more about the notwithstanding clause. Although there is academic debate about the meaning of section 33 of the *Charter*,[74] the majority view is that the notwithstanding clause permits Parliament (and provincial legislatures) to enact laws that might otherwise be vulnerable to invalidation under the *Charter*, or in the words of Lorraine Weinrib, to "suppress certain rights for a limited period subject to certain formalities."[75] This view is supported by the only decision in which the Supreme Court has interpreted section 33, *Ford v AG Quebec*.[76]

It is often suggested that section 33 preserves a degree of parliamentary sovereignty because it gives Parliament the ability to legislate in a manner inconsistent with constitutional rights.[77] In my view, however, linking parliamentary sovereignty and section 33 misconstrues the nature of both sovereignty and entrenched rights. While some scholars are of the view that a constitutional override is necessary to preserve parliamentary sovereignty in the face of such rights, moreover, not all agree. As Oliver observes:

> [I]f sovereignty is the undefeatable ability to determine the law and to have those determinations obeyed, one might also ask whether that ability must be absolute, whether it must literally involve the ability to command *anything* whatsoever. Or is

73 *Singh, supra* note 66 at para 16.

74 For a good summary of the variety of academic positions, see Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 UTLJ 221 at 226-30; Donna Greschner & Ken Norman, "The Courts and Section 33" (1987) 12 Queen's LJ 155 at 166.

75 Lorraine Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State" (1999), 33:1 Israel LR 13. Lorraine Weinrib also calls it a "legislative escape" from "judicial review of rights claims": Lorraine Eisenstat Weinrib, "Learning to Live with the Override" (1990) 35:3 McGill LJ 541 at 563 [Weinrib, "Override"]. See also Tremblay, *supra* note 51 at 10.

76 *Ford v Quebec (Attorney General)* [1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford*]. See also Constitutional Law Group, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery, 2010) at 790.

77 Goldsworthy, *supra* note 19 at ch 8.

> it possible that the "sovereign" *cannot* effectively command *anything*, but that instead its commands must prevail only *within a (usually broad) permitted range of options*?[78]

According to this second view, constitutional rights might be said to create a framework "within which"[79] Parliament exercises sovereign decision-making power.[80] While Parliament's authority is circumscribed, it still retains its sovereignty.

Section 33 was not part of the federal government's initial constitutional proposal.[81] It was introduced at a late stage in the constitutional negotiations in an attempt to mollify provincial leaders concerned about the *Charter*'s potential impact on their authority.[82] Grafting a constitutional override onto the *Charter* may have addressed the concerns of political leaders, but it presents a challenge in terms of developing a coherent account of Canadian constitutionalism.

The notwithstanding clause does not create an unlimited override power. The override can only be used to suspend the operation of certain provisions of the *Charter,* namely sections 2 and 7 through 15.[83] Any legislation subject to the override must include "an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*."[84] Once legislation invoking the notwithstanding clause has been enacted, it is operative for five years, although it can be renewed.

Those who argue that the notwithstanding clause preserves parliamentary sovereignty rely on a version of sovereignty fraught with problems. To put it bluntly, characterizing the notwithstanding clause as preserving sovereignty is inconsistent with the only descriptively and normatively plausible variant of parliamentary sovereignty in Canadian constitutional law: a limited sovereignty conditioned by conditional rights. Allowing the executive to introduce legislation that suspends rights for purely political reasons does not preserve constitutionally important values.[85] Section 1 of the *Charter* already permits

78 Oliver, "Sovereignty", *supra* note 5 at 138-39.

79 *Secession Reference, supra* note 52; *Singh, supra* note 66. I will make use of this language throughout.

80 Robert Alexy, "On Constitutional Rights to Protection" (2009) 3:1 Legisprudence 1 at 1 [Alexy, "Protection"]; Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010) [Alexy, *Theory*]; Elliot, "New Constitutional Order", *supra* note 4; Oliver, "Sovereignty", *supra* note 5; *Secession Reference, supra* note 52; *Singh, supra* note 66.

81 Weinrib, "Override", *supra* note 75 at 563.

82 *Ibid.*

83 Weinrib, "Override", *supra* note 75 at 554.

84 In *Ford, supra* note 76 at para 33, the Court wrote that "Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case."

85 Including parliamentary sovereignty.

Parliament and the executive to *justifiably* limit constitutional rights. In a constitutional state, it is difficult to defend also allowing them to limit rights *unjustifiably*. Such an understanding of section 33 would undermine the logic of constitutional rights and the version of parliamentary sovereignty I advance in this paper.

Assuming that the notwithstanding clause is unlikely to be repealed,[86] it is necessary to re-think how we conceptualize section 33. Rather than interpreting section 33 as permitting political actors to limit constitutional rights without adequate justification, the provision should be understood as creating a mechanism for mediating differences of opinion between the political branches and the judiciary on matters of constitutional interpretation.[87] In other words, when politicians and courts take different positions on what the *Charter* requires in a particular situation, the political branches may invoke the notwithstanding clause to insist upon their interpretation of the *Charter*. Several scholars suggest that this is a plausible way of conceptualizing section 33.[88]

This interpretation of the notwithstanding clause has obvious benefits from the standpoint of constitutional theory. When section 33 is framed in the manner just described, the question becomes "which interpretation of *Charter* rights should prevail?" rather than whether the *Charter* should apply at all. On this view, *Charter* rights "trace the perimeter" of parliamentary sovereignty.[89] At least one of the premiers participating in the pre-*Charter* constitutional negotiations, Allan Blakeney, understood the notwithstanding clause in this way. As Hiebert explains,

> For Blakeney, the notwithstanding clause would guard against the *Charter* evolving in a manner that excluded a parliamentary role in defining the scope of protected

86 Prime Minister Paul Martin suggested repealing the notwithstanding clause during the 2006 election campaign. The Liberals were ultimately defeated in the election. See Brian Laghi, Campbell Clark & Daniel Leblanc, "Martin hits hard at Harper", *The Globe and Mail* (10 January 2006), online: <www.theglobeandmail.com/news/national/martin-hits-hard-at-harper/article964940/>.

87 Grégoire CN Webber, "The Unfulfilled Potential of the Court and Legislature Dialogue" (2009) 42:2 Can J Political Science 443; Janet L Hiebert, "Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding" in James B Kelly & Christopher P Manfredi, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 107 [Hiebert, "Dominant Narrative"].

88 Janet L Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal & Kingston: McGill-Queen's University Press, 2002) at 220-21; Tushnet, "*Marbury*", *supra* note 3 at 264-65; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 265 [Roach, *Supreme Court on Trial*]; Webber, *supra* note 87.

89 "Elliot, New Constitutional Order", *supra* note 4 at 367.

> rights. The notwithstanding clause, in other words, was not thought of to negate rights but, rather, to allow for a more expansive understanding of human rights, in which Parliament, as well as the judiciary, would be responsible for their articulation and protection.[90]

Permitting political actors to dispense with the *Charter* for purely political reasons is inconsistent with the core assumptions of rights-based constitutionalism. The fact that the notwithstanding clause has only rarely been invoked does not weaken this conclusion.[91] *Charter* rights represent fundamental values. It is surely sufficient that Parliament has the power to justifiably limit constitutional rights; it cannot also be necessary to interpret section 33 as creating a political sledgehammer.

The sovereignty-preserving interpretation of the notwithstanding clause is not the only theory of section 33 that can claim to be rooted in democratic principles. Rights protection is central to the Canadian polity's collective self-understanding. Both Oliver and Elliot argue that this kind of ongoing, popular support for rights is important to modern conceptions of limited parliamentary sovereignty.[92] Part of what lends "legitimacy" to the political process is that political actors govern within boundaries established by the Constitution.[93]

Finally, the view of parliamentary sovereignty I argue for in this paper finds support in the Supreme Court's opinion in the *Secession Reference*. There, the Court observed that "[i]t is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented."[94] It also echoes the reasoning of the Federal Court of Appeal in *Singh*. In Canada in 2016, it is hard to sustain the argument that the executive and Parliament should be permitted to limit rights without adequate justification. I return to the significance of justification in the next section.

90 Hiebert, "Dominant Narrative", *supra* note 88 at 115-16.

91 Tushnet, "*Marbury*," *supra* note 3 at 268; Billingsley, *supra* note 3 at 337; Richard Albert, "Advisory Review: The Reincarnation of the Notwithstanding Clause" (2008) 45:4 Alta L Rev 1037 at 1038.

92 Elliot, "New Constitutional Order", *supra* note 4 at 345-46; Oliver, "Sovereignty", *supra* note 5 at 137-38.

93 *Ibid.*

94 *Secession Reference, supra* note 52 at para 67.

V. Important questions about political actors and the courts

In this section I suggest that parliamentary sovereignty continues to be a meaningful concept in Canadian constitutional law in part because of the important questions it prompts us to ask about the role of political actors and courts under the *Charter*. I then venture a few answers to some of these questions.

One insight that emerges from engaging with the concept of parliamentary sovereignty is that the space allocated to legislative choice is influenced by Parliament's (and the executive's) willingness to adopt a *Charter* values-inspired politics. Scholars have suggested that the more that law-making is influenced by constitutional values, the less courts will interfere with Parliament's will as expressed in legislation.[95] Conversely, the more the executive and Parliament flout their constitutional duties by making policy inconsistent with or in blatant disregard of rights, the less the courts will defer.[96]

Discussion of the continued relevance of parliamentary sovereignty in constitutional states sometimes focuses on which institution of government has the last word. On most accounts, either Parliament has the last word, or the courts do by virtue of their ability to check Parliament.[97] Deep engagement with the concept of parliamentary sovereignty reveals that this framing fails to capture the legal and political dynamics at play in Canadian constitutional law, for at least two reasons. First, all institutions of government play a role in protecting and promoting rights.[98] Second, the relationship between Parliament and the courts is a complex and dynamic one. The balance of power may shift depending on Parliament's level of responsiveness to constitutional rights.

95 Hiebert, "Parliamentary Sovereignty", *supra* note 8; David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (London: Hart Publishing, 1997) 279 at 304 [Dyzenhaus, "Politics of Deference"]; TRS Allan, "Deference, Defiance and Doctrine: Defining the Limits of Judicial Review" (2010) 60 UTLJ 41 [Allan]; Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth & Peter Leyland, eds, *Public Law in a Multi-Layered Constitution* (London: Hart Publishing, 2003) 337 [Hunt]; Hiebert, "Parliamentary Sovereignty", *supra* note 8 at 2272-73; Gardbaum, "Reassessing", *supra* note 26 at 175.

96 Hiebert, "Parliamentary Sovereignty", *supra* note 8; Kavanagh, "Forbidden Territory", *supra* note 8.

97 Hunt refers to "competing supremacies": Hunt, *supra* note 95 at 339-40.

98 Jeff A King, "Institutional Approaches to Judicial Restraint" (2008) 28:3 Oxford J Leg Stud 409 at 428 [King]; Hunt, *supra* note 95; Gardbaum, "Reassessing", *supra* note 8.

Constitutional rights can be understood as creating a framework for governance.[99] By this I mean that *Charter* rights structure the law-making process by placing demands on political actors. If constitutional rights represent our basic values as a society, then it stands to reason that Parliament and the executive ought to "implement"[100] rights in a meaningful way.[101] Political actors can only claim to govern legitimately if they ensure that rights play a role in determining which policies they pursue and how those policies are structured.[102]

Hunt, writing in the UK context, argues that there is "explicit recognition in this country's institutional arrangements that Parliament has an important role in both the definition and protection of fundamental rights and values."[103] King concurs. In an article about "institutional" theories of deference, King departs from the premise that rights protection and promotion are shared obligations:

> ... [T]he institutional approach ... takes the view that the three primary branches of government essentially collaborate in the general promotion of commonly accepted public values such as fairness, autonomy, welfare, transparency, efficiency, etc. Parliament, the executive and courts are on this vision part of a joint-enterprise for the betterment of society.[104]

These statements also apply in the Canadian context. As Hunt and King point out, however, traditional conceptions of sovereignty obscure the "collaborative" nature of rights protection.[105] The dominant theories of judicial review and deference, which King contests, posit that "courts are the forum of principle and that policy is to be decided by democratically accountable bodies."[106] King problematizes this account of institutions by arguing that courts do consider

99 Vanessa MacDonnell, "The Constitution as Framework for Governance" (2013) 63 UTLJ 624 [MacDonnell, "Framework"].

100 Mattias Kumm, "Who's Afraid of the Total Constitution?" in Augustín José Menéndez & Erik Oddvar Eriksen, eds, *Arguing Fundamental Rights* (Dordrecht, NL: Springer, 2006) 113 at 115; Jennifer Nedelsky, "Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives" in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 93 at 121 [Nedelsky].

101 I have also made the stronger claim that the executive *must* implement rights: see MacDonnell, "Framework", *supra* note 99.

102 For more on legitimacy, see Oliver, "Sovereignty", *supra* note 5. Oliver argues that it is possible to conceive of a variant of parliamentary sovereignty that accommodates socioeconomic rights: see *ibid.*

103 Hunt, *supra* note 95 at 339.

104 King, *supra* note 98 at 428. See also Aileen Kavanagh, "Judicial Restraint in the Pursuit of Justice" (2010) 60 UTLJ 23 at 38 [Kavanagh, "Pursuit of Justice"]; Tushnet, *Weak Courts, Strong Rights, supra* note 26; Gardbaum, "Reassessing", *supra* note 8.

105 King, *supra* note 98 at 428. See also Hiebert & Kelly, *supra* note 37 at 8-9.

106 *King, supra* note 98 at 415.

the policy dimensions of legal issues and should not be precluded from doing so.[107] He also critiques the way this account characterizes the political branches, noting that courts do not have a monopoly on principle.[108] While political actors are subject to political "pressures" and imperatives that are different from courts, politicians "can and should act in principled ways"[109] — in Canada, in ways dictated by the *Charter*.

In my view, King's description of the relationship between political actors and courts as "collaborative" offers something more than the "dialogue metaphor"[110] so often invoked in Canadian constitutional theory. The term "collaboration" suggests cooperation and common purpose. While it is likely correct to say that these are also features of dialogue theory, those who write about dialogue sometimes describe the interaction between the political branches and the courts in rather more discordant terms. Roach's work brings this out especially clearly: he refers to one variant of "legislative sequel"[111] as the "in-your-face" response.[112] Of course, institutions can collaborate while also disagreeing,[113] but King's emphasis on shared goals is important to the vision of constitutionalism I advance here.

This brings us to a second point that I wish to make in this section, which is that the relationship between political actors and courts is not static. Institutions interact in ways that transcend individual cases, rights and issues. The dynamics between institutions can change over time as institutions assert themselves and interact with one another. For the moment, I am less concerned with the way that political actors and courts advance competing views

107 *Ibid.*

108 *Ibid* at 428.

109 Amy Gutmann, "Foreword: Legislatures in the Constitutional State" in Bauman & Kahana, *supra* note 100, ix at x [Gutmann].

110 Peter W Hogg, Alison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited: Or "Much Ado about Metaphors" (2007) 45:1 Osgoode Hall L J 1 [Hogg, Bushell Thornton & Wright, "Dialogue Revisited"]. See also Peter W Hogg & Allison A Bushell Thornton, "The *Charter* Dialogue Between the Courts and the Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75 at 84-87 [Hogg & Bushell Thornton, "*Charter* Dialogue"]; Roach, *Supreme Court on Trial*, *supra* note 88.

111 Hogg & Bushell Thornton, "*Charter* Dialogue", *ibid* at 82.

112 This response, he says, consists of outright defiance of the Court's view of what the *Charter* requires. Roach, *Supreme Court on Trial*, *supra* note 88 at 273.

113 King puts it as follows: "Tension and disagreement between institutions is not regarded as a cacophonous power struggle, but rather as part of the dynamic process of give and take that the public chooses as part of the complete package of modern democratic government." King, *supra* note 98 at 428.

of constitutional rights or weigh conflicting rights and interests.[114] I am more interested in how institutions situate themselves in relation to one another over the medium to long term.

Institutional dynamics are shaped by a number of factors. They can be influenced by the structure and function of the institution itself,[115] as well as by an institution's self-perception and core commitments. They are also shaped by their interactions with other institutions.[116] It stands to reason that a court's willingness to defer will depend on the degree to which political actors are responsive to constitutional rights. The version of parliamentary sovereignty I advance in this paper suggests that Parliament's authority is constrained and legitimated by its respect for constitutional rights. If Parliament and the executive show a commitment to rights, there is good reason to expect that courts will grant them a wider berth to interpret and implement constitutional rights. The opposite is also true. If Parliament were to internalize this reality, it might experience an expansion in sovereign authority relative to courts.

Scholars have taken great interest in the concept of deference in recent years. Important work has been done to define deference and to suggest criteria for determining when it is appropriate. Kavanagh, for example, explains that "judicial deference occurs when judges assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy."[117]

This paper suggests that there is — and should be — a connection between the "diligence"[118] with which Parliament considers and addresses constitutional questions during the legislative process and the intensity of constitutional review by courts.[119] By diligence I mean whether parliamentarians closely scrutinize bills during the legislative process with a view to identifying the constitutional dimensions of the proposal. It would also include ensuring that a bill balances competing rights appropriately and limits rights proportionately and only when necessary. The theory that best captures this form of deference is

114 Hogg & Bushell Thornton, *supra* note 110; Mark Tushnet, "Interpretation in Legislatures and Courts: Incentives and Institutional Design" in Bauman & Kahana, *supra* note 100 at 355 [Tushnet, "Interpretation"].

115 Kavanagh, "Pursuit of Justice", *supra* note 104; Tushnet, *Weak Courts, Strong Rights, supra* note 26.

116 Kavanagh, "Pursuit of Justice", *supra* note 104 at 26: ". . . judicial restraint in public law adjudication had an explicitly relational aspect vis-à-vis the legislature and executive."

117 Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 Law Q Rev 222.

118 Allan, *supra* note 95 at 50. I will make use of the term diligence throughout.

119 For a sophisticated rendering of this argument in the UK context, see Kavanagh, "Forbidden Territory", *supra* note 8. See generally Hiebert, "Parliamentary Sovereignty", *supra* note 8.

Dyzenhaus' "deference as respect."[120] Dyzenhaus distinguishes "deference as respect" from "deference as submission." In his words, "deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision, whether that be the statutory decision of the legislature, a judgment of another court, or the decision of administrative agency."[121]

When legislatures take their constitutional functions seriously, it is appropriate to recognize this by not only considering how and why Parliament has legislated in the manner it has (what Kavanagh refers to as "minimal deference"[122]), but also deferring (in a "substantial" way, in Kavanagh's terms) based on Parliament's preferred position.[123] Both Hunt and Allan take a similar approach to the relationship between Parliament and the courts. Hunt links deference to the principle of justification[124] and explains that "deference from the courts must be *earned* by the primary decision-maker by openly demonstrating the justifications for the decisions they have reached and by demonstrating the reasons why their decision is worthy of curial respect."[125] Allan echoes this point, noting that "the court's enquiry must extend to the quality of the relevant procedures."[126]

It is a well-established principle of Canadian and UK law that courts will not inquire into the process by which legislation is enacted.[127] Kavanagh explains that this has not prevented UK courts from assessing whether legislators have weighed the rights consequences of proposed legislation. Her careful

120 Dyzenhaus, "Politics of Deference", *supra* note 95 at 286.

121 *Ibid.*

122 Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expanding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) at 191.

123 *Ibid.*

124 David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14:1 SAJHR 11, cited in Hunt, *supra* note 95 at 340, 351. See also David Dyzenhaus, "What is a 'democratic culture of justification'?" in Murray Hunt, Hayley Hooper & Paul Yowell, eds, *Parliament and Human Rights: Redressing the Democratic Deficit*, 1st ed (Oxford: Hart Publishing, 2015).

125 Hunt, *supra* note 95 at 340. See also Dyzenhaus, "Politics of Deference", *supra* note 95 at 306.

126 Allan, *supra* note 95 at 45. See also David Dyzenhaus, *The Constitution of Law: Legality in Times of Emergency* (Cambridge: Cambridge University Press, 2006) at 147 [Dyzenhaus, *Constitution of Law*], cited in Allan, *supra* note 95 at 54. See also Hunt, *supra* note 95.

127 *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525; Article 9, *Bill of Rights 1689*, 1 William & Mary Sess 2 c 2; *R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another*, [2014] UKSC 3; *Wilson & Ors v Secretary of State for Trade and Industry* [2003] UKHL 40, Lord Nicholls of Birkenhead; *Edinburgh & Dalkeith Railway Company v Wauchope* [1842] UKHL J12. See also Dicey, *supra* note 11 at 55; Kavanagh, "Forbidden Territory", *supra* note 8.

study of the UK jurisprudence reveals that while judges are aware of the perils of measuring the "quality or sufficiency of the reasons advanced in support of a legislative measure during the course of parliamentary debate,"[128] they do take into account "the quality of the decision-making process in Parliament with reference to the human rights issue."[129] This can involve asking whether there was "a legislative focus on the human rights issue," "active parliamentary deliberation on that issue," and whether "opposing views [were] fully represented."[130] Importantly, Kavanagh would reject the suggestion that Parliament must weigh the rights consequences that flow from proposed laws in "explicit" terms.[131] Rather, she argues that there ought merely to "be some focus on the implications or consequences for the interests underpinning human rights."[132] This is consistent with the view that political actors may legitimately approach rights questions differently than courts.[133]

A similar review of the Canadian case law reveals that judges do consider the extent to which Parliament has weighed the rights implications of new policies when they engage in constitutional review. *Mills* is perhaps the best example of this.[134] The legislation at issue in *Mills* provided a legal framework for accessing complainants' therapeutic records in sexual assault cases. The Court had invalidated an earlier such scheme on constitutional grounds in *O'Connor*.[135] In upholding the legislation against constitutional challenge, the majority pointed to preambular language in the new legislation which reflected a sensitivity to the constitutional rights at stake.[136] It noted that the legislation being challenged "reflects Parliament's effort at balancing these rights,"[137] and that "Parliament has enacted this legislation after a long consultation process that included a consideration of the constitutional standards outlined by this Court in *O'Connor*."[138] Applying Kavanagh's criteria, the majority in *Mills* appears to have been influenced by the "legislative focus" on rights as well as by Parliament's "active deliberation" about the constitutional concerns raised by the legislation. It might even be fair to say that the majority inferred from

128 Kavanagh, "Forbidden Territory", *ibid* at 464, citing *Wilson, ibid.*
129 Kavanagh, "Forbidden Territory", *ibid* at 465 (emphasis removed).
130 *Ibid* at 463 (emphasis removed).
131 *Ibid* at 467.
132 *Ibid.*
133 Gardbaum, "Reassessing", *supra* note 26 at 173.
134 *R v Mills*, [1999] 3 SCR 668 [*Mills*].
135 *R v O'Connor*, [1995] 4 SCR 411.
136 *Ibid* at para 48. See also Hogg, Bushell Thornton & Wright, "Dialogue Revisited", *supra* note 110 at 21-22.
137 *Mills, supra* note 134 at para 18. See also *ibid* at para 58.
138 *Ibid* at para 59.

Parliament's "lengthy consultation process"[139] and "years of Parliamentary study and debate"[140] that "opposing views [were] fully represented."

Similar statements appear in *JTI-Macdonald*,[141] *Sauvé*,[142] *Hall*[143] and *Harkat*.[144] These are all "second look" cases — cases in which the Court is asked to determine the constitutionality of legislation enacted after an earlier law was struck down on *Charter* grounds.[145] One might expect the Court in these cases to be particularly attuned to the question of whether rights were considered. The point here is not to provide a comprehensive accounting of all cases in which the Court has considered Parliament's attentiveness to rights. Rather, it is simply to demonstrate that courts *do* examine whether Parliament took rights into account in the legislative process.

In this paper, I also argue that courts *should* consider this issue in determining whether deference is appropriate.[146] I do so on the basis that the requirement that political actors be attentive to rights flows from the constitution itself.[147] Interestingly, Hogg, Thornton & Wright explain that the Supreme Court's decisions do not point in a single direction in terms of whether deference is appropriate in so-called "second look" cases.[148] In some cases, such as *Mills*, the Court has adopted a deferential posture, whereas in others, like *Sauvé*, it has not.[149]

As Hunt notes, justification is at the core of the concept of deference as respect. Justification has many virtues. One of them is that the process of providing a justification can help clarify for the decision-maker exactly what is at stake when it proposes a new policy. This is important because constitutional issues are often more complicated than they first appear. Policy issues rarely implicate a single, discrete right.[150] Rather, they typically engage multiple constitutional rights that must be accommodated within a single policy response.[151]

139 *Ibid* at para 17.

140 *Ibid* at para 125.

141 *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at paras 7-8, 11, [2007] 2 SCR 610.

142 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 9, [2002] 3 SCR 519. But see para 13.

143 *R v Hall*, 2002 SCC 64 at para 18, [2002] 3 SCR 309.

144 *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 55, [2014] 2 SCR 33.

145 Hogg, Bushell Thornton & Wright, "Dialogue Revisited", *supra* note 110 at 6.

146 Kavanagh makes a similar argument: see Kavanagh, "Forbidden Territory", *supra* note 8.

147 *Mills, supra* note 134 at para 58; Wilson, *supra* note 127, Lord Hobhouse of Woodborough.

148 Hogg, Bushell Thornton & Wright, "Dialogue Revisited", *supra* note 110. See also Gardbaum, *New Commonwealth, supra* note 37 at 122-23.

149 *Ibid.*

150 Alexy, *Theory*, *supra* note 80.

151 *Ibid; Mills*, *supra* note 134 at para 59. See generally Jeff King, "The Pervasiveness of Polycentricity" (2008) Public Law 101.

To conclude the point, Parliament and the courts are "partners"[152] in a shared project of rights protection and promotion.[153] Parliament has the ability to expand its sphere of sovereign decision-making relative to courts by demonstrating that it diligently identifies and responds to the constitutional implications of proposed laws.[154] Where multiple constitutional interests are engaged, as they often will be, Parliament must also show that it has given thought to how best to accommodate those interests.

A second insight that emerges from the study of parliamentary sovereignty is that Parliament enjoys considerable law-making power notwithstanding the presence of the *Charter*. Constitutional rights create parameters for governance but they do not remove Parliament's sovereign decision-making power. Parliament retains authority to make decisions within a limited but still considerable "sphere."[155]

The *Charter* does not impose a complete ban on intrusions on constitutional rights. Rights can be justifiably limited in the service of competing rights or social interests.[156] Thus, Parliament retains the discretion to limit rights where, after careful deliberation, it concludes that there is sufficient justification for doing so. In this way, it could be argued that section 1 imposes a requirement of deliberation and careful decision-making on political actors.[157] Judicial intervention is warranted only where the decision to limit constitutional rights cannot be justified.[158]

As Allan points out, moreover, "there is usually more than one decision compatible with the complainant's rights, and it is for the public body rather than the court to choose between them."[159] This observation has important consequences for our assessment of the size of the sovereign policy space that Parliament retains in the wake of the *Charter*. Taken together with what I suggest is the correct approach to deference, it is fair to say that Parliament retains considerable freedom to make policy within the confines established by the *Charter*.

152 Kavanagh, "Pursuit of Justice", *supra* note 106 at 38.

153 *Ibid*; King, *supra* note 98 at 428; Dyzenhaus, *Constitution of Law,* cited in Allan, *supra* note 95 at 54.

154 See Gardbaum, "Reassessing," *supra*.

155 Oliver, "Sovereignty", *supra* note 5 at 138-39. See generally Alexy, *Theory*, *supra* note 80.

156 Section 1 of the *Charter* states that "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

157 For a similar view, see Allan, *supra* note 95 at 45.

158 *Ibid* at 43.

159 *Ibid.*

Now, this is not Diceyan sovereignty — far from it. But as long as Parliament is attentive to the demands imposed upon it by the *Charter*, it will enjoy considerable legislative freedom. The laws that emerge from this process are legitimated not only by their democratic character, but also by their fidelity to constitutional rights.

VI. Conclusion

In this paper I have argued that a theory of limited sovereignty can plausibly be invoked to describe Parliament's powers in the post-*Charter* era. Under this version of parliamentary sovereignty, the *Charter* creates a framework within which Parliament exercises decision-making authority. Although Parliament's sovereignty is delimited by constitutional rights, its scope to legislate remains robust.

Engaging with the concept of parliamentary sovereignty also shows that there is a connection between the diligence with which Parliament considers and responds to constitutional demands and the deference afforded to legislative judgment on judicial review. Parliament can increase its decision-making authority relative to courts by taking constitutional rights seriously. Political actors and courts have a common obligation to secure and promote constitutional rights. When Parliament upholds its end of the bargain, courts are more likely to take a hands-off approach. By demonstrating its commitment to implement constitutional rights in a meaningful way, Parliament will have "earned"[160] the courts' deference.

160 Hunt, *supra* note 95 at 340.

Temporal Limitations in Constitutional Amendment

*Richard Albert**

Formal amendment rules are designed to fragment or consolidate power, whether among political parties or government branches, or along ethnic, subnational, or other lines. Time is an understudied and undertheorized dimension along which amendment rules may also fragment or consolidate power. This temporal feature of formal amendment rules entails unique implications for how we understand the formation of constitutional consensus and how we evaluate contemporaneity in amendment ratification. In this article, I apply a comparative perspective to the use of time in formal amendment in order to demonstrate the possibilities for the design of temporal limitations and also to probe the trade-offs between political brinkmanship and contemporaneity in ratification. My larger purpose is to suggest a research agenda for further comparative inquiry into the use of time in the design of formal amendment rules.

Les règles de modification officielles sont conçues de manière à fragmenter ou consolider le pouvoir, que ce soit au sein de partis politiques ou d'agences gouvernementales ou encore, conformément à des lignes ethniques, infranationales ou autres. Le temps est une dimension qui, jusqu'à présent, a fait l'objet de peu d'études et de théories, et en vertu de laquelle les règles de modification peuvent aussi fragmenter ou consolider le pouvoir. Cette caractéristique temporelle des règles de modification officielles entraîne des conséquences uniques par rapport à la façon dont nous entendons la création du consensus constitutionnel et la façon dont nous évaluons la contemporanéité dans la ratification de modifications. Dans cet article, j'applique une perspective comparative à l'emploi du temps dans la modification officielle afin de montrer le potentiel pour l'élaboration de limites temporelles ainsi que pour examiner les compromis entre la politique de la corde raide et la contemporanéité en matière de ratification. Mon objectif plus global est de proposer un programme de recherche visant de nouvelles études comparatives sur l'emploi du temps dans l'élaboration des règles de modification officielles.

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I. Introduction

We cannot understand constitutional change without inquiring into its relation to time. Yet the temporal dimension of constitutional amendment remains today understudied and undertheorized, despite the prevalence of democratic constitutions that require constitutional actors to adhere to certain specifications as to the timing of various steps in the amendment process, whether at the initiation, proposal, or ratification stages, or indeed in all of these steps.[1] For example, amendment rules sometimes establish deliberation floors or ceilings to compel constitutional actors to consider an amendment proposal during a defined period of time, establishing either a minimum or maximum period of consideration.[2] Amendment rules sometimes also create safe harbour provisions that altogether prohibit constitutional actors from proposing amendments for a defined period of time, either after a new constitution has come into force or after an amendment has failed or succeeded.[3] In this article, I evaluate the use of temporal limitations in constitutional amendment from a comparative perspective in order both to demonstrate the possibilities for the design of temporal limitations and to expose the trade-offs between political brinkmanship and constitutional contemporaneity in constitutional amendment.[4]

Time is only one dimension along which formal amendment rules may fragment or consolidate power. They may also fragment or consolidate power among political parties, as does the Japanese Constitution, by requiring supermajority agreement in the national legislature.[5] Amendment rules may also fragment or consolidate power among branches of government; for example, the French Constitution authorizes the executive and legislature each to initiate a constitutional amendment.[6] Amendment rules may also fragment or consolidate power along ethnic or linguistic identities, as does the Constitution of Bosnia and Herzegovina, which authorizes amendment only by a Parliamentary Assembly whose members must include Croats, Bosniacs, and Serbs,[7] or the Constitution of Kiribati, which does not permit an amendment to the rights of Banabans unless the amendment is supported by the nominated or elected representative of the Banaban community.[8] Geographic boundaries are another

1 See Part II, *below*.
2 See Section II.B, *below*.
3 See Section II.A, *below*.
4 In this article I focus on the interrelation between time and constitutional change in connection only with formal amendment. I leave for another day how time interrelates with informal amendment.
5 Japan Const, ch IX, art 96 (1947).
6 France Const, tit XVI, art 89 (1958).
7 Bosnia & Herzegovina Const, art X, para 1 (1995).
8 Kiribati Const, ch IX, art 124 (1979).

way to fragment or consolidate the amendment power: in Iraq, regional legislative authorities and the people of the regions may withhold their consent from, and thereby defeat, certain amendments.[9] Federalist structures are yet another way of fragmenting or consolidating amendment power: the Constitutions of Australia and South Africa each sometimes require a subnational entity affected by a given amendment to consent to the change.[10]

Fragmenting and consolidating power are the core design strategy for formal amendment rules in constitutional democracies. Allocating power along these lines can serve any number of purposes, from promoting efficiency in formal constitutional change, to complicating amendment in order to protect the founding constitutional bargain, or to rallying a broad, representative, and sustainable base of support behind a ratified amendment.[11] In contrast to the consequences of consolidating the amendment power, fragmenting the amendment power almost always exacerbates amendment difficulty. The fragmentation of amendment power is a screen through which may pass only those amendments reinforced by a breadth and depth of political and popular agreement that may potentially reflect multiple layers of legitimacy — not only the legal legitimacy that comes from successfully navigating the textually entrenched rules of amendment or the sociological legitimacy reflected in the approval of constitutional actors representing disparate groups, but also the moral legitimacy associated with modern forms of collaborative governance that privilege consent and cooperation over conquest and the consolidation of power.[12]

The fragmentation and consolidation of the amendment power across time has unique properties and consequences that today remain open questions. The study of the temporal dimension of constitutional amendment moreover responds to Paul Pierson's call for greater attention to the *structure* as opposed to the *number* of veto points in institutional design, particularly as to how and why political institutions are structured to resist or facilitate change.[13] I therefore take this as an invitation, both to fill the void and to advance our learning and interest in the relationship between time and change. Although I focus primarily on Canada and the United States, the analysis may be applicable elsewhere and indeed is intended to invite further study.

9 Iraq Const, s VI, ch I, art 126 (2006).

10 Australia Const, ch VIII, art 128 (1901); South Africa Const, ch 4, art 74 (1996).

11 In this article, I use "amendment" to mean "formal amendment" unless otherwise noted.

12 For a discussion of these three forms of legitimacy, see Richard H Fallon, Jr, "Legitimacy and the Constitution" (2005) 118:6 Harv L Rev 1787 at 1794-97.

13 See Paul Pierson, *Politics in Time* (Princeton University Press, 2004) at 144-46.

Just as democratic constitutions structure the conduct of their subjects and objects — the who and what of constitutional law — constitutions sometimes also structure the timing — the when — of decisions constitutional actors make on the authority of the constitutional text. For example, the *Constitution Act, 1982* required the Prime Minister of Canada to convene a first ministers' constitutional conference within 15 years of its coming-into-force.[14] The United States Constitution established a temporal rule of its own: the slave trade was protected from abolition for the first 20 years of the Constitution.[15] These and other uses of time in constitutional design to shape conduct and choice have with good reason drawn recent attention from scholars of comparative public law.[16] Yet there remains much to learn about the temporal dimension of constitutional change, specifically about the architecture of the rules of formal amendment.

My purpose in this article is to illuminate the options available to constitutional designers as they consider whether and why to entrench temporal limitations on how constitutional actors deploy amendment rules. This study of amendment has real implications for the present day, as we have seen and will likely continue to see efforts by constitutional actors around the democratic world to circumvent the onerous rules of constitutional amendment.[17] Constitutional designers have at their disposal resources to help them understand the relationship between formal amendment difficulty and informal constitutional change,[18] as well as how to identify when constitutional actors deploy the democratic procedures of amendment and ordinary law-making to achieve non-democratic ends.[19] But they have few resources to understand and

14 See *Constitution Act, 1982*, s 49, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]. The conference was held in 1996 but some question whether it fulfilled the spirit of the requirement. See John D Whyte, "'A Constitutional Conference … Shall be Convened …' Living with Constitutional Promises" (1996) 8:1 Const Forum Const 15.

15 US Const, art V (1789).

16 See e.g. Sofia Ranchordás, *Constitutional Sunsets and Experimental Legislation* (Cheltenham: Edward Elgar, 2014); Ozan O Varol, "Temporary Constitutions" (2014) 102:2 Cal L Rev 409; Rosalind Dixon & Tom Ginsburg, "Deciding Not to Decide: Deferral in Constitutional Design" (2011) 9:3 Intl J Const L 636.

17 See Richard Albert, "Amending Constitutional Amendment Rules" (2015) 13 Intl J Const L 655.

18 See e.g. Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999) at 225-30; Edward Schneier, *Crafting Constitutional Democracies: The Politics of Institutional Design* (Lanham, MD: Rowman & Littlefield Publishers, 2006) at 223.

19 See e.g. Richard Albert, "Constitutional Amendment by Stealth" (2015) 60:4 McGill LJ 673; Ozan O Varol, "Stealth Authoritarianism" (2015) 100 Iowa L Rev 1673; David Landau, "Abusive Constitutionalism" (2013) 47:1 UC Davis L Rev 189.

evaluate the use of temporal limitations in the design of formal amendment rules. I seek here to begin to fill that void.

II. Time and Change in Constitutional States

There are two major forms of temporal limitations in constitutional amendment: deliberation requirements and safe harbours.[20] I focus in this article on deliberation requirements, though it is useful here to distinguish them from safe harbours and to briefly discuss the latter. A deliberation requirement compels constitutional actors to evaluate an amendment proposal during a defined period of time. This period of time may be either a floor or a ceiling, the former referring to a minimum amount of time for which an amendment proposal must remain open to deliberation by constitutional actors and the public prior to its ratification, and the latter to the maximum amount of time during which constitutional actors and the public may deliberate on an amendment before a ratification vote must be held. A safe harbour creates an outright prohibition on constitutional amendment during a specified period of time. Both kinds of limitations are variable in that designers may choose to entrench deliberation requirements or safe harbours of varying durations of time, either separately or in combination.[21]

A. Safe Harbours

Constitutional designers entrench different forms of safe harbours in connection with constitutional amendment. We can identify at least five general periods of time during which designers will impose safe harbours: (1) states of emergency; (2) periods of succession or regency; (3) the interval following a failed amendment; (4) the interval following a successful amendment; and (5) the period immediately following the adoption of a new constitution. Each of these forms of safe harbours disables the amendment process during specified periods of time.

Consider a safe harbour during a state of emergency. Under the Spanish Constitution, "[t]he process of constitutional amendment may not be initiated in time of war or under any of the states considered in section 116,"[22] a refer-

20 See Richard Albert, "The Structure of Constitutional Amendment Rules" (2014) 49:4 Wake Forest L Rev 913 at 952-54.

21 Safe harbours are occasionally subject to override, as in Portugal, where constitutional actors may by an extraordinary supermajority and for exceptional reasons vote to initiate the amendment process despite the prohibition on amendment. See Portugal Const, tit II, art 284(2) (1976).

22 Spain Const, pt X, s 169 (1978).

ence to states of "alarm, emergency and siege (martial law)."[23] Constitutions also entrench safe harbours in connection with succession or where a ruler is unable to lead. In Belgium, for example, "[d]uring a regency, no change can be made in the Constitution with respect to the constitutional powers of the King and Articles 85 to 88, 91 to 95, 106 and 197 of the Constitution."[24] Likewise, in Luxembourg, "[d]uring a regency, no change can be made to the Constitution concerning the constitutional prerogatives of the Grand Duke, his status as well as the order of succession."[25]

Safe harbours sometimes also prohibit amendment in the immediate aftermath of a failed or successful amendment and in the period following the adoption of a new constitution. In Estonia, "[a]n amendment to the Constitution regarding the same issue shall not be initiated within one year after the rejection of a corresponding bill by a referendum or by the Riigikogu,"[26] the unicameral legislature authorized to amend the Constitution in collaboration with other institutions in the country.[27] In contrast, under the Greek Constitution, "revision of the Constitution is not permitted before the lapse of five years from the completion of a previous revision."[28] The Cape Verdean Constitution illustrates the fifth form of safe harbour, which authorizes amendments only five years after the adoption of the 1980 Constitution: "This Constitution may be revised, in whole or in part, by the National Assembly after five years from the date of its promulgation."[29] The Constitution does, however, create an escape-hatch authorizing an extraordinary supermajority of the National Assembly to bypass this safe harbour.[30] One of the earliest safe harbours, if not the first, appeared in the first French Constitution, which disallowed amendments to the new constitution for the first two terms of the national legislature.[31]

B. Deliberation Floors and Ceilings

This article is concerned principally with deliberation requirements. The distinction between a deliberation floor and ceiling is important to what follows, so let us review examples of each to concretize the difference. A deliberation floor establishes a minimum period of time to deliberate on an amendment

23 *Ibid*, pt V, s 116.
24 Belgium Const, tit VIII, art 197 (1994).
25 Luxembourg Const, ch. X, art 115 (1868).
26 Estonia Const, ch XV, art 168 (1992).
27 *Ibid*, ch XV, arts 161-68.
28 Greece Const, pt IV, s II, art 110(6) (1975).
29 Cape Verde Const, tit III, art 309(1) (1980).
30 *Ibid*, tit III, art 309(2).
31 French Const, tit VII, art 3 (1791).

proposal prior to a binding vote or action to ratify it, or to move the proposal forward to the next steps in the amendment process. In contrast, a deliberation ceiling establishes the maximum period of time within which to consider and vote on an amendment.

Consider the Italian Constitution. It creates a deliberation floor requiring at least three months between legislative debates on an amendment proposal: "Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting."[32] Similarly, although its deliberation floor is directed to the public, not the legislature, the South Korean Constitution requires the President to give the public a minimum amount of time to evaluate an amendment: "Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more."[33]

In contrast, the Costa Rican Constitution entrenches a deliberation ceiling. The Legislative Assembly must review the amendment proposal "three times at intervals of six days, to decide if it is admitted or not for discussion."[34] The Australian Constitution merges both a deliberation floor and ceiling into its conditions for ratifying an amendment: "The proposed law for the alteration [of the Constitution] must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives."[35]

There is a third variety of deliberation requirement: the intervening elections model. This model of constitutional change combines time with the design of representative institutions, for instance by requiring successive parliaments to consent to an amendment. The same parliament is prohibited from both proposing and ratifying a formal amendment without an intervening national election to reconstitute the parliament between each of these steps. This model is prominent in Scandinavia, where Denmark, Norway, and Sweden

32 Italy Const, tit VI, s II, art 138 (1947).
33 South Korea Const, ch X, art 129 (1948).
34 Costa Rica Const, tit XVII, art 195(2) (1949).
35 Australia Const, pt V, ch VIII, art 128 (1901).

each structure formal amendment in this way.[36] In this article, I focus only on deliberation floors and ceilings.

III. Two Models of Constitutional Consensus: Canada and the United States

Both deliberation floors and ceilings structure how constitutional actors and the public arrive at the consensus required to legitimate a constitutional amendment. Yet each design is anchored in a different perspective on the nature and form of the political agreement that legitimizes a constitutional amendment and each privileges different values in the formation of constitutional consensus. In this section, I compare two competing approaches to the entrenchment of deliberation floors and ceilings. The American model, which imposes neither a deliberation floor nor a ceiling, authorizes the inter-generational ratification of a constitutional amendment. Inter-generational ratification fragments the amendment power across time. In contrast, the Canadian model imposes both a deliberation floor and a ceiling. It therefore makes constitutional amendment conditional on intra-generational ratification and consolidates the amendment power in a defined period of time. Both models reveal complications, some more problematic than others.

A. Inter-Generational Ratification

The text of the original United States Constitution is silent on when amendment proposals must be ratified. As I discuss below, however, Congress has sometimes imposed a ratification deadline on amendment proposals, an option the Constitution leaves open by its very silence. On this point, the text of the Constitution says only that an amendment will be valid where two-thirds of Congress votes to propose one and thereafter three-quarters of the states vote to ratify it either in state legislatures or conventions.[37] By law, though not required by the constitutional text, the Archivist of the United States issues a certification when the requisite number of states have ratified an amendment.[38] Historically, the average time span from proposal to ratification has been under two years and three months for 24 of the 27 amendments to the Constitution,

36 See Denmark Const, pt X, sec 88 (1953); Norway Const, pt E, art 121 (1814); Sweden Inst of Gov, ch 8, art 16 (1974).

37 US Const art V. The convention-centric amendment process has never been successfully used. See William B Fisch, "Constitutional Referendum in the United States of America" (2006) 54:Supp Am J Comp L 485 at 490.

38 See 1 USC § 106b (1988).

but one amendment proposal took over 200 years to ratify.[39] The Constitution's silence has with good reason raised questions about how long a state may take to ratify a proposal.

On March 2, 1861, one month before the first major battle in the Civil War, the United States Congress passed an amendment proposal protecting slavery in the states. Known as the "Corwin Amendment," for Representative Thomas Corwin,[40] this amendment proposed that "[n]o amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."[41] Outgoing president James Buchanan signed the proposal,[42] newly-elected president Abraham Lincoln did not oppose it,[43] and three states ratified it.[44] However, the onset of the Civil War interrupted the ratification process.[45] The Corwin Amendment would have become the Thirteenth Amendment had it been ratified,[46] but instead the United States ultimately entrenched a different Thirteenth Amendment abolishing slavery.[47]

This sequence of events suggests a question worth asking: is the Corwin Amendment still today ratifiable?[48] The ratification of the Twenty-Seventh Amendment in 1992 — well over 200 years after Congress passed it and transmitted it to the states — suggests the answer could well be yes. The amendment states that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."[49] James Madison initially proposed the amendment in the

39 See The U.S. National Archives and Records Administration "Constitution of the United States: Amendments 11-27", *The Charters of Freedom* (2015), online: <www.archives.gov/exhibits/charters/constitution_amendments_11-27.html>.

40 Ewen Cameron Mac Veagh, "The Other Rejected Amendments" (1925) 222 The North American Rev 274 at 281.

41 US, HR Res 80, *Proposing an Amendment to the Constitution of the U.S.*, 36th Cong, 1861.

42 Rogers M Smith, "Legitimating Reconstruction: The Limits of Legalism" (1999) 108:8 Yale LJ 2039 at 2059 n 89.

43 Abraham Lincoln, First Inaugural Address (4 Mar 1861), reprinted in *The Abraham Lincoln Papers at the Library of Congress*, Washington, DC, Library of Congress, online: <memory.loc.gov/mss/mal/mal1/077/0773800/012.jpg>.

44 Douglas Linder, "What in the Constitution Cannot be Amended?" (1981) 23:2 Ariz L Rev 717 at 728.

45 Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge: Harvard University Press, 2010) at 36.

46 Alexander Tsesis, *The Thirteenth Amendment and American Freedom: A Legal History* (New York: New York University Press, 2004) at 2-3.

47 US Const, amend XIII.

48 Michael Stokes Paulsen, "A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment" (1993) 103:3 Yale LJ 677 at 701-04.

49 US Const, amend XXVII.

First Congress on June 8, 1789.[50] Congress adopted a resolution proposing the amendment in the same year, six states had ratified it by 1792, and a seventh state ratified it in 1873.[51] Yet it was not until 1978 that another state ratified the amendment, which subsequently led another 30 states to jump aboard in the intervening 14 years.[52] In 1992, Michigan became the 38th state to ratify the amendment proposal, in so doing reaching the three-fourths threshold for satisfying the ratification requirement.[53] Despite having taken over 200 years to ratify, Congress saw no constitutional infirmity with the amendment,[54] the Department of Justice issued a memorandum defending its constitutional soundness,[55] and a federal court refused to hear a challenge to it.[56]

The amendment rules in Article V do not prohibit Congress from imposing a time limit on states to ratify an amendment proposal.[57] Yet it was not until the Eighteenth Amendment that Congress first imposed a ratification deadline.[58] The proposal stated that "this article shall become inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the State by the Congress."[59] Similar language has appeared in all amendment proposals or authorizing resolutions since the Twentieth Amendment.[60] The Corwin Amendment could therefore be ratifiable by the requisite number of states today. The same is true

50 Louise Weinberg, "Political Questions and the Guarantee Clause" (1994) 65:4 U Colo L Rev 887 at 937 n 179.

51 Gideon M Hart, "The 'Original' Thirteenth Amendment: The Misunderstood Titles of Nobility Amendment" (2010) 94 Marq L Rev 311:1 at 327 n 88.

52 Richard A Primus, "When Should Original Meanings Matter?" (2008) 107:2 Mich L Rev 165 at 209 n 157.

53 David P Currie, "The Constitution in Congress: Substantive Issues in the First Congress" (1994) 61:3 U Chi L Rev 775 at 851 n 449.

54 Paul E McGreal, "There is no Such Thing as Textualism: A Case Study in Constitutional Method" (2001) 69:6 Fordham L Rev 2393 at 2431.

55 Memorandum from the Office of the Assistant Attorney General (2 November 1992) in US, US Department of Justice Office of Legal Counsel, *Opinions of the Office of Legal Counsel: Consisting of Selected Memorandum Opinions Advising the President of the United States, The Attorney General and Other Executive Officers of the Federal Government In Relation to Their Official Duties* (Washington DC: US Department of Justice, 1992) vol 16 at 102, online: <www.ncjrs.gov/pdffiles1/Digitization/141890NCJRS.pdf>.

56 See *Boehner v Anderson*, 809 F Supp 138 (D DC 1992).

57 Adam M Samaha, "Dead Hand Arguments and Constitutional Interpretation" (2008) 108:3 Colum L Rev 606 at 649.

58 Peter Suber, "Population Changes and Constitutional Amendments: Federalism Versus Democracy" (1987) 20:2 U Mich JL Reform 409 at 423-24.

59 US Const, amend XVIII, § 3.

60 Michael J Lynch, "The Other Amendments: Constitutional Amendment that Failed" (2001) 93:2 L Library J 303 at 305.

of three other amendments proposed by the Congress years ago but not yet ratified by the states.

Each of these unratified amendments has been passed by both houses of Congress, transmitted to the states, and contains no expiration date. Each apparently remains viable as a valid amendment pending ratification by the required three-quarters of states. The first proposes to change the size and number of congressional districts.[61] Proposed in 1789, it has thus far been ratified by roughly 10 states.[62] The second would strip American citizenship from anyone who accepts a foreign title of nobility, honour, or dispensation without congressional permission.[63] It was successfully proposed in 1810 by a wide margin in the Senate and the House.[64] The third proposes to grant Congress the power to regulate child labour.[65] Proposed in 1924, it has been ratified by twenty-eight states.[66] The fourth outstanding amendment is the Corwin Amendment.

These four outstanding amendment proposals were transmitted to the states in 1789, 1810, 1861, and 1926, respectively. The long interval between proposal and ratification raises the question whether an amendment without a ratification deadline nonetheless expires after a significant period of time. The answer from political practice is no: the Twenty-Seventh Amendment was ratified over 200 years after its proposal. The answer from the case law of the United States Supreme Court appears also to be no: lapse of time does not by itself negate the ratifiability of an amendment passed by Congress and transmitted to the states.[67] Whether an amendment has been ratified with sufficient contemporaneity to its proposal is a judgment for Congress to make,[68] and Congress' judgment is moreover a political question unreviewable by courts.[69] The congressional role is collateral to the larger point here, however, which is that the United States Constitution authorizes inter-generational ratification:

61 1 Pub Res 3, *Proposing an Amendment to the Constitution of the U.S.*, 1st Cong, 1 Stat 97 (1789).

62 Gabriel J Chin & Anjali Abraham, "Beyond the Supermajority: Post-Adoption Ratification of the Equality Amendments" (2008) 50:1 Ariz L Rev 25 at 29.

63 11 Pub Res 2, *Proposing an Amendment to the Constitution of the U.S.*, 11th Cong, 2 Stat 613 (1810).

64 Curt E Conklin, "The Case of the Phantom Thirteenth Amendment: A Historical and Bibliographic Nightmare" (1996) 88:1 Law Library J 121 at 123.

65 US, HRJ Res 184, *Proposing an Amendment to the Constitution of the U.S.*, 68th Cong, 1924.

66 Jol A Silversmith, "The 'Missing Thirteenth Amendment': Constitutional Nonsense and Titles of Nobility" (1999) 8 S Cal Interdisciplinary LJ 577 at 580 n 20.

67 *Coleman v Miller*, 307 US 433 (1939).

68 *Ibid* at 454.

69 *Ibid. Coleman* refined the earlier holding in *Dillon v Gloss*, 256 US 368 (1921), which held that ratification "must be within some reasonable time after the proposal." *Ibid* at 375. Nonetheless it is unclear whether the modern Court would resolve the issue in the same way.

an amendment proposal may be validly ratified by a future generation whose ratifiers may not even have been alive when it was first proposed.

B. Intra-Generational Ratification

In contrast, the general amendment procedure in the Constitution of Canada consolidates the amendment power in the hands of present political actors in a compressed period of time: it requires intra-generational ratification and indeed denies the possibility of inter-generational ratification. Here I stress the *general* amendment procedure because the *Constitution Act, 1982* entrenches five separate amendment procedures,[70] each one designated for amendments to specific provisions and principles and each increasing in difficulty according to the importance of the entrenched provision or principle to which it is assigned.[71] It is beyond the scope of this article to explain and evaluate all five amendment procedures but a short word on each is appropriate.[72]

The unilateral provincial amendment procedure authorizes provinces to amend their own constitution by simple legislative majority.[73] The unilateral federal amendment procedure, authorizes a majority in both houses of Parliament to amend Parliament's own internal constitution and matters of federal executive government.[74] The regional amendment procedure requires both houses of Parliament and the legislatures of one or more but not all provinces affected by a given amendment to agree by majority vote to the amendment.[75] The most onerous amendment rule, the unanimity procedure, requires approval resolutions from both houses of Parliament and from each provincial legislature, and it applies to amendments to the provisions and principles thought to be most important in Canada, including the monarchy, the composition of the Supreme Court, and the rules of formal amendment themselves.[76] None of these four amendment procedures entrenches a temporal limitation on proposal or ratification.

70 Parliament also possesses a narrow power of amendment outside of the *Constitution Act, 1982*. See *Constitution Act, 1867*, (UK), 30 & 31 Vict, c. 3, s 101, reprinted in RSC 1985, Appendix II, No 5.

71 See *Constitution Act, 1982*, *supra* note 14, Part V. For a theoretical perspective on the purpose of these escalating amendment thresholds, see Richard Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada" (2016) 41:1 Queen's LJ 143.

72 For a detailed analysis of Canada's formal amendment rules, see Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 Alta L Rev 85.

73 *Constitution Act, 1982*, *supra* note 14, s 45.

74 *Ibid*, s 44.

75 *Ibid*, s 43.

76 *Ibid*, s 41.

The general amendment procedure in Canada entrenches both a deliberation floor and ceiling, in contrast to the United States Constitution. This procedure requires approval from both houses of Parliament and from at least two-thirds of the provinces whose aggregate population represents at least half of Canada's total provincial population.[77] This "general" amendment procedure serves as both the default amendment procedure and a more targeted one: it must be used to amend all provisions and principles not otherwise assigned to another amendment procedure and it also applies to certain designated provisions and principles, for instance senatorial selection, power, and representation.[78] For our purposes, the key parts of the general amendment procedure are the temporal limitations it puts on ratifying an amendment:

> A proclamation shall not be issued [] before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.
>
> A proclamation shall not be issued [] after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.[79]

The first part reflects a deliberation floor and the second a deliberation ceiling. Together, they generate the rule that no amendment may become official without giving constitutional actors at least one year from the date of its proposal to consider it, nor may an amendment pass after three years from the same date. This is a very small window of time within which to authorize a material change to the Constitution of Canada. Below I discuss the consequences of this rule.

But first consider that there are both theoretical and actual reasons why this rule makes sense in the Canadian context. As a matter of theory applicable elsewhere, the rationale for the three-year limit was threefold: first, "to bring closure to an amendment process that was dragging on without ever capturing the necessary support"; second, to "ensure that a forgotten resolution supporting an amendment would not later catch a government by surprise if the requisite support was gained"; and third, "to ensure a proposal was debated at a time when the circumstances surrounding its initiation were still current."[80] As a Canada-specific matter, however, the one-year rule must be read alongside

77 *Ibid*, s 38(1).
78 *Ibid*, s 42(1).
79 *bid*, s 39.
80 Katherine Swinton, "Amending the Canadian Constitution: Lessons from Meech Lake" (1992) 42:2 UTLJ 139 at 146.

the cluster of rules allowing provinces to opt out of amendments that affect provincial powers, rights, or privileges.[81] In order to invoke this protection, a province "needs a reasonable time to decide whether or not to exercise this option, and one year does not seem unduly long to consider a change that is likely to last for generations."[82] The Constitution's formal amendment rules are therefore designed to give provinces one year to evaluate whether to proceed with ratifying the amendment or to opt out from its application.

The Constitution of Canada entrenches other amendment rules in connection with time. For example, the House or Senate or indeed any legislative assembly may rescind an earlier-passed resolution of assent to a proposed amendment at any time before the amendment is proclaimed.[83] Indeed, Newfoundland exercised this power of rescission when a change of government occurred while the Meech Lake Accord was pending before the legislative assemblies.[84] Another temporal amendment rule in Canada allows the House to overcome Senate inaction: an amendment made using the regional, general, or unanimity procedure may be made without an authorizing Senate resolution if the Senate has not adopted one within 180 days of the House of Commons adopting its own authorizing resolution and again adopting it after 180 days.[85] The rules of amendment specify that this 180-day period does not run while Parliament is prorogued or dissolved.[86]

Some have attributed the failure of the Meech Lake Accord to the three-year deliberation ceiling, which required provinces to ratify it within the specified time or the entire amendment package would expire.[87] The Meech Lake Accord sought to fulfill Quebec's requests for more powers in the aftermath of the process that led to the *Constitution Act, 1982* — a process in which Quebec

81 *Constitution Act, 1982*, *supra* note 14, ss 38(2)-(4), s 40.

82 Swinton, *supra* note 80.

83 *Constitution Act, 1982*, *supra* note 14, s 46(2).

84 James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Minister of Supply and Services Canada, 1996) at 112.

85 *Constitution Act, 1982*, *supra* note 14, s 47(1).

86 *Ibid*, s 47(2).

87 See e.g. Canada, Special Joint Committee of the Senate and House of Commons on the Process for Amending the Constitution of Canada, The Process for Amending the Constitution of Canada (Ottawa: Supply and Services Canada, 1991) at 31; Gordon Robertson, *Memoirs of a Very Civil Servant: Mackenzie King to Pierre Trudeau* (Toronto: University of Toronto Press, 2000) at 342-48; Patrick J Monahan, "After Meech Lake: An Insider's View" (The Inaugural Thomas G Feeney Memorial Lecture delivered at the University of Ottawa 13 October 1990), at 9-10, online: <www.queensu.ca/iigr/sites/webpublish.queensu.ca.iigrwww/files/files/pub/archive/reflectionpapers/Reflections5AfterMeechLake.pdf >.

had been marginalised.[88] Negotiated by the heads of government in Canada, the Meech Lake Accord was both perceived as and indeed was in fact the result of "executive federalism,"[89] a term with negative connotations for excluding the public from meaningful participation in its design and negotiation. The Accord proposed amendments to recognize Quebec as "a distinct society,"[90] to give all provincial governments the formal power to suggest senatorial nominees for appointment,[91] to grant all provinces some control over immigration, to constitutionalize the Supreme Court,[92] to mandate constitutional conferences,[93] and to grant all provinces a veto in constitutional amendments on major items concerning proportional representation, the Supreme Court, and the Senate.[94] Most of what Quebec had demanded was later offered to all provinces.

There was some doubt, however, whether the Meech Lake Accord was indeed subject to the three-year time limit in the general amendment procedure.[95] The uncertainty arose from the Meech Lake amendment package itself, parts of which on their own would trigger the general amendment procedure while others would fall under the unanimity procedure. Only the general amendment procedure requires that an amendment be ratified within three years of its initiation; the unanimity procedure does not. Yet constitutional actors proposed the Meech Lake Accord as an omnibus bill of amendments and subjected it to the most exacting requirements of both the general and unanimity procedures, requiring Parliament and each of the provinces to approve the proposal within three years. As Warren Newman argues, it may not have been constitutionally necessary to subject the entire Meech Lake Accord to the three-year requirement.[96] Constitutional actors could have split the package into two parts: one with amendments in relation to matters under the unanimity rule in Section 41, which does not impose a deliberation requirement; and

88 See Peter W Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988) at 3-4.

89 David Cameron & Richard Simeon, "Intergovernmental Relations in Canada: The Emergency of Collaborative Federalism" (2002) 32:2 Publius 49 at 52.

90 The 1987 Constitutional Accord, Ottawa, Ontario, June 3, 1987, at Schedule s 1 ("Meech Lake Accord") (not ratified).

91 *Ibid* at Schedule s 2.

92 *Ibid* at Schedule s 3.

93 *Ibid* at Schedule s 13.

94 *Ibid* at Schedule s 9.

95 Compare Gordon Robertson, "Meech Lake — The myth of the time limit" (1989) 11:3 *Choices* 1 (arguing that time limit should not apply), with RE Hawkins, "Meech Lake — The Reality of the Time Limit" (1989) 35:1 McGill LJ 196 (arguing that time limit should apply) and FL Morton, "How Not to Amend the Constitution" (1989) 12:4 Can Parliamentary Rev 9 (arguing that entire debate was flawed).

96 See Warren J Newman, "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada" (2007) 37 SCLR (2d) 383 at 400.

another with amendments in relation to matters under Section 38, which does. Nonetheless, Mary Dawson, the lead advisor to the Government of Canada on constitutional matters at the time recently explained her reasoning: "The Meech Lake Accord included some amendments that called for the general procedure and others that required unanimous approval. The draft amendments were part of one interrelated package. I advised that both the three-year limitation period and the need for unanimity would apply simultaneously."[97] Constitutional actors therefore chose, correctly or not, a ratification strategy reflecting the concept of *cumul*, which refers to the informal combination of requirements in two or more amendment procedures.[98]

Soon after its negotiation in 1987, the Meech Lake Accord seemed on its way toward ratification, with Parliament and over two-thirds of the provinces having ratified it.[99] But the Accord began to show signs of distress in the face of opposition from constitutional actors across the country.[100] As the deadline approached, with three provinces yet to ratify the amendment package, the first ministers gathered to negotiate a way toward ratification. They arrived at an agreement: in exchange for the three premiers putting the Accord to a vote before the expiration of the deadline, all premiers in turn agreed to place before their legislatures a separate resolution that would address the concerns of the three holdouts.[101] Despite these eleventh-hour efforts, two provincial legislatures failed to ratify by the deadline, leading to the defeat of the entire package.

The outcome may seem perplexing for some observers. After all, the Accord had remarkably been approved by all parties in the Parliament of Canada as well as 8 of 10 provinces representing almost 95 percent of the entire population of Canada.[102] The unraveling of the Meech Lake Accord cannot of course be

97 See Mary Dawson, "From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown" (2012) 57:4 McGill LJ 955 at 983.

98 For a discussion of *cumul*, see Jacques-Yvan Morin & José Woehrling, *"Les constitutions du Canada et du Québec – du régime français à nos jours"* t 1 (Montreal: Les Éditions Thémis, 2004) at 531.

99 See Bruce P Elman & A Anne McLellan, "Canada After Meech" (1990) 2:2 Const Forum Const 63 at 64.

100 See Michael B Stein, "Improving the Process of Constitutional Reform in Canada: Lessons from the Meech Lake and Charlottetown Constitutional Rounds" (1997) 30:2 Can J Political Science 307 at 320

101 Ronald L Watts, "Canadian Federalism in the 1990s: Once More in Question" (1991) 21:3 Publius 169 at 178.

102 See CES Franks, "The Myths and Symbols of the Constitutional Debate in Canada" (1993) Queen's University Institute of Intergovernmental Relations Reflections Paper No 11, online: <www.queensu.ca/iigr/sites/webpublish.queensu.ca.iigrwww/files/files/pub/archive/reflectionpapers/Reflection11CDFranksMythsandSymbols.pdf>.

explained by one factor alone but, as Peter Oliver observes, "as the last days of that three-year period elapsed and as two small provinces succeeded in blocking the way forward for the others, the amending formula came to be seen as more than just a procedure, but in fact part of the problem."[103]

IV. Designing Temporal Limitations

These contrasting Canadian and American experiences with constitutional amendment expose the trade-offs involved between political brinkmanship and constitutional contemporaneity when constitutional actors choose or not to associate temporal limitations to the ratification of an amendment proposal. The risk of political brinkmanship rises as a ratification deadline approaches, but the absence of a ratification deadline makes possible inter-generational ratification, which might undermine the political and moral value of contemporaneity between proposal and ratification. The question whether constitutional designers should entrench deliberation requirements does not yield a definitive answer as to the better practice in constitutional design. The best answer can come only from deep reflection on the purpose of constitutional amendment and the values most important to the formation of constitutional consensus. In either case, the choice to entrench or reject temporal limitations is not one that would be wise to recommend for universal application. The choice must instead fit the unique cultural, historical, legal, political, and social specificities of a given jurisdiction, as with all matters of constitutional design. The choice need not always be a trade-off between brinkmanship and contemporaneity; one can imagine a middle path that strikes a constructive balance between both ends. Exploring the trade-offs between brinkmanship and contemporaneity can nonetheless help inform the choice.

A. Time and Brinkmanship

The United States has encountered its own Meech Lake moment. The failure of the Equal Rights Amendment in the United States likewise demonstrates the risk of political brinkmanship when a ratification deadline approaches. In 1972, Congress adopted an amendment proposal to formally entrench gender equality. The text of the proposal transmitted to the states read as follows:

> *Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),*

103 Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999) 49:4 UTLJ 519 at 592.

> That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
>
> Article —
>
> Section 1. Equality of rights under law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.[104]

Congress attached a seven-year ratification deadline to its proposal to the states.[105] Just like the Meech Lake Accord, early days proved promising for the Equal Rights Amendment: within one week, seven states had ratified it; within one month, 14 states; and within one year, 30 states — just eight states fewer than the 38 required for ratification — had ratified the proposal.[106] Yet in subsequent years, only five additional states ratified the proposal, bringing the number to 35.[107] As the seven-year ratification deadline approached and it seemed unlikely that three more states would ratify the amendment,[108] Congress passed a resolution extending the ratification period for just over three more years:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That notwithstanding any provision of House Joint Resolution 208 of the Ninety-second Congress, second session, to the contrary, the article of amendment proposed to the States in such joint resolution shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States not later than June 30, 1982.[109]

This congressional extension attracted significant attention at the time. Scholars debated whether Congress had the authority to extend the period of ratification and if so by what margin, whether the rule of presentment

104 US, HRJ Res 208, *Proposing an Amendment to the Constitution of the U.S.*, 92nd Cong, 1972.

105 *Ibid.*

106 Orrin G Hatch, "The Equal Rights Amendment: A Critical Analysis" (1979) 2 Harv JL & Pub Pol'y 19 at 19-20.

107 *Ibid* at 21.

108 See Leo Kanowitz & Marilyn Klinger, "Can a State Rescind its Equal Rights Amendment Ratification: Who Decides and How?" (1977) 28:4 Hastings LJ 979 at 981.

109 US, HRJ Res 638, *Joint Resolution Extending the Deadline for the Ratification of the Equal Rights Amendment*, 95th Cong 1978.

required the president to sign the measure, and whether it was proper for Congress to change the deadline after it had already been set.[110] The Equal Rights Amendment ultimately failed, even with the ratification extension — although some later relied on the 200-year ratification of the Twenty-Seventh Amendment to argue that the time limit had been unconstitutional all along and that the Equal Rights Amendment remained open indefinitely for states to ratify until they achieved the three-quarters mark for ratification.[111] In the end, however, the deliberation requirements complicated the task of ratifying the amendment proposal.

There may nonetheless be good reason for constitutional designers to entrench deliberation requirements. In Canada, the one-year deliberation floor was a complement to the right of provincial legislatures to opt-out of certain amendments from whose effect the Constitution of Canada authorizes provinces to withdraw even if the requisite initiation and ratification thresholds are otherwise met.[112] The right to opt out is available for amendments that are made using the general amendment procedure and that derogate from provincial legislative powers, proprietary rights, or any other provincial rights or privileges.[113] Where a province chooses to exercise this opt-out right, the provincial legislature must properly register a timely dissent,[114] in which case it will be eligible for reasonable compensation if the amendment concerns the transfer of educational or cultural matters from provincial to federal jurisdiction.[115] The choice to opt out is a serious one. A province requires a reasonable amount of time to evaluate whether to opt out of amendments in this category, and less than one year might not be long enough.[116]

110 See Ruth Bader Ginsburg, "Ratification of the Equal Rights Amendment: A Question of Time" (1979) 57:6 Tex L Rev 919; J William Heckman Jr, "Ratification of a Constitutional Amendment: Can a State Change its Mind?" (1973) 6:1 Conn L Rev 28; Grover Rees III, "Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension" (1980) 58:5 Tex L Rev 875; "The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues", Comment, (1978) 127:2 U Pa L Rev 494.

111 See Allison L Held, Sheryl L Herndon, & Danielle M Stager, "The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States" (1997) 3 Wm & Mary J Women & L 113. However, the more persuasive view is that the Equal Rights Amendment proposal expired when the deadline — either the first or the second — passed without ratification. See Brannon P Denning & John R Vile, "Necromancing the Equal Rights Amendment" (2000) 17:3 Const Commentary 593.

112 *Constitution Act, 1982*, *supra* note 14, s 38(2)-(4), 40.

113 *Ibid*, s 38(2)-(3).

114 *Ibid*, s 38(3).

115 *Ibid*, s 40.

116 Swinton, *supra* note 80 at 146.

The three-year deliberation ceiling is not as closely connected to another amendment rule in the Constitution of Canada but it nonetheless derives from a theory of how to manage the formation of constitutional consensus. The rule was anchored in three rationales: first, to ensure a definitive end, whether rejection or entrenchment, of an amendment proposal; second, to foreclose the possibility of ghost amendments that are proposed and then languish for some time only to be revived much later to the surprise of constitutional actors; and third, to focus public awareness and political decision making on an amendment proposal in the time it is initiated.[117] Yet although the theory seems soundly rooted in good reason, there was little thought given to how these temporal limitations would apply in practice at the time of the design of the *Constitution Act, 1982*.[118]

It is worth asking whether three years is too little time to ratify an important amendment.[119] The late Richard Simeon observed that the failure of the Meech Lake Accord "was more likely a result of the brinkmanship tactics employed than of the rule itself" and, therefore, that three years is not necessarily too short.[120] But perhaps the nature of the relationship between time limits and brinkmanship is altogether different — not correlative but rather causative. Perhaps rather than understanding brinkmanship as something to which constitutional actors have recourse independently of and without instigation by time limits, we should consider that time limits may cause constitutional actors to engage in brinkmanship when their objective is either to defeat the amendment subject to the time limit or to extract concessions on the amendment itself or on other issues, related or not. On this understanding, the fragmentation of power across time gives constitutional actors an important weapon to fight an amendment proposal or to improve their bargaining position as the deadline approaches and their vote increases in value. This strategy would better explain the fate of the Meech Lake Accord and the Equal Rights Amendment. Each gave constitutional actors a roadmap to a winning strategy where their own interests were concerned: either to seek concessions on the amendment or on

117 *Ibid.*

118 See Richard Simeon, "Why did the Meech Lake Accord Fail?" in Ronald L Watts & Douglas M Brown, eds, *Canada: The State of the Federation 1990* (Kingston: Queen's University Institute of Intergovernmental Relations, 1990) 15 at 28.

119 One might also ask whether three years is too long. Following the defeat of the Meech Lake Accord, a special parliamentary committee recommended shortening the time limit to two years. See Canada, Special Joint Committee of the Senate and the House of Commons on the Process for Amending the Constitution of Canada, *The Process for Amending the Constitution of Canada* (Ottawa: Supply and Services Canada, 1991) at 30-31.

120 *Simeon*, *supra* note 118.

some other matter of consequence to them, or alternatively to hold out until time expires should their demands go unfulfilled.[121]

This risk of political brinkmanship need not dissuade constitutional designers from entrenching deliberation ceilings. Although deliberation ceilings may aggravate the possibility of amendment failure, they nonetheless offer important advantages — though whether reward outweighs risk is a judgment for constitutional designers to make with due regard to local norms. In addition to the three advantages above — ensuring a definitive end, foreclosing ghost amendments, and focusing decision-making — deliberation ceilings concentrate the formation of constitutional consensus within a defined period of time. Where amendment rules fragment power across political institutions and actors by dispersing the initiation and ratification powers, deliberation ceilings promote both contemporary and representative consensus. Ratification on these terms fosters representative consensus insofar as the ratifying actors differ in form and interest from the initiating actors. Ratification on these terms also reflects intra-generational contemporaneity in their independent judgments of the amendment, provided the deliberation ceiling directs constitutional actors to act within some narrow period of time. Contemporaneity and representativeness both reinforce the sociological legitimacy of the amendment.

B. Time and Contemporaneity

Inter-generational ratification may also itself generate sociological legitimacy. Where an amendment is ratified across generations, its entrenchment may be said to reflect the considered intertemporal judgment of the constitutional community. Inter-generational ratification is consistent with Jed Rubenfeld's thesis that "written self-government does not demand that new constitutional principles be adopted whenever a majority so wills" but rather "only when a people is prepared to make a significant *temporal* commitment to them."[122] Rubenfeld argues that our understanding of self-government should require something more than the support of "actual people of the here and now"[123] and be anchored in a less presentist notion of sovereignty. He suggests that we must instead reimagine the formation and sustainability of constitutional consensus,

121 The "height" of the deliberation ceiling is relevant. Where the ceiling is high — and for instance extends beyond electoral term limits — the incentives for constitutional actors would be different from the incentives under a lower ceiling. These differences are worth exploring in greater detail, as is the relative effect of the height of the ceiling as compared to the very presence of a ceiling, whatever its height.

122 Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven: Yale University Press, 2001) at 175.

123 *Ibid* at 11.

that it takes shape over time and that, in order to reflect the sociological legitimacy that only the people's popular will can confer, it cannot privilege the consent of the governed today over the consent of the governed over time. On this theory, constitutional actors should seek legitimacy for decisions made in the name of the people "not in governance by the present will of the governed, or in governance by the a-temporal truths posited by one or another moral philosopher, but rather in a people's living out its own self-given political and legal commitments over time — apart from or even contrary to popular will at any given moment."[124]

This view counsels pause in answering the question whether an amendment proposal should remain ratifiable for generations. Intra-generational ratification may not necessarily reflect the considered judgement of the constitutional community where the ratifying supermajority is fleeting and unsustainable, and also where the people and their representatives are pressed to action by special circumstances, such as a national emergency or crisis. In these circumstances, the supermajority approval of an important constitutional amendment may not in fact reflect stable and representative support. This situation is precisely why many national constitutions expressly prohibit constitutional actors from amending the constitution during periods of great insecurity, for instance war or siege or succession, when passions may move the people to make decisions that they would not otherwise make in non-crisis times.[125] Not even extraordinary supermajorities may withstand this critique if they are temporary and susceptible to collapsing quickly after their formation.

Inter-generational ratification may make it possible to respond to this concern, though it would not necessarily solve it.[126] Assume an amendment rule is silent on whether an amendment must be ratified within a defined period of time, as is the case with the United States Constitution. This permissive amendment rule would allow an extended ratification period not unlike the two centuries it took to ratify the Twenty-Seventh Amendment. However, it would also authorize instantaneous ratification that would not test the durability of the supermajorities that had expressed their support for the amendment. Constitutional designers must therefore be explicit in their design of amendment rules if they wish to force inter-generational ratification. They may, for instance, prohibit ratification prior to the expiration of a certain period of time,

124 *Ibid.*

125 See Part II.A, *above*.

126 It has been suggested that an effective design to combat the problem of fleeting supermajorities in constitutional democracies is the Scandinavian model of intervening election, which requires multiple ratification by successive legislatures. See Albert, *supra* note 17.

such as an extended deliberation floor. An inter-generational deliberation floor would be unusual: imagine a deliberation floor prohibiting constitutional actors from ratifying an amendment within one generation, or 20 years after its initiation. By the time the ratification deadline had expired, the people may have adopted an entirely new constitution altogether.[127]

Perhaps instead of *requiring* inter-generational ratification, constitutional designers could adopt the United States Constitution's model of *allowing* it.[128] But other rules should be entrenched alongside the open-ended amendment ratification rule — additional rules that would make it possible for both constitutional actors and the public to verify that the constitutional consensus behind an amendment has indeed remained stable and representative over time. We can verify the durability of the constitutional consensus behind a constitutional amendment by designing rules requiring constitutional actors to confirm a prior rescission or ratification where the ratification process extends across more than one generation or some other significant period. Without the power to confirm a prior rescission or ratification, we cannot *really* speak of inter-generational ratification because the successful ratification of an amendment across generations would reflect separate generations acting in isolation rather than in conversation.

The United States Constitution exposes a design flaw on this point because it does not state clear rules on whether a state has the power, while an amendment is pending, to rescind a prior ratification or to ratify an amendment that it has in the past rejected. As a consequence, an amendment ratified across generations in a regime where the constitutional text imposes no ratification deadline creates a serious risk of creating the artificial appearance of considered supermajority approval for the amendment. This constitutional design conceals the reality that there had never existed, in any single period, a durable supermajority to ratify an amendment. Sanford Levinson calls the silence of the Constitution on this point the "easiest example" of something to change in the design of Article V.[129] Indeed, the Constitution's silence on the power to rescind a prior ratification has generated significant scholarly interest in explor-

127 The average lifespan of a constitution is 19 years. See Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009) at 2.

128 Indeed, this was suggested by Clyde Wells, Premier of Newfoundland and Labrador. See Clyde Wells, "Constitutional Amendment and Constituent Assemblies" (1991) 14:3 Can Parliamentary Rev 8 at 9-10.

129 Sanford Levinson, "Designing an Amendment Process" in John Ferejohn, Jack N Rakove & Jonathan Riley, eds, *Constitutional Culture and Democratic Rule* (Cambridge: Cambridge University Press, 2001) 271 at 281.

ing whether states should have the power to change their mind on a pending amendment.[130]

To avoid uncertainty, constitutional designers should be explicit about whether ratifying bodies — state legislatures, state conventions, or indeed others — possess the right to rescind a prior amendment ratification or to ratify an amendment previously rejected before constitutional actors arrive at the ratification threshold required to entrench a constitutional amendment.[131] To illustrate, where the ratification threshold in a federalist constitution requires two-thirds of subnational states to consent to the amendment proposed by the national government, it should be clear from the text of the constitution whether and how a state may negate its prior ratification of an amendment, or do the opposite, as long as the two-thirds ratification threshold has not been met. If the objective of designing amendment rules in this way is to foster the kind of non-presentist sociological legitimacy that comes from inter-generational ratification, then it would not be enough simply to authorize subnational states to rescind or ratify a prior decision. Here it would be advisable for constitutional designers either to require subnational states to confirm or reject their prior decision if significant time has passed between the original amendment proposal and the final ratification satisfying the three-quarters threshold, or to state a presumption that the prior decision remains valid unless the subnational state choses to reverse it.

The first option would be more difficult to design and to oversee. It would require constitutional designers to designate a specific period of time after which final ratification of a pending amendment would require confirmations of prior ratifications or rejections. Identifying the right period of time may prove difficult, but constitutional actors regularly draw lines in their work, and there is no apparent reason why they should not be trusted to make this choice. The second option would be less difficult both in terms of constitutional design and political enforcement. It would require no specific designation of the period of

130 See e.g. Charles L Black Jr, "On Article I, Section 7, Clause 3 — and the Amendment of the Constitution" Correspondence, (1978) 87:4 Yale LJ 896; Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process" (1983) 97:2 Harv L Rev 386 at 421-24; Philip L Martin, "State Legislative Ratification of Federal Constitutional Amendments: An Overview" (1974) 9:2 U Rich L Rev 271; Robert M Rhodes & Michael P Mabile, "Ratification of Proposed Federal Constitutional Amendments — The States May Rescind" (1977) 45:1 Tenn L Rev 703.

131 Note here that ratifying bodies have two ways of rejecting an amendment: they may adopt a resolution expressly rejecting it or they may refuse to take action on it. In the case of inaction, it is difficult to conceptualize how a ratifying body could confirm its prior rejection of an amendment proposal unless inaction after a certain period of time were taken to mean rejection or they were required to memorialize their rejection in some verifiable way.

time for which a prior ratification or rejection remains valid and until it must be confirmed, nor would it pose challenges as to its application because there would be an understanding that the original decision on ratification remains valid until the relevant constitutional actors make an intervening decision reflecting the contrary intent, specifically to reverse a ratification or rescission.

Three other considerations in the design of temporal limitations merit some mention. First, constitutional designers may vary the duration of time for which a pending amendment remains valid according to the importance of the subject matter of the amendment. For matters of heightened importance, constitutional actors and the people could be required to deliberate for a longer period of time than they would devote to less important matters.[132] The variability of temporal limitations within the larger structure of amendment rules is not unusual, as many constitutional democracies vary the amendment thresholds according to the amendable subject matter.[133] Second, temporal limitations such as deliberation ceilings and floors should not be associated exclusively with federal states like Canada and the United States; they may be used as well in unitary states, parliamentary and presidential forms of government, republics and constitutional monarchies, and indeed all democratic states where amendment rules are taken seriously, as they should be. Third, deliberation ceilings and floors may not in fact be *deliberative*. Establishing minimum or maximum periods of time for ratifying an amendment does not on its own ensure that the choice will be informed or even debated, nor does it encourage deliberative decision-making. The manipulation of time in these ways is therefore another important feature of constitutional amendment rules that constitutional designers should consider incorporating in how they structure the requirements for constitutional change.

V. Conclusion

I have sought in this article to explain and evaluate some of the options available in the design of deliberation requirements in constitutional amendment, part of a larger category of temporal limitations that also includes safe harbours.[134] My purpose has been to diagnose, not to prescribe, in an effort to highlight some of the considerations that constitutional designers must confront in fragmenting or consolidating the constitutional amendment power.

132 Constitutional designers may also vary the method of amendment according to the importance of the amendable matter. See Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59:2 McGill LJ 225 at 247-57.

133 See Albert, *supra* note 20 at 942-46.

134 See Part II, *above*.

Amendment rules commonly fragment or consolidate powers along branches of government, political parties, geographic boundaries, federalism, ethnic differences, and linguistic divisions. Time, as I have shown, is an additional dimension along which to fragment or consolidate the amendment power. My larger purpose has been to suggest a research agenda for further inquiry into some of the questions associated with time and change.

Many new lines of inquiry present themselves. As for Canada and the United States, perhaps the distinction between inter- and intra-generational ratification maps onto the deeper divide between originalism and living constitutionalism. The implications of the unity or diffusiveness of the body of amending actors is also worth exploring for its implications in designing deliberation requirements: the more unified the constitutional actors, the more time constitutional designers could perhaps afford to build into the amendment process; in contrast, the more diffuse they are, the higher the risk of brinkmanship as the ratification deadline approaches. Relatedly, the process of constitution-making may raise an instructive parallel inasmuch as it may be profitable to compare the comparative risk and reward of imposing temporal limitations in designing and amending constitutions. Separately, legal systems and their cultural contexts may affect how time is perceived and structured, which may explain variations in the use of time in common and civil law jurisdictions. Analogous questions in other fields may also provide useful insights, namely in connection with the ratification of treaties. Interdisciplinary perspectives from political science, history, and philosophy would both complicate and perhaps clarify the analysis. There remains much to learn about the options and implications of manipulating time in the design of formal amendment rules. The ideas presented here are hopefully a useful beginning.

Legislatures as Hostages of Obstructionism: Political Constitutionalism and the Due Process of Lawmaking

*Cristina Fasone**

The normative accounts of political constitutionalism maintain that legislatures are to be preferred to courts for the enforcement of the Constitution and claim that disagreement is at the core of democratic decision-making. Although disagreement in legislatures is vital for the fulfillment of their representative function, if such disagreement is able to turn itself into unconstrained obstructionism as a routine practice, then parliamentary institutions may become hostages of their own internal opposition. Indeed, the deadlock created by parliamentary obstructionism affects the decision-making capacity of legislatures vis-à-vis the other branches of government. By relying on a comparative analysis, the article highlights the downside effect of obstructionism on the constitutional role and legitimation of legislatures. It also makes a case for a careful limitation of this practice by protecting the "due process" of lawmaking through a strict enforcement of constitutional provisions and standing orders by legislatures or, should they fail, and as an extrema ratio, by courts.

Les comptes rendus normatifs du constitutionnalisme politique soutiennent que les législatures doivent être préférées aux tribunaux pour la mise en application de la Constitution et prétendent que le désaccord est au cœur du processus décisionnel démocratique. Bien que le désaccord dans les législatures soit essentiel pour la réalisation de leur fonction représentative, si le désaccord arrive à se transformer en obstructionnisme sans contraintes dans la pratique courante, alors les institutions parlementaires pourraient devenir otages de leur propre opposition interne. En effet, l'impasse créée par l'obstructionnisme parlementaire influe sur la capacité décisionnelle des législatures par rapport aux autres branches du gouvernement. L'auteure de l'article s'appuie sur une analyse comparative afin de souligner les effets désavantageux de l'obstructionnisme sur le rôle constitutionnel et la légitimation des législatures. Elle établit aussi le bien-fondé d'une restriction prudente de cette pratique en protégeant la « due process » du processus législatif grâce à une mise en application stricte des dispositions constitutionelles et règlements des assemblées parlementaires par les législatures ou, dans le cas où elles n'y parviennent pas, et en tant qu'extrema ratio, par les cours.

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Introduction

One of the main tenets of normative theories of political constitutionalism is that the enforcement of a Constitution should not be viewed solely, or even primarily, as the task of the judiciary.[1] Rather, such enforcement is more legitimate when understood as the result of political decision-making, whereby the deliberative process reconciles disagreements through political debate.[2] Insofar as they follow from the participation of a wide range of political actors, many of them minorities, disagreements are not only inherent to any democratic legal system but also desirable.[3] Conflicts and disagreements are at the core of politics and they stand as a necessary precondition for the legitimation of lawmaking.[4]

Although disagreement in legislatures is vital for the fulfillment of their representative function, if such disagreement is able to turn itself into unconstrained obstructionism as a routine practice to pursue unconstitutional ends, then parliamentary institutions may become the victims of their own internal opposition. The deadlock created by parliamentary obstructionism affects the decision-making capacity of legislatures vis-à-vis other branches of government. The use of obstructionist techniques, like filibustering, without effective limitations, derogates from majority rule. These derogations are usually tolerated in the name of minority protection and the constitutional autonomy legislatures enjoy to set and apply their own internal rules.

Of course, distinctions should be made depending on the specific features of a political system, in particular based on the structure of the government

1 As outlined by Marco Goldoni & Christopher McCorkindale, "A Note From the Editors: The State of the Political Constitution" (2013) 14:12 German LJ, there are three waves of political constitutionalism: the first, 'functional political constitutionalism', dates back to authors like John Griffith, who considers the Constitution to be used to realize political objectives and enhance the role of conflicts in democratic decision-making. The second wave — the one with which this article engages as the relevant authors focus particularly on legislatures — is marked by a normative turn, which emphasizes the virtue of parliamentary politics and lawmaking and is endorsed by scholars like Jeremy Waldron, Richard Bellamy and Adam Tomkins. Finally, the third wave, which is more attentive to the reflexive dimension of the constitutional theory and investigates its underpinnings, pools together authors like Martin Loughlin, Grégoire Webber, and Graham Gee.

2 For example, John AG Griffith, "The Political Constitution" (1979) 42:1 Modern L Rev 1, where he emphasizes the idea of an instrumental or utilitarian use of the Constitution in relation to political objectives.

3 *Ibid* at 20.

4 See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 232ff, who describes participation as "the right of rights." On the same normative appraisal regarding political participation for the purpose of enforcing a Constitution, see also Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005) and Richard Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

and the dynamics of political parties and parliamentary groups.[5] For instance, in parliamentary systems like Canada's, where the executive branch is able to dominate parliamentary action through the support of a cohesive parliamentary majority in the House of Commons,[6] tolerating a degree of obstructionism by political minorities can be perceived as a legitimate exercise of the 'right of resistance'[7] by those minorities. By the same token, during periods of unified government in the US, the use of procedural devices by the minority party to counter an otherwise unlimited "tyranny" of the majority is vital for the appropriate functioning of checks and balances. However, the abuse of obstructive techniques in the case of divided, minority or coalition governments can become dangerous for a legislature because such abuse impairs its ability to fulfill its representative functions in lawmaking and holding the executive accountable, and might lead to political paralysis. By allowing the exploitation of veto or delay powers by either chamber, bicameralism can also become an instrument of obstruction in a legislature in which the two chambers enjoy the same or equivalent decision-making powers.

Relying on a comparative analysis, this article highlights the downside effects of obstructionism on legislatures and makes a case for a careful limitation of this political and institutional practice for the sake of protecting the constitutional role assigned to legislatures in relation to executives. It highlights that mechanisms to ensure democratic dissent can easily slide into unconstrained obstructionism, causing the powers of a legislature in the constitutional system to be severely impaired.

This article mainly focuses on the legislatures in France, Italy, and the US. The case selection is explained by the different forms of government and legislative systems of those countries, according to Hirschl's theory of the "most different case logic."[8] The aim of the article is to show that obstructive tactics pose a serious challenge to the authority of legislatures, regardless of whether the form of government is presidential (the US), semi-presidential (France), or parliamentary (Italy), and despite a variety of institutional and political features

5 As has been significantly pointed out by Daryl J Levinson & Richard H Pildes, "Separation of Parties, Not Powers" (2006) 119:8 Harv L Rev2311 the 'separation of parties' within a legislature can be much more important than the structural separation of powers when it comes to the functioning of the form of government.

6 See Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundation of Canadian Democracy* (Toronto: Irwin Law, 2005) at 310ff.

7 John Locke, "Two Treatises of Government" in Paul E Sigmund, ed, *The Selected Political Writings of John Locke,* (New York: WW Norton and Co, 2005).

8 See Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law" (2006) 53:1 Am J Comp L 125.

that favor or counter obstructionism. It argues that a stricter enforcement of constitutional rules and standing orders by Speakers in legislatures paralyzed by obstructionism is desirable. When these rules and orders are not sufficient, judicial intervention may be required. Although it poses the risk of undermining parliamentary autonomy and privileges, the involvement of courts to limit obstructionism is appropriate provided that courts comply with these standards: i) they exercise self-restraint and "passive virtues";[9] and ii) they consider constitutional adjudication in this field instrumental in the guaranteeing of procedural preconditions for democratic decision-making, including by majorities, rather than being solely devoted to the protection of minority rights.[10]

The article is set out as follows. First, it looks at the constitutional role of legislatures and the application of majority rule and minority rights in this context. Here, the article focuses on the conditions under which obstructionism can impair the ability of a legislature to fulfill its constitutional tasks. Second, the article examines concrete examples of obstructive tactics that delay legislative debate indefinitely or work to overturn the results of parliamentary debate. Third, the paper discusses the main assumptions of political constitutionalism in those accounts that argue in favor of the strengthening of the role of legislatures in constitutional democracies, and asks whether this theory effectively takes into account the problems that loose anti-obstructionist rules or their non-enforcement may create for the authority of legislatures. Fourth, it highlights the importance of a legislature effectively applying constitutional rules in countering obstructionism and the role courts can play under specific conditions. Finally, based on the comparative analysis, conclusions are drawn on the enforcement of the rules governing legislatures and on how to protect the "due process" of lawmaking, i.e., the legal requirements for parliamentary procedures that fulfill the constitutional functions of a legislature, including the balance between majority decisions and minority rights.[11]

The constitutional role of legislatures: majority rule and minority rights

Legislatures are not just arenas for public debate. Indeed, they are first and foremost constitutional bodies entitled to legislate and, hence, to decide by

9 Alexander M Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, 2nd ed (New Heaven: Yale University Press, 1986) at 111-199.

10 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard: Harvard University Press, 1980) at 73-104.

11 On the notion of due process of lawmaking, see extensively, Hans A Linde, "Due Process of Lawmaking" (1976) 55:2 Neb L Rev 197 at 240-242.

majority rule on public policies, hopefully in agreement with the executive. In other words, besides providing a forum for the exchange of views, the representative function is performed by legislatures in passing laws, approving budgets, and scrutinizing and sometimes sanctioning the executive. Legislatures cannot relinquish their decision-making role and postpone the approval of the measures needed indefinitely without violating the Constitution. To this end they must be organized in such a way as to ensure that laws are approved in due time to address the political, social, and economic concerns that have prompted their adoption. However, as democratic representative institutions, legislatures must operate on the basis of rules (rooted either in the Constitution or in the legislature's own standing orders) that enable minority groups or parties to be involved in the debate and, on some occasions, to prevent the adoption of decisions.[12]

In this regard, a distinction has to be drawn between debates and decision-making within a deliberative process in legislatures. Decisions on legislative bills or motions are normally majority decisions. The use of a higher *quorum* for adopting a decision, inclusive of minorities, should be exceptional, as with the power of minorities to obstruct decisions otherwise supported by a majority. The reason for exceptions of this kind is the need to build more robust and legitimate outputs that enjoy the widest possible consensus. Without clear limits, obstructionism can become a major concern for the legitimacy of legislatures if it makes them unable to decide and thus to satisfy the demands of representation coming from the majority of the people.

The claims of minorities can be endorsed in a legislative decision by means other than participation in a quorum. Minority groups can make their voices heard in debates that precede a final vote. Their claims can be put forward in different forms, such as: putting questions to the government, as in France, where the standing orders of the National Assembly reserve time on the agenda to questions from minority groups;[13] setting up committees of inquiry, as in Germany, where the Basic Law acknowledges the right of one quarter of the *Bundestag*'s MPs to establish such a committee;[14]or, making a larger share of time available for minority groups than majority groups to debate governmental bills, as in Italy.[15] Such mechanisms give minorities their rightful role to

12 Here the words "minority groups" and "parties" or "minorities" are used instead of "opposition" because in many countries there is not official recognition of the role of the Opposition as the main political formation after the one in government.

13 Art 48.8, Standing orders of the French National Assembly.

14 *Germany: Basic Law for the Federal Republic of Germany,*23 May 1949, art. 44.1.

15 Art 24.7 Standing orders of the Italian Chamber of Deputies.

engage in debates and influence the final result of deliberations, through the quality of the arguments advanced, legislative tactics, and inter-party negotiations. Giving minorities the power to prevent the adoption of decisions by the legislature may well produce "boomerang effects" on the institution.

Obstructionist strategies are frequently deployed by strategically manipulating the rules governing democratic legislatures. Such obstructionism often takes place in compliance with the standing orders, or the plausible interpretation thereof, but in a way that blocks the ordinary functioning of the legislature in question.

Among the factors that can turn obstructionism into a threat to the constitutional role legislatures are called to play are the presence, in particular in parliamentary systems, of coalition governments, based on a fragmented and loose alliance of parties. Small parties within the coalition can find it easier to have an influence on policy-making, and obtain visibility, by threatening to delay parliamentary debates or by introducing a large number of amendments. Likewise, minority governments can become subject to the blackmail of the parties in parliament that usually offer external support to government policies, even though not voting in favor of the government in office.

Bicameralism can also be used with a view to obstructing the work of a legislature. Bicameral systems in which both chambers enjoy the same decision making powers — in Italy, for instance — and where they show different political majorities, as in France at present, or in times of divided governments, can lead to a situation in which one chamber regularly obstructs the work of the other.[16]

Obstructionism is more problematic now for democratic legislatures than it was several decades ago. What has changed is that, under the pressure of globalization and processes of regional integration, external time constraints — in addition to those already imposed by the executive — often shape the agendas of legislatures. The inability of a legislature to make prompt decisions, given international and European obligations, can thus result in taking *de facto* lawmaking powers away from legislatures. A paradox emerges where minority groups and parties that often complain about the increasingly limited role left to legislatures in policy-making are precisely the very ones that act to maintain or even worsen this situation through obstructionism.

16 See, for instance, George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton: Princeton University Press, 2002) at 136-160.

The level of media coverage of legislatures has also substantially increased in recent decades, with the effect that minorities are led to use obstructionism as a strategic tool to garner attention for their opposition positions. This link between the use of obstructive techniques within legislatures and the need for visibility in the media can become significant, especially in countries where there are no other constitutional devices, such as an Ombudsman or the referral by parliamentary minorities of a constitutional question (*saisine parlementaire*) to a Constitutional Court,[17] available to minorities to influence decision-making.

Obstructive techniques in three democracies: The US, Italy, and France

Unconstrained debate

Perhaps the most renowned example of obstructionism in legislatures is that of filibustering in the US Senate, the chamber in which states are represented on an equal footing, with two Senators per state regardless of the size and the population (Article 1, section 2 of the Constitution). In the Senate, the standing orders (Rule XXII) allow a debate to be closed only with a super-majority of three-fifths (60) of the Senators. The text of the Constitution neither endorses nor forbids the practice of unconstrained debates.[18]

While the House of Representatives has gradually changed this rule on cloture so as to weaken its implications for the House's activities,[19] the Senate has not done so, despite the fact that Senators have criticized its enforcement since the very first years of the Senate because of the paralysis it can prompt. This is largely because the filibuster represents an extraordinarily powerful tool in the hands of individual Senators in political bargaining.[20] Moreover, filibustering is tied to and to some extent justified by the nature of this Chamber as the link

17 *Saisine parlementaire* for example, exists in France, Germany, Poland, and Spain.

18 See Barbara Sinclair, "The '60-Vote Senate:' Strategies, Process, and Outcomes" in Bruce I Oppenheimer, ed, *US Senate Exceptionalism* (Columbus, OH: The Ohio State University Press, 2002) 260.

19 The House of Representatives post-2000 is traditionally seen as a chamber dominated by the majority party, through the Rules Committee and the manipulative interpretation of standing orders to the detriment of the minority: see Thomas E. Mann & Norman J Ornstein, *The Broken Branch: How Congress Is Failing America And How To Get It Back On Track* (Oxford: Oxford University Press, 2006) at 7-15.

20 See William McKay & Charles W Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* (Oxford: Oxford University Press, 2010) 439; Sarah A Binder & Steven S Smith, *Politics or Principle? Filibustering in the United States Senate* (Washington DC: Brookings Institution, 1997) 4.

between Federation and states whereby the extension of the debate until the super-majority is reached is a form of protection of the states' interests.

From 1789 to 1917 debates in the Senate could be closed only by the unanimous consent of the Senators. Interestingly, in 1917 the choice to move away from the unanimity rule was taken upon request by President Woodrow Wilson. Because of the unanimity rule, a bill supported by the President to equip US merchant ships against attacks by German submarines during WWI could not be put to a vote (the United States entered the war five weeks after the change of the rule on filibustering). The threshold was lowered to three-fifths in 1975. According to Sarah A. Binder, the original sin was not in the rule allowing for filibustering in itself, but in the Senate's mistake in 1949 of abolishing the motion for a previous question that could be tabled by any Senator and which is still in force in the House of Representatives. If approved by simple majority, the motion for a previous question allows the House to immediately conclude debate and to vote. Without such a motion, the Senate lost the main device to counter obstructionism.[21]

All attempts to challenge the constitutionality of the Senate's filibustering rule have failed, both on the grounds of lack of standing and the prospective violation of the Chamber's autonomy to determine the rules of its own proceedings under Article I of the Constitution. The most recent case, *Common Cause v Biden*, originated from a federal lawsuit filed by the group Common Cause, several congressmen, and the potential beneficiaries of proposed legislation that could not be brought to a vote. The plaintiffs argued that filibustering is an unsustainable alteration of the ordinary majority rule, which should be presumed to apply in Congress unless otherwise provided for by the Constitution. The Supreme Court nevertheless denied *certiorari* on 3 November 2014.[22] Given the lack of judicial protection against filibustering,[23] the only tool to defeat it is a change of the precedents or the rules of the Senate. This change requires agreement of the minority, taking into account that the debate on amendments of the Senate's standing orders can be put to a cloture only by a two-thirds majority (a higher quorum than the usual three-fifths rule).

21 In the 1950s, Senator Strom Thurmond was able to filibuster the approval of the *Civil Rights Act 1957* by speaking undisturbed for 24 hours and 18 minutes, the longest filibuster in the Senate's history.

22 See US Supreme Court, *Common Cause v Biden* (3 November 2014), US14-253 (denying petition for certiorari).

23 This can also be linked to the debate over the ability of Congress to interpret the Constitution, and whether Congress needs an external authority imposing the correct constitutional interpretation from above. See Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 2000) at 6ff.

In a similar way as the problems with the US Senate, obstructionism in Italy has also directed its attack against changes to the chambers' standing orders on the ending of debates. The combined effects of the lack of rules to constrain debates together with the flow of amendments tabled, in particular by the small Italian Radical Party, led to a deadlock in the Chamber of Deputies in 1981. The reform of the standing orders of the Chamber was then made possible only by a creative interpretation of the rules regarding the amendment of the standing orders themselves by the Speaker, Nilde Iotti. MPs now cannot present their own amendments, but just "principles and criteria" to be transformed into specific amendments by the Committee on rules, should they be approved by the Floor.[24]

At the beginning of the 1990s, a new device against obstructionism in parliamentary debates was introduced — the allotment of precise quotas of time (*contingentamento dei tempi*) for parliamentary procedures. Until this change the government and the parliamentary groups supporting it had not really been able to implement their agenda. Any attempt to plan parliamentary activities was thwarted by oratorical marathons on the part of minority groups that significantly delayed the approval of bills. Since 1990, each bill has been assigned a finite amount of time available for the whole parliamentary activity, and this quota is then split between the government, the rapporteurs, and the different political groups, based on their size.

In the Chamber of Deputies, the rules on the allocation of time have remained controversial, and as a result, have been relaxed in terms of their anti-obstructive effects. While these rules are applied to the general debate, this is not always the case for the examination of and voting on articles and amendments, and the final vote.[25] Most important, by way of a precedent set by the Speaker in 1990, the pre-defined allocation of time is not enforceable to "decree-laws," which account for a significant part of the statutes finally enacted.[26]

24 Once this precedent was settled by the Speaker, another condition that allowed obstructionism to survive, the general application of secret votes on the final approval of bills, was eventually removed in 1988.

25 See Luigi Gianniti & Nicola Lupo, *Corso di diritto parlamentare*, 2nd ed (Bologna: Il Mulino, 2013) 178.

26 This temporary derogation has now become permanent to some extent — although it is not codified — as this apparently illogical exclusion has been confirmed by the Speakers so far in order to avoid a further increase in the adoption of decree-laws: a targeted objective that has not yet been achieved.

Unconstrained amending powers

Rules on amendments in the US Congress differ substantially between the House of Representatives and the Senate. In the House, which is dominated by the majority party, amendments to a bill must be strictly linked to the subject of the article to which they refer (*germaneness*) and there is a tight control on their admissibility by both the Speaker and committee chairmen.[27] By contrast, in the Senate, not only are there no limits to the number of amendments that can be tabled or to the length of the oral explanation by the presenters — filibustering on amendments is also applied in Senate committees — there are no constraints on the subject of amendments either.[28] The absence of limits also poses a problem of compliance with Article I, section 7 of the US Constitution, which states that money bills must originate in the House of Representatives. Through unrestricted amendments, the Senate can usurp this role.

Some limits on amendments have been introduced. Robert Byrd, a long-serving Senate Majority leader for the Democratic Party, succeeded in changing Senate precedents with the support of a simple majority in order to counter legislative gridlock. For example, as the Presiding Officer of the Senate he set a new precedent that allowed the Presiding Officer to rule dilatory amendments out of order. In 2013 a temporary change of the Senate's standing orders eliminated the right of the minority party to filibuster a bill provided that each party has had the opportunity to present at least two amendments to the bill.[29]

In the Italian Parliament, standing orders and institutional practice of both chambers fix precise time limits and relevancy limits to the bill under scrutiny, depending on the nature of bill. Despite these limits, the number of amendments tabled by individual MPs and committees can be huge. The high number of amendments — often in the thousands — paired with the lack of fast-track procedures, make any kind of review on the admissibility of amendments by the Speaker a weak instrument to ensure that legislative procedure is carried out in due time.

27 See Congressional Research Service, *The Amending Process in the House of Representatives*, by Christopher M Davis (Washington, DC: CRS Report for Congress, 2015) at 6ff.

28 In contrast, many states' Constitutions fix the 'single subject rule,' a requirement to confine all acts of a state legislature to a single subject. The violation of such requirement has led some state courts to invalidate legislation (and constitutional amendments). See Millard H Ruud, "No Law Shall Embrace More Than One Subject" (1958) 42 Minn L Rev 389 at 395; Martha J Dragich, "State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges" (2001) 38 Harv J on Legis 103 at 165-166.

29 See Congressional Research Service, *Changes to Senate Procedures in the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki (Washington, DC: CRS Report for Congress, 2013).

The case of decree-laws enacted by the government and to be converted into statutes within 60 days is different. A strict scrutiny of the admissibility of amendments to these acts is ensured and a fast-track procedure is followed. The Italian Senate's standing orders allow the use of the *guillotine* (*ghigliottina*) on amendments for decree-laws. If, after 30 days from the start of the examination of the decree-law, the Senate has not completed the conversion of the decree into a statute, the Speaker can put the decree to a final vote that precludes unexamined and undebated amendments. While this preferential treatment of decree-laws has led the executive to use this technique widely, as if it were the "ordinary" procedure for legislation, it has not solved the problem of the enormous number of amendments. To the contrary, with the predominance of decree-laws, MPs find it particularly important to use amendments as tools to show the electorate their engagement with parliamentary activities, even if they are eventually precluded by the *guillotine*.

What must be done with the massive flow of amendments? Since the 1990s the practice has become the approval of a maxi-amendment composed of one article and thousands of sections on which the executive asks for a confidence vote to take control of amendments. A maxi-amendment of one article bypasses the ordinary legislative procedure as well as the legislative process regarding decree-laws.[30] Although doubts have been raised about their compliance with the Constitution, the Speakers of the two Chambers have never declared maxi-amendments inadmissible. The advantage of a maxi-amendment for the executive is that it gives the government the opportunity to table an amendment that entirely replaces the content of the bill, inserting new provisions but also saving most of the amendments tabled by MPs (who then find a further incentive to table a huge number of amendments).[31] The chamber votes on the bill as if it were one single item and not article by article, unlike what Article 72 of the Italian Constitution prescribes. The confidence vote puts a "take it or leave it" alternative before the chamber. If the chamber rejects the bill (necessarily as a whole), then it forces the government to resign, and it also becomes likely — although not compulsory — that parliament is dissolved and new elections are called.

30 See Elena Griglio, "I maxi-emendamenti del governo in parlamento" (2005) 4 Quaderni costituzionali 807.

31 See governmental bill on the reform of the education system (A.S. 1934) — now Law no 107/2015 — that attracted more than 2400 amendments in the Senate on its first reading. The committee rapporteur proposed a maxi-amendment, inclusive of amendments presented by individual MPs, also from minority groups, that was finally approved on 25 June 2015 with the usual combination with a confidence vote asked by the executive to secure the approval by the majority.

The development of this practice, which is also influenced by the instability of parliamentary majorities and coalition governments in Italy, has not been countered either by a strict scrutiny on the admissibility of amendments by the Speakers or by constitutional case law.[32]

By contrast, the Speakers of the French Parliament and the *Conseil constitutionnel* ensure tighter enforcement of standing orders on the requirements for and the admissibility of amendments. An amendment in the French Parliament must be accompanied by a brief explanation, an impact regulatory analysis, and be related only to a single article (Articles 98 and 98-1 RAN; Article 48 RS). The latter provision prevents maxi-amendments. Additional articles whose content is irrelevant to the subject of the bill are also inadmissible (the so-called *cavaliers legislatifs*).

The case law of the *Conseil constitutionnel* has been largely favorable to the extension of the amendment rights of MPs as corollary of the right to initiate bills. However, from 1986 to 2001, in order to counter obstructionism during the three governments of "cohabitation,"[33] the *Conseil constitutionnel* adopted a restrictive interpretation of the right of amendment based on the doctrine of the "*limites inhérentes*": the admissibility of an amendment depends on its relevance to the subject of the bill and its significance in terms of impact on the text. The judicial construction aimed to prohibit the practice of tabling and approving amendments which reproduced the content of other normative measures, above all executive ordinances.[34] However this strict scrutiny and the doctrine of the inherent limits were abandoned in 2001.[35]

Although the requirements posed by the Constitution, the standing orders for tabling amendments, and the case law of the *Conseil constitutionnel* all discourage MPs from tabling thousands of amendments, their number remains considerable. The executive can use a variety of instruments to prevent obstructionism through amendments. The government may request a "*vote bloqué*" in the legislative process at the National Assembly or the Senate, consisting of a single vote on a bill. This is effective in containing the number of amendments since it makes it possible to skip voting on amendments and articles. The

32 See Giovanni Piccirilli, *L'emendamento nel processo di decisione parlamentare* (Padova: Cedam, 2008).

33 The three cohabitations took place in the following periods: 1986-1988, 1993-1995, 1997-2002.

34 See Cons const, 23 January 1987, *Loi portant diverses mesures d'ordre social,* (1987) Rec 13, 86-225 DC, on the so-called "Séguin amendment."

35 See Cons const, 19 June 2001, *Loi organique relative au statut des magistrats et au Conseil supérieur de la magistrature,* (2001) Rec 63, 2001-445 DC.

only amendments implicitly approved are those presented or accepted by the Executive.

The French "nuclear option" against amendments, however, is a combination of a confidence vote with the "*vote bloqué*": a sort of "*super-vote bloqué*" (Article 49, paragraph 3 of the Constitution). Once the Prime Minister declares that he wants to engage the confidence relationship with the National Assembly on the approval of a certain bill, the bill is considered automatically approved unless, within the subsequent twenty-four hours, one or more resolutions of no-confidence are tabled (subscribed to by at least one tenth of the deputies) and approved. The bill is "approved" as modified by the amendments proposed or accepted by the Executive. The constitutional reform of July 2008 has moderated the power of the Government to use this procedure by providing that it can only be used on finance bills and social security financing bills, and only once in a session on Private Members' bills. The use of this procedure is rare although it was recently applied twice by Prime Minister Manuel Valls to pass the much controversial labour reform on 10 May and 6 July 2016.[36] It has never led to the approval of a resolution of no confidence.[37]

Assumption by the Executive of Legislatures' Powers

If activities of legislatures are blocked or significantly delayed by obstructionism, what can and often does happen is that the actual power to decide is transferred from legislative assemblies to the executive. This is a trend seen in many countries and implies a significant limitation of legislatures' authority in lawmaking and oversight powers.

An example of the first kind has occurred in France with the use (and abuse) of executive ordinances (*ordonnances*) to shorten the length of the ordinary legislative procedure. The executive may adopt an ordinance, in order to implement its political programme, on matters reserved by Article 34 of the French Constitution, and by fixing a time limit in the enabling act, previously approved by the Parliament (Article 38 of the Constitution). Afterwards, the content of the ordinance has to be confirmed by a statute. In the absence of

36 *See Projet de loi relatif au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*, XIVe Législature, last modified on 15 July 2016: <https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000032291025&type=general&typeLoi=proj&legislature=14>.

37 Another interesting and recent example of the use of the "*super-vote bloqué*" to let the government pass a fundamental bill for the implementation of its political programme against more than 3000 amendments tabled is provided by the approval of the so-called "Macron Law", now *Loi n° 2015-990 pour la croissance, l'activité et l'égalité des chances économiques*, JO, 7 August 2015, 13537.

the adoption of this statute, the ordinance lapses and its content can be modified only by a subsequent statute. Therefore, the executive makes every possible effort to ensure fast confirmation by parliamentary statute. The mixed nature, both parliamentary and governmental, of the procedure for adopting these executive acts has caused an improper use of this measure. Until recently, both the authorization and the ratification of ordinances derived from an amendment to the text of a bill having a completely different content. In order to prevent the misuse of the *ordonnances*, a constitutional reform in 2008 amended Article 38 of the Constitution to permit ratification of the ordinances only by explicit statutory terms.[38]

In Italy, symmetric bicameralism and the lack of shortened or accelerated parliamentary procedures for the approval of statutes have led to an abuse of the tool of decree-laws, almost always combined in recent parliamentary practice with maxi-amendments and confidence votes. In the 1990s, the Italian Constitutional Court declared the practice of the executive of tabling decree-laws a second time before Parliament just a few days before their validity expired to be unconstitutional (so-called reiteration of decree-laws).[39] Since 2007 the Constitutional Court has started to review the existence of "a case of extraordinary necessity and urgency" that Article 77 of the Constitution imposes on the adoption of a decree-law, and on this basis has occasionally struck down statutes converting decree-laws.[40] In 2012, the Court found the evident lack of internal consistency and homogeneity of an omnibus decree-law converted into a statute by Parliament to be unconstitutional. Although the Court did not enter into the details of parliamentary procedures — such as the adoption of maxi-amendments — something it has so far excluded from its jurisdiction, it nevertheless introduced clear limits on the amendability of decree-laws and the practice followed by the executive with the agreement of the governing bodies of the parliament.[41]

Constitutional case law has thus partly compensated for the failure of Speakers to prevent the occurrence of this troublesome situation, despite their

38 Jean-Pierre Camby and Pierre Servent, *Le travail parlementaire sous la cinquième république*, 5th ed (Paris: Montchrestien, 2011) at 92-100.

39 Judgment 360/1996, Corte Costituzionale della Repubblica Italiana, Rome, 17 October 1996, Gazzetta Ufficiale, 44 (Italy).

40 Judgment 171/2007, Corte Costituzionale della Repubblica Italiana, Rome, 30 May 2007, Gazzetta Ufficiale, 21 (Italy). Judgment 128/2008, Corte Costituzionale della Repubblica Italiana, Rome, 5 July 2008, Gazzetta Ufficiale, 20 (Italy).

41 Judgment 22/2012, Corte Costituzionale della Repubblica Italiana, Rome, 22 February 2012, Gazzetta Ufficiale, 8 (Italy). Judgment 32/2014, Corte Costituzionale della Repubblica Italiana, Rome, 22 February 2014, Gazzetta Ufficiale 11 (Italy).

having the legal tools in the Constitution and in standing orders to protect parliamentary powers. For example, Article 72 of the Italian Constitution is incompatible with the practice of maxi-amendments in that it imposes the approval of a law article by article, which becomes impossible when a single article composed of thousands of sections is voted to replace the content of the whole bill. Nevertheless, Speakers have not enforced this provision.

The weak enforcement of the standing orders and constitutional provisions by Speakers, as if they were mere political guidelines, has favored an abusive stretching of parliamentary procedures, which is also the inheritance of decades of obstructionism by some minority groups. The executive has put parliamentary procedures under stress because it has not been allowed to govern and implement its political programme through legislation.[42]

In the US the abuse of obstructionist tactics has had the consequence of limiting the exercise of veto powers by the Senate, especially regarding the ratification of international treaties and, to a lesser extent, presidential appointments. Accordingly, the authority of the President and the executive have been expanded in these fields.

Indeed, when it comes to international treaties, the Senate must decide by a super majority of two-thirds (Article II, section 2 of the Constitution).[43] A series of circumstances, however, has contributed to bypassing the advice and consent of the Senate. A practice begun in WWI has almost become the rule: the greater part of international agreements signed by the US have taken the form of executive agreements under national law, which do not require the procedure under Article II of the Constitution to be followed.[44] The main instrument used by the Senate to influence the executive on international agreements yet to be negotiated are "reservations," whereby in a resolution the Senate fixes the conditions that must be fulfilled by the prospective treaty in order to be

42 This is why, for instance, the government "invented" the new (unconstitutional) tool of the reiteration of decree-laws to compel the parliament to consider those decrees. See Andrea Manzella, *Il parlamento*, 3rd ed (Bologna: Il Mulino, 2003).

43 See Lori Fisler Damrosch, "The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties" in Stefan A Riesenfeld & Frederick M Abbott, eds, *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Dordrecht: Martinus Nijhoff, 1994) 205-223 and Adrian Vermeule, "Absolute Majority Rules" (2007) 37:4 Brit J of Political Science 655.

44 See McKay & Johnson, *supra* note 20 at 67-68. On some issues, like commercial policy, the President has an obligation by law — under the *Trade Act of 1974,* 19 USC 12 (1975) — to agree with the Congress on the position to be taken towards a treaty under negotiation. See the recent case of the Trade Promotion Authority bill and the filibustering in the Senate against its approval.

concluded as an executive agreement, and thus waive the power to authorize the ratification by super majority.[45]

A similar attempt of the executive to withdraw powers from the Senate can be detected in the field of presidential appointments. The advice and consent of the Senate is required for ambassadors, members of the cabinet and Justices of the US Supreme Court, as well as "all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law (Article II, section 2)." Additional constraints have been added by the US Supreme Court in a series of cases.[46] For example, the advice and consent of the Senate must be applied to the appointment of any public official at the federal level who enjoys a significant authority under federal law, and Congress cannot delegate the veto power to an officer of the Senate or to both chambers.

While the advice and consent procedure on presidential appointments requires only a majority vote, unconstrained filibustering effectively means that a three-fifths vote is needed for cloture before the Senate votes on the appointee. The abuse of filibustering and the delay or refusal to make decisions on confirmation on the part of the Senate have been severely criticized by scholars, especially with respect to vacancies on the federal courts. A serious discussion on how to limit filibustering of appointments was launched by the Senate itself in 2010.[47]

The most serious delay with the Senate procedure occurred during the first term of the Obama presidency (2009-2013). Given the gridlock in this period, Congress itself constrained the advice and consent power of the Senate. The *Presidential Appointment Efficiency and Streamlining Act of 2011*, which entered

45 The debate on these procedures and the attempt of the President to bypass the Congress have recently resurfaced concerning the Iranian Nuclear Arms Deal, against the strong opposition of Republicans that dominates both chambers of the current 114th US Congress. See Jay Solomon, "Obama Legacy on Nuclear Arms Under Threat", *The Wall Street Journal* (14 June 2015).

46 See, for instance, US Supreme Court, *Buckley v Valeo*, 424 US 1 (1976).

47 See Sarah A Binder & Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary* (Washington D.C.: Brookings Institution Press, 2009) at 79ff. and Bruce Ackerman, *The decline and fall of the American Republic* (Harvard: Harvard University Press, 2010) at 141ff. In 2010 the Senate organised a series of hearings of experts on congressional procedures on how to reform the rule on filibustering: see US Senate, Committee on Rules and Administration, *Hearings on Examining the Filibuster*; 111th Congress, 2nd session, 22 April-29 September 2010 (Washington D.C., U.S. Government Printing Office), at 17ff.

into force on 9 October 2012, removed 163 offices from the approval of the Senate.[48]

A second step taken in November 2013, while 59 executive branch nominees and 17 judicial nominees were awaiting confirmation, was the use of the "nuclear option"[49] and the change of Senate precedents — not the standing orders — on presidential appointments by majority vote. The Senate rules on filibustering in the legislative process had been changed a few months beforehand. By slight majority (52-48), Democratic Senators succeeded in forbidding the use of the filibuster on all executive branch and judicial nominees other than to the Supreme Court.[50]

The limits of political constitutionalism and the procedural justification of judicial review: the ambiguous nature of the legislatures' rules

The threat that obstructionism may represent for legislatures poses a paradox for normative accounts of political constitutionalism. Such accounts contend that because of competitive elections and democratic decision-making, legislatures are to be preferred to courts for enforcing the rule of law and rights protection.[51] In according this central role to legislatures, political constitutionalism fails to consider that, under certain conditions, parliaments might be blocked in the exercise of their functions by the use of obstructive powers by minorities, making them unable to enforce the Constitution.

48 See Maeve P Carey, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress* (Washington D.C.: Congressional Research Service, 2012) at 9ff.

49 This denomination was first used in 2005 when, facing a deadlock in the advice and consent procedure on presidential appointments, a group of Republican senators put forward the idea of having the President of the Senate, Dick Cheney at that time, rule from the chair that filibustering on judicial appointees was unconstitutional in that it prevented the President of the United States from naming judges with the simple majority of the Senate, with which the consent was deemed to be formed (rather than the three-fifths rule provided by the Senate's standing orders). The "nuclear option" was, however, only threatened but not used on that occasion.

50 All Republican senators and three democrats opposed the use of the "nuclear option." As for recent controversy on President Obama's proposal to appoint Merrick Garland as the new Associate Justice of the Supreme Court and the Senate's refusal to consider such appointment, see, provocatively, Gregory L Diskant, "Obama Can Appoint Merrick Garland to the Supreme Court if the Senate does Nothing", *Washington Post*, 8 April 2016

51 See, for example, Richard Bellamy, "The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy" (1996) 44 Political Studies 436, Jeremy Waldron, "The Core of The Case Against Judicial Review" (2005) 115 Yale LJ1346 and, recently, Cormac Mac Amhlaigh, "Putting Political Constitutionalism in its Place" (2016) 14:1 Intl J Constitutional L 175.

For some theorists of political constitutionalism,[52] the superior authority of legislatures has its roots in their accountability to voters and in the enhancement of public debate through the confrontation between opposed factions. Legislatures are viewed as ensuring that those positions are ultimately reconciled through transparency and the involvement of the highest number of individuals. By contrast, in a court "the counter-majoritarian bias promotes privileged against unprivileged minorities, while its legalism and focus on individual cases distort public debate."[53] Normative theories of political constitutionalism also argue that the enforcement of the majority rule and the promotion of a public debate in democratic processes should be guaranteed by means of electoral reforms and strengthened parliamentary processes, in particular for the benefit of minorities, and not by rules entrenched in rigid Constitutions and enforced by judicial review.

However, what if obstructive tactics promoted by minorities prevent legislatures from fulfilling their functions and majorities from enacting their programs? Codified constitutional rules, enforced by an independent arbiter like a court, may be needed to ensure the regular functioning of a democratic system. Nevertheless, there are also historical and legal reasons, beyond the arguments put forward by political constitutionalists, that support a cautious approach by courts when the adjudication of parliamentary procedures is at stake. Indeed, the protection of parliamentary autonomy is a landmark principle in constitutional law which can be traced back to the English Bill of Rights 1689, which states that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Along these lines Rudolf von Gneist in Germany and Albert Dicey in the United Kingdom elaborated on the doctrine of the *interna corporis acta* and the notion of parliamentary sovereignty, respectively.[54] Both theories assume that the acts and the conduct adopted in parliament are immune from judicial challenge and review. Although the value and implementation of those theories have been softened in practice by developments in constitutional law, they still serve to protect legislatures from the interference of other institu-

52 In particular the normative accounts of political constitutionalism: see Marco Goldoni & Christopher McCorkindale, "Why we (still) Need a Revolution" (2013) 14:2 German LJ 2197.

53 See Bellamy, *supra* note 4. On the influence of privileged groups on the case law of courts, see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard: Harvard University Press, 2007).

54 See Rudolf von Gneist, "Soll der Richter auch über die Frage zu befinden haben, ob ein Gesetz verfassungsmäßig zu Stande gekommen?", *Gutachtenfür den vierten Deutschen Juristentag* (Berlin: Springer, 1863) at 5-6 and Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & co, Ltd, 1885).

tions so as to preserve separation of powers and democratic decision-making through parliamentary autonomy provided that such autonomy does not affect the functioning of a Constitution itself, like obstructionism may do.

A role for constitutional rules and courts

In ordinary political life the adoption of precise anti-obstructive rules in a legislature's standing orders is sufficient, provided that they are consistently enforced by its governing bodies, *in primis* the Speaker. However, what frequently happens is that, although equipped with anti-obstructive provisions, the standing orders are degraded to nothing more than political rules, subject to whatever derogation political parties and groups find convenient for their strategic purposes at a given moment. These derogations are often seconded by Speakers. In contrast, it is argued here that the rules governing the functioning of democratic legislatures should be understood as legal and binding, to be applied as long as they contribute to the fulfillment of the constitutional role held by a legislature. If obsolete and dysfunctional, they must be updated and amended without resorting to "creative" interpretations by Speakers. A formal amendment of a legislature's standing orders ensures legal certainty, transparency, and predictability of the procedures. To this end having a minimum set of rules on legislative process entrenched in the Constitution can provide an important benchmark for the development and evolution of standing orders.[55] In other words, the problem of systematic obstructionism has to be countered, first of all, by designing procedural rules in legislatures in a way that restricts the margins in which obstructionist tactics are established and tolerated. These rules must be strictly enforced by Speakers and other governing bodies of a legislature.

Nevertheless, as political parties and groups often find avenues to exploit rules to their own advantage without paying attention to the long-term institutional effects, courts should be allowed to intervene to redress unsustainable obstructive practice in legislatures as a last resort. This should be the case even where practice is formally in compliance with the standing orders, but nevertheless violates principles entrenched in the Constitution concerning the attribution of powers to the different branches of government.

55 This is the case of the standing orders of the French Parliament after the constitutional reform of 2008 that have been constantly updated as to enhance the decision-making capacity of both chambers. See French Sénat, *Résolution réformant les méthodes de travail du Sénat dans le respect du pluralisme, du droit d'amendement et de la spécificité sénatoriale, pour un Sénat plus présent, plus moderne et plus efficace*, by Gérard Larcher, Report No 100 (31 May 2015).

Although the author agrees with political constitutionalists that it is problematic for courts to command legislatures, as this encroaches upon the principle of the separation of powers and parliamentary privilege, as a last resort they should be able to adjudicate whether legislatures are violating constitutional provisions and procedures or, by omission, failing to fulfill their constitutional function. For example, if due to obstructionism, a Parliament systematically relinquishes the appointment of constitutional or supreme court judges or the adoption of the budget while an obligation exists under the Constitution — as was the case in the deadlock over the approval of the US federal budget and the subsequent government shutdown[56] — this may mean that the legislature is unable to fulfill the representative and democratic function for which it is established.

Nevertheless, courts should only have a say in how parliamentary procedures are carried out in the case of systematic infringements of the Constitution. Otherwise, giving courts the last word on the application of the "due process of lawmaking" might have remarkable downside effects on the autonomy of legislatures and the judicialisation of their procedures.[57] Hence, "Courts that insist on 'due process of lawmaking' must do so in ways that respect the underlying realities of each nation's constitutional structure" — and particularly parliamentary prerogatives — "and acknowledge the limited competence of the judiciary."[58] Some conditions can be offered under which judicial review on parliamentary procedures is legitimately fulfilled:

i) Whenever possible, courts follow self-restraint by putting forward an interpretation in conformity with the Constitution[59] or as to allow a weak form of judicial review;[60] and

ii) Judicial review is intended as an instrument to preserve the fundamental conditions for the deployment according to the Constitution of the legislative process, seen as the basic democratic procedure from which

56 See Pete V Domenici e Alice M Rivlin, "Congressional Budget Process is Broken, Drastic Makeover Needed" (27 July 2015), *Opinions* (blog), online:<http://www.brookings.edu/research/opinions/2015/07/27-congressional-budget-overhaul-rivlin-domenici>.

57 Susan R Ackerman, Stefanie Egidy & James Fowkes, *Due Process of Lawmaking: The United States, South Africa, Germany, and the European Union* (Cambridge: Cambridge University Press, 2015) at 3.

58 *Ibid.*

59 See Bickel, *supra* note 9.

60 See Marc Tushnet, "Alternative Forms of Judicial Review" (2003) 101:8 Mich L Rev 2781, at 2785 and Stephen Gardbaum, "The Case for the New Commonwealth Model of Constitutionalism" (2013) 14 German LJ 2229.

> all the others stem, and where not only minorities are to be protected but also the right of the majority to decide has to be respected.[61]

The first condition would include courts, when declaring a parliamentary statute unconstitutional, postponing the effect of their judgment, as well as issuing a warning to parliament concerning a future lack of compliance with the Constitution. Self-restraint also requires that courts only become involved by means of individual direct complaints or of referrals by the Head of State, the Speaker, or the Ombudsman targeted to detect a violation of constitutional provisions dealing with parliamentary procedures, not on their own motion. The second condition largely calls on John Hart Ely's theory of procedural judicial review, whereby courts would eschew their own policy preferences in favour of protecting the fundamental principles of the legislative process entrenched in the Constitution, including majority rule where appropriate. In many countries, these conditions are already observed. In Italy, the Constitutional Court can only be called upon with great difficulty to decide issues dealing with legislatures' internal procedures, as this encroaches upon parliamentary sovereignty (*autodichia*).[62] In Spain, where in principle courts can make decisions on those cases, they often refrain from doing so by means of the interpretation in conformity with the Constitution.[63] Also in the case of France's *Conseil constitutionnel*, a hybrid between a judicial and a political body with the direct power to intervene even while the legislative process is taking place, constitutional judgments dealing with parliamentary procedures usually uphold the validity of the parliamentary outcome.[64]

Conclusion

Are legislatures better suited than courts to protect the value of constitutional democracies, as the normative accounts of political constitutionalism contend? This article argues that such a conclusion should be checked against the actual ability of legislatures to preserve their representative and decision-making functions under constitutional law, and in particular focuses on the downside effects of obstructionism. The failure of legislatures to address the challenge of

61 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard: Harvard University Press, 1980) at 73ff.

62 See Judgment 154/1985, Corte Costituzionale della Repubblica Italiana, Rome, 06 May 1985, Gazzetta Ufficiale, 0 (Italy), and, for a gradual overcoming of *autodichia*, Judgment 120/2014, Corte Costituzionale della Repubblica Italiana, Rome, 05 May 2014, Gazzetta Ufficiale 21 (Italy).

63 See José M Morales Arroyo, *El conflict parlamentario ante el Tribunal Constitucional* (Madrid: Centro de Estudios Políticos y Constitucionales, 2008) at 109ff.

64 See the section above on unconstrained amending powers.

obstructionism properly, even when anti-obstructive rules are formally provided by standing orders, leads to questioning whether legislatures enjoy a superior authority in protecting democratic principles and procedures. If in legislatures the majority rule is systematically relinquished in favor of super-majorities or veto powers of minorities, then decision-making powers may well come to be exercised by other, more effective, institutions.

The way to cope with the challenge of obstructionism is neither leaving the task of finding solutions on a case by case basis to politics and political agreements, nor entitling courts to review legislatures' procedures on a first instance basis. Indeed, many courts refrain from deciding this kind of controversy.

What is needed instead is the adoption of a basic set of written constitutional norms defining the general framework for carrying out procedures in a legislature and designing the functions it has to perform. These norms form the starting point for the development of legislatures' standing orders that, while giving the opportunity to any political force to express its view in the debate, at the same time allows the majority to pass the measures needed to address problems of the polity.

Once these anti-obstructive rules are established in a legislature's standing orders, then they must be applied consistently as legally binding provisions. This implies that the "due process of lawmaking" in legislatures, in particular with respect to obstructionism, should be established first within legislatures and based on the observance of constitutional rules and standing orders.[65] Only as a last resort, in the event of a persistent or recurrent deadlock in the legislature that patently violates constitutional rules and cannot be overcome otherwise, should courts be allowed to intervene. Indeed, as claimed by John Hart Ely, judicial review can here be justified on procedural grounds. Beyond the substantive protection of the right of political minorities to be involved in parliamentary debates, the resorting to judicial review in *extrema ratio* can help to ensure respect for the successful completion of decision-making in a legislature.

65 With this regard the decision of the Speaker of the Italian Senate on 29 September 2015, based on Arts. 8, 55, and 97 of the standing orders, to consider as not duly received — and hence excluded for the debate and voting — the seventy-two million amendments (!) tabled on the Floor of the Senate on the Constitutional Reform Bill (A.S. 1429-B), unless they had not been already received by the Committee on Constitutional Affairs, seems to go in the right direction. The Constitutional Reform Bill, indeed, has been examined by the Senate in the third reading, after two previous approvals, by the Senate and the Chamber of Deputies, respectively. See Nicola Lupo, "Il Presidente del Senato e la riforma costituzionale: gli effetti della mancata revisione del diritto parlamentare", online: (2015) 18 *Federalismi.it* <http://www.federalismi.it/nv14/editoriale.cfm?eid=379>.

Electoral Management Bodies as a Fourth Branch of Government

*Michael Pal**

Electoral Management Bodies (EMBs) are tasked with administering elections in most democracies, yet have been the subject of relatively little scholarly attention until recently. This article focuses on one under-examined aspect of EMBs: the decision in some democracies to grant them constitutional status. While independent EMBs are now the norm, there are variations in how they are designed. Within the democracies that use independent EMBs, there is a division between those that enshrine the EMB in the constitution itself as a fourth branch of government with status similar or equivalent to the legislature, executive, and judiciary, and those that create and empower EMBs through statute. This article traces the phenomenon of EMBs as a fourth branch of government in contemporary constitutional design and investigates its implications.

Les organismes de gestion électorale (OGE) sont chargés de gérer les élections dans la plupart des démocraties et pourtant, jusqu'à récemment, ils ont fait l'objet de relativement peu d'attention érudite. Cet article traite essentiellement d'un aspect peu examiné des OGE, c.-à-d. la décision dans certaines démocraties de leur accorder une reconnaissance constitutionnelle. Bien que les OGE indépendants soient désormais la norme, il existe des variations dans la façon dont ils sont conçus. Chez les démocraties qui optent pour des OGE indépendants, il existe une division entre celles qui inscrivent l'OGE dans la constitution comme quatrième branche du gouvernement avec un statut semblable ou équivalent aux pouvoirs législatif, exécutif et judiciaire et celles qui créent et habilitent les OGE grâce à des lois. L'auteur de cet article fait l'historique du phénomène des OGE comme quatrième branche du gouvernement dans la conception constitutionnelle contemporaine et examine les implications.

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I. Introduction

Most democracies task specialized commissions, which are collectively known as Electoral Management Bodies (EMBs),[1] with responsibility for administering elections. Election administration includes interpreting and applying electoral laws, counting ballots, and running polling stations among other functions essential to democracy. The current dominant trend in democracies is to assign election administration to an independent EMB,[2] rather than leaving it within the hands of elected representatives or the bureaucrats ultimately accountable to them. Placing election administration within the ambit of EMBs instead of within the political branches reduces the risk of partisan interference in election administration.[3] Election administration through an independent and impartial EMB maximizes the probability of electoral integrity.[4]

Despite their importance in the democratic architecture, and their prevalence across democracies, EMBs have received relatively little scrutiny until recently. While independent EMBs are now the norm, there are variations in how they are designed. Within the democracies that use independent EMBs, there is a division between those that enshrine the institution in the constitution itself as a branch of government with status similar or equivalent to the legislature, executive, and judiciary, and those that create and empower EMBs through statute as regular administrative bodies. This article focuses on this under-examined aspect of election administration — the decision in some

1 Rafael Lopez-Pintor, *Electoral Management Bodies as Institutions of Governance* (New York: United Nations Development Programme, 2000); Alan Wall et al, *Electoral Management Design: The International IDEA Handbook* (Stockholm: International IDEA, 2006); Louis Massicotte, Andre Blais & Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (Toronto: University of Toronto Press, 2004) at 83-97. I exclude from this definition electoral courts, which are tasked with aspects of election administration in some democracies. Electoral boundary commissions should also be considered EMBs, though with a more limited mandate confined to the realm of redistricting than the electoral commissions that are the subject of this article.

2 Lopez-Pintor, *supra* note 1 at 25-26. 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. Canada, Australia, the United Kingdom, South Africa, Mexico, and India are notable democracies that assign election administration to an independent institution. Leading democracies where the executive still has a significant role in running elections include France, Japan, and Germany.

3 See Sarah Birch, *Electoral Malpractice* (Oxford: Oxford University Press, 2012), for the prevalence of abuses of electoral governance across multiple democracies.

4 Electoral integrity is a concept used to measure the legitimacy of democratic processes that has recently found favour among the political science community as an alternative to standards such as "free and fair" elections. See Pippa Norris, "The New Research Agenda Studying Electoral Integrity" (2013) 32:4 Electoral Studies 563, and Pippa Norris, *Why Electoral Integrity Matters* (New York: Cambridge University Press, 2014).

democracies to constitute EMBs as a fourth branch of government. It traces the phenomenon of EMBs as a fourth branch of government in contemporary constitutional design and investigates its implications.

How constitutional designers have envisioned EMBs varies among these democracies. In some, EMBs are the only entity to be granted elevated constitutional status and the sole institution comprising the fourth branch of government. In others, a multitude of bodies have been created and endowed with constitutional status, with the common denominator being their oversight of the actions of the other branches. This second scenario could be understood as fostering several new branches of government or instead a fourth one composed of many different institutions. For the purposes of this article, I focus exclusively on EMBs and use the term the "fourth branch of government" in relation to them, without intending to foreclose the existence of other similarly constituted branches of government dealing with matters of institutional oversight.

EMBs in established democracies tend to be statutory creatures, born of regular legislation that defines their existence, functions, authority, and appointment process. This model displays some vulnerabilities, as EMBs inevitably clash with the elected representatives whose political activities they regulate. Governments may be tempted to use their legislative authority to impede the work of independent EMBs or to stack them with partisan appointees. The risk of "partisan capture" by political majorities of EMBs designed on the statutory model is alive and ongoing.[5]

The danger of partisan interference has led some democracies to constitutionalize the body engaging in election administration. These democracies entrench independent EMBs in the constitution rather than enabling them through statute. This approach to constitutional design removes EMBs from direct control by transitory political majorities in the legislature, as they can no longer legislate to eliminate or neuter the election commission. Newer democracies, and those transitioning from periods of authoritarian or colonial

5 As will be discussed in the paper, even commissions with constitutional status are vulnerable to capture. Recently, hostile political actors have captured or eliminated election commissions in the Maldives and Hungary. e.g. BBC, "Entire Maldives Election Commission Sentenced" *BBC News* (9 March 2014), online: <http://www.bbc.com/news/world-asia-26508259>; Kim Lane Scheppele, "Hungary, An Election in Question, Part 3", *The New York Times* (28 February 2014) online: <http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-3/?_php=true&_type=blogs&_r=0>. 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 was imposed and "[n]ot surprisingly, all of the new members...appear to be allied with the governing party."

rule, have led this trend. India, South Africa, Mexico, Kenya, and Costa Rica are at the vanguard. The constitutions in these countries elevate EMBs to a veritable fourth branch of government, alongside the legislature, executive, and judiciary. Other notable democracies adopting this form of constitutional design include South Korea, the Maldives, Nepal, Bangladesh, Afghanistan, and several countries in Latin America. As a matter of constitutional practice, democracies of otherwise varying lineages and trajectories have adopted this model in an attempt to insulate EMBs from partisan capture and enhance electoral integrity.

At the level of theory, Bruce Ackerman has called for a "serious constitutional exploration"[6] of how a "democracy branch"[7] within the state itself could be formulated to check misuses of power by elected representatives who undermine the democratic process in order to entrench themselves. This article aims to contribute to that exploration by analyzing the strengths and weaknesses of granting EMBs constitutional status. The fourth branch model represents an evolution in democratic practice, constitutional design, and election administration that has implications for electoral integrity, but also for how we understand the separation of powers.

The benefits of constitutionalizing EMBs, and therefore insulating them from the risk of direct partisan capture, are significant. This approach protects the existence and the functioning of the election commission. The democracies that take this approach provide a model for protecting the election commission as an inextricable component of electoral integrity. An assessment of the lived experience of these democracies, however, indicates that constitutional protection for EMBs has not eliminated partisan interference, but merely channeled it in different directions.[8] While the model is an improvement from the statutory approach, the experiences of democracies where EMBs form a fourth branch of government have exposed flaws in constitutional design and, at times, the failures of courts to fully protect EMB independence and impartiality despite their constitutional status.

6 Bruce Ackerman, "The New Separation of Powers" (2000) 113:3 Harv L Rev 633 at 691.

7 *Ibid* at 716-722.

8 This is a variation on the "hydraulics" metaphor in election law: Samuel Issacharoff & Pamela S Karlan, "The Hydraulics of Campaign Finance Reform" (1999) 77:7 Tex L Rev 1705. Under the hydraulics theory, if a path is closed off to money in politics, for example, it will naturally flow elsewhere to seek a different outlet. There might be a similar phenomenon with respect to EMBs. Stronger EMBs with the ability to vigorously enforce electoral laws might create incentives for elected representatives to pass less robust laws, in the hope of diminishing the artillery available to the regulator. I thank Tim Kuhner for this point.

This article will proceed as follows. Section II discusses the statutory model of election administration and details the risk of partisan capture. The recent conflict in Canada between the federal government and Elections Canada will be investigated as a prominent example showcasing the vulnerability of EMBs under the statutory approach. Section III considers the fourth branch model, with a particular focus on India, South Africa, Kenya, Mexico, and Costa Rica, as leading examples of democracies that have enshrined the EMB in their constitutions. This section will focus on the variation among the approaches adopted by the constitutions in these democracies along three lines: 1) the EMB's authority; 2) its relationship to the other branches as defined in the constitution; and 3) the provisions regarding the structure of the EMB. Section IV assesses the experiences with election administration in these democracies. It suggests ways forward that build on the successes of the model at reducing partisan interference while improving on the weaknesses in constitutional design that have become evident. I conclude in Section V by considering the broader implications of the fourth branch model beyond election administration, namely for comparative constitutional design.

II. The statutory model of election administration

The adoption of election commissions with constitutional status is a reaction to the limits of the statutory model for election administration. The statutory model prevails in many prominent established democracies, including the United Kingdom, Australia, Canada, New Zealand, and the United States. The United Kingdom's Electoral Commission,[9] the Australian Electoral Commission,[10] and Elections Canada all possess broad mandates to administer elections and oversee political activity.[11] All three are independent and impar-

9 Navraj Singh Ghaleigh, "A Model for Party Finance Supervision? The First Decade of the UK's Election Commission" in Keith D Ewing, Joo-Cheong Tham & Jacob Rowbottom, eds, *The Funding of Political Parties* (Oxford: Hart Publishing, 2011), and Keith D Ewing, *The Cost of Democracy* (Oxford: Hart Publishing, 2007). Troublingly, the EMB in the United Kingdom in 2009 had its membership revised to include some partisan appointees. See Canada, *Comparative Assessment of Central Electoral Agencies,* by Paul G Thomas & Lorne R Gibson (Ottawa: Elections Canada, 2014) at 50-51. The 2009 amendments, however, made sure that the partisan appointees would be a minority.

10 Norm Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management* (Canberra: Australian National University Press, 2012), and Colin Hughes, "The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality" in Graeme Orr, Bryan Mercurio & George Williams, eds, *Realising Democracy: Electoral Law in Australia* (Sydney: The Federation Press, 2003).

11 Jean-Pierre Kingsley, "The Administration of Canada's Independent, Non-Partisan Approach" (2004) 3:3 Election LJ 406 and Diane R Davidson, "Enforcing Campaign Finance Laws: What Others Can Learn from Canada" (2004) 3:3 Election LJ 537.

tial EMBs that replaced election administration dominated by government departments accountable to elected representatives. The move to administration by EMBs was an initial victory for electoral integrity as those with the most to gain from electoral rules were no longer in ultimate control of them.

The United States' Federal Election Commission (FEC) follows the statutory model, but represents a variation. It has independence, but not impartiality. It operates as a distinct entity formally independent of Congress and the executive, but is staffed by an equal number of Democrat and Republican Commissioners. While superior to an EMB composed of representatives from only one political party, the FEC has been heavily criticized for its partisan make-up, limited mandate covering only campaign finance, and impotence in the face of flagrant abuses of federal election laws.[12]

The statutory model uses regular legislation to create commissions, outline their mandates, and define the appointment process. Legislation may set rules for interaction with government or political parties, and may indicate general principles (such as non-partisanship) that are to guide the decision-making of the EMB. For instance, the *Canada Elections Act*[13] brings Elections Canada into existence with the office of the Chief Electoral Officer (CEO) at its apex and establishes removal only for cause with the agreement of both houses of Parliament as well as the Governor General.[14] The Act also grants the CEO the power to "exercise general direction and supervision of the conduct of elections" and ensures that Elections Canada operates with "fairness and impartiality" in carrying out its duties.[15]

Despite its success in taking election administration away from direct control by elected representatives, a defining weakness plagues the statutory model: it fails to stamp out the partisan interference with election administration that animated the creation of independent EMBs separate from the political

12 Ackerman, *supra* note 6 at 713 says the FEC's structure "virtually guaranteed administrative failure." The current FEC Chair has gone so far as to say that, "The likelihood of the laws being enforced is slim [for the 2016 election]. I never want to give up, but I'm not under any illusions. People think the FEC is dysfunctional. It's worse than dysfunctional": Eric Lichtblau, "F.E.C. Can't Curb 2016 Election Abuse, Commission Chair Says," *New York Times* (2 May 2015) online: New York Times <www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?_r=0>. See Brooks Jackson, *Broken Promise: Why the Federal Election Commission Failed* (Ann Arbor: Priority Press Publications, 1990), and Daniel W Butrymowicz, "Loophole.com: How the FEC's Failure to Fully Regulate the Internet Undermines Campaign Finance Law" (2009) 109:7 Colum L Rev 1708.

13 *Canada Elections Act,* SC 2000 c 9.

14 *Ibid* at s 13.

15 *Ibid* at s 16 (a) and (b). The Act also provides a form of rule-making power to the EMB in s 17.

branches in the first place. If dissatisfied with a decision of an EMB, a political majority in the legislature may simply amend the commission's enabling statute. This furnishes partisan-minded governments dissatisfied with the impact of independent and impartial election administration with an ample set of options, from outright elimination of the EMB to manipulation of the rules that structure its functioning.

EMBs are vulnerable to two forms of partisan capture that are particularly relevant for the purposes of this article, though a more complete typology should be developed as part of the growing study of these institutions. The first is capture built into the very creation of the EMB. On the statutory model, the US FEC stands as emblematic of this approach. By placing partisans on the FEC, Congress guarantees that the interests of Democrats and Republicans will be taken into account. There is no representation for small political parties or independent voters. While partisan balance wherein no single political party has a majority may be an attractive way of generating buy-in for the creation of an arms-length regulator from both camps in a two-party system, it deliberately minimizes any chance of impartial election administration.

The second form of capture is partisan interference with an independent and impartial EMB. Elected officials can use the appointment process to ensure partisans staff the EMB, shorten tenures so commissioners are more responsive to political pressures, cut funding, or curtail the authority of the EMB. Governments can limit the independence or impartiality of a commission or decrease the EMB's capacity to effectively carry out its functions.

Canada's recent experience with the *Fair Elections Act*[16] (*FEA*) demonstrates the vulnerability of EMBs on the statutory model. The *FEA* dramatically altered Canadian election law on a number of fronts, particularly by imposing restrictive voter identification rules[17] that were heavily criticized.[18] Also

16 *Fair Elections Act*, SC 2014, c 12.

17 The government used the data in a report on "vouching" by Harry Neufeld to justify the elimination of the practice, which had permitted an individual to "vouch" for the identity and residence of a voter lacking the proper documents at the polling station. See Canada, *Compliance Review: Final Report and Recommendations: A Review of Compliance with Election Day Registration and Voting Process Rules,* by Harry Neufeld (Ottawa: Elections Canada, 2013) online: Elections Canada <www.elections.ca/res/cons/comp/crfr/pdf/crfr_e.pdf>. Mr Neufeld, however, publicly disputed their interpretation of his report and their conclusion. See Joan Bryden, "Author of Report Touted by Poilievre Contradicts Minister on Voter Fraud", *The Ottawa Citizen* (7 March 2014) online: Ottawa Citizen <www.ottawacitizen.com/news/Author+report+touted+Poilievre+contradicts+minister+voter/9590853/story.html>.

18 Josh Wingrove, "Scholars Denounce Conservatives' Proposed *Fair Elections Act*", *The Globe and Mail* (19 March 2014) online: The Globe and Mail <www.theglobeandmail.com/news/politics/scholars-denounce-conservative-governments-proposed-fair-elections-act/article17561354/>.

included in the *FEA* were several amendments to the *Canada Elections Act* that reshaped Elections Canada. The Conservative government of the day justified these changes as necessary to curb any unaccountable behaviour by the EMB and to ensure predictability for political participants.

Looked at as a whole, however, the *FEA* amendments appear to have weakened the EMB through changes to rules on tenure, public communication, and internal administration. The *FEA* eroded the protections provided by the CEO's lifetime appointment by replacing it with a 10 year term.[19] The CEO was banned from communicating with the public regarding anything other than technical information about where and how to vote, excepting programs for school children.[20] The CEO and Elections Canada were therefore prevented from conducting voter engagement campaigns among low turnout groups, such as youth of voting age. Despite these concerns, turnout was up by 7% overall in the 2015 federal election and even increased among youth, whom Elections Canada had targeted with a pilot project for easier access to voting on campuses.[21] The *FEA* expanded the role for political parties in election administration by formalizing a broader role for an Advisory Committee of Political Parties to the EMB.[22]

The *FEA* also notably ended the CEO's authority to appoint the Commissioner of Elections Canada. The Commissioner, who is in charge of investigating if candidates and parties have violated the *Elections Act*, will now be appointed by and report to the Director of Public Prosecutions (DPP). The DPP is formally independent from government, but reports directly to a cabinet Minister and is selected by the executive, rather than by the House of Commons as is the CEO.[23] The rationale underlying this move appears to have been to ensure that the investigative arm of the regulator remains distinct from

19 This change is applicable to future appointees, not the current office holder, Marc Mayrand, see *Canada Elections Act, supra* note 13 at s 13. The previous CEO, Jean-Pierre Kingsley, had been in office from 1990-2006.

20 *Ibid* at s 18 and s 17.1. The CEO took the view in the 2015 election that his powers were not curtailed by the amendments.

21 See Kathleen Harris, "Voter Turnout Spikes After Long, Unpredictable Campaign", *CBC News* (20 October 2015) online: CBC News <www.cbc.ca/news/politics/canada-election-2015-voting-polls-turnout-1.3278838>. See also Allison Jane Smith, "Youth Aren't Apathetic, and StatsCan Has the Proof", *The Ottawa Citizen* (28 February 2016) online: Ottawa Citizen <http://ottawacitizen.com/opinion/columnists/smith-youth-arent-apathetic-and-statscan-has-the-proof?utm_content=buffer25264&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer>.

22 *Canada Elections Act, supra* note 13 at s 16.2(2), 21.1(1). The stated goal of this body was to ensure parties had a venue to express their concerns to Elections Canada and to receive opinions from the regulator that they could use to plan their operations.

23 *Director of Public Prosecutions Act*, SC 2006, c 9, s 121; *Canada Elections Act, supra* note 13 at s 13(1).

those who administer elections. There is merit in the abstract to this view. The concrete impact, however, is a risk of greater political interference in investigations of violations of election laws. In addition to these changes to the structure of Elections Canada, for the first time, an aspect of election administration was carved out from Elections Canada's mandate. Elections Canada's powers to monitor and regulate automated phone calls (termed "robocalls"), which are increasingly being used by political parties in Canada, was granted to another agency.[24]

Whatever the motivations behind the changes or the policy rationales on offer, their cumulative effect was to weaken the office of the CEO and the capacity of Elections Canada to effectively oversee compliance with election laws. The plenary power of Parliament to amend legislation gives any government all the authority it needs to alter election administration. Legislative majorities of all political stripes will have incentives to create more favourable rules of the electoral game that give them a leg up on their competitors. That partisan interference with elections plagues even established democracies such as Canada, let alone transitional democracies, is an underlying flaw of the statutory model. Partisan excesses may be tempered within parliamentary systems by minority or coalition governments, or in congressional systems by divided government. Absent these specific conditions, partisan capture of EMBs designed on the statutory by political majorities is a live risk. By contrast, other democracies have recognized this vulnerability and moved certain decisions about election administration out of the scope of legislative discretion by establishing EMBs in their constitutions. I turn now to consider this alternative to the statutory model.[25]

24 There were vote-suppressing robocalls in the 2011 election. See *McEwing v Canada (Attorney General)*, 2013 FC 535 (where the results were upheld in several ridings despite the robocalls because the outcome was not affected). A Conservative Party operative, Michael Sona, was sentenced to jail for electoral fraud in the riding of Guelph for misleading robocalls: Michael Oliveira, "Tory Staffer Sentenced to Nine Months in Robocall Scandal", *The Globe and Mail* (19 November 2014) online: The Globe and Mail <www.theglobeandmail.com/news/politics/michael-sona-convicted-in-robocalls-voter-fraud-scandal-faces-sentencing-today/article21646553/>. As of the date of writing, there were no claims of voter suppression in the 2015 federal election.

25 I leave for other work consideration of whether courts in countries with the statutory model could read constitutional protection for an election commission into guarantees of democratic rights. The right to vote or to representative government, or perhaps even the freedom of political expression, could all arguably be textual anchors. The basic argument would be that without independent and impartial election administration carried out by an EMB, democratic rights established in constitutional texts are illusory, and so constutional protection should be on offer. If recognized, such a right could potentially have prevented the *FEA*'s interference with Elections Canada, for example.

III. The fourth branch model

Fourth branch democracies respond to the weaknesses of the statutory model by protecting EMBs in their constitutions. They aim to provide a constitutional status for the institutions conducting election administration in order to insulate them from interference by political majorities. In doing so, they move beyond the traditional understanding of three branches in the separation of powers through the creation of an additional foundational institution of government. It is true that the *functions* of the EMB may not be fully distinct from those exercised by the other branches.[26] EMBs may serve a quasi-judicial function by settling disputed elections, a quasi-executive role in rule-making and applying statutes, and possess quasi-legislative powers to set rules around administration. Despite some overlap in functions among the EMB, legislature, executive, and judiciary, in the fourth branch model the EMB is conceived of as *institutionally* distinct. The *subject-matter* of its authority is also separate. The model carves out the election administration functions previously carried out by other actors within the state and assigns them to an autonomous body not directly accountable to any of the other branches.

The creation of additional branches of government can be justified by the failures of the traditional tripartite separation of powers. Bruce Ackerman argues that, given the reach of the modern administrative state, constitutional design needs to break free of envisioning government as composed of only three branches.[27] He asserts that the classic separation of powers is incapable of checking the daily exercise of political power by elected representatives and bureaucracies.[28] This failure, Ackerman claims, means that additional branches are necessary, and must be imbued with constitutional status and protection, so as to effectively check misuses of political power.[29] As a result, "a modern con-

26 I thank Mark Walters for this point.

27 Ackerman, *supra* note 6 makes this argument in the context of comparison between the American Presidential model and the constrained Parliamentarianism he finds in descendants of Westminster democracies. I take no position in the debate about Presidentialism versus Parliamentarianism, constrained or otherwise. For that debate, see Cindy Skach, "The 'Newest' Separation of Power: Semi-Presidentialism" (2007) 5:1 Intl J Constitutional L 93.

28 A related argument for the "self-restraining" state has positioned EMBs alongside courts, central banks, and anti-corruption agencies as elements necessary to check political power. See Andreas Schedler, Larry J Diamond, & Marc F Plattner, eds, *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, CO: Lynne Rienner Publishers, 1999) at 75-145, including specifically on EMBs, Robert A Pastor, "A Brief History of Electoral Administration" at 75-83.

29 There has been a larger debate about whether the administrative state as a whole should be understood as a fourth branch. In Canada, see Lorne Sossin, "The Ambivalence of Administrative Justice in Canada: Does Canada Need a Fourth Branch?" (2009) 46 SCLR 51 and "The Puzzle of

stitution . . . should be designed to insulate certain fundamental bureaucratic structures from *ad hoc* intervention by politicians."[30] As part of this transformation, Ackerman advocates for a "democracy branch" to conduct oversight of the rules structuring politics and electoral competition, because, "[h]aving won an election, the lawmaking majority might notoriously seek to insulate itself from further electoral tests — by suspending elections, restricting free speech, or fiddling with electoral laws."[31]

Ackerman reframes the failures of the democratic process identified by J.H. Ely.[32] Ely posited the need for courts to act to ensure democratic accountability, given the risk of attempts by political majorities to entrench themselves beyond the reach of the electorate.[33] Ackerman goes further than Ely in terms of institutional response, as he identifies the need for bodies beyond courts to remedy the predictable failings of the political branches.[34] Ackerman points to the "common use of independent, but non-judicial, agencies throughout the world to supervise crucial elements of the electoral process" as a welcome development in responding to the problem of entrenchment identified by Ely.[35] Ackerman conceives of EMBs as an integral part of the democracy branch and calls for the FEC to be constitutionalized in the United States,[36] on the model of the Indian Constitution's entrenchment of the Election Commission of India.[37] In this formulation, EMBs would be elevated above mere statutorily-created administrative bodies, to reside in similar status to the legislature, executive, and judiciary as fundamental institutions protected by the constitution.

Many constitutions take up Ackerman's call to action. Constitutional designers have explicitly created new institutions, including some that amount to a democracy branch to oversee elected representatives. These constitutions emphasize that independent election administration is fundamental to democracy as a guarantee that elected representatives will actually be accountable to the people. This reduces the "democratic risk" of democratic transitions, to use

Independence for Administrative Bodies" (2009-10) 26 NJCL 1 at 8; and Katrina Miriam Wyman, "The Independence of Tribunals in an Era of Ever Expanding Judicial Independence" (2001) 14 Can J Admin L & Prac 61 at 100.

30 Ackerman, *supra* note 6 at 689 (emphasis omitted).

31 *Ibid* at 712.

32 *Ibid* at 716.

33 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980).

34 Ackerman, *supra* note 6 at 716-722.

35 *Ibid* at 713.

36 *Ibid* at 714.

37 *Ibid* at 715-716.

Samuel Issacharoff's evocative phrasing — that elected governments will end or curtail the democratic experiment by entrenching themselves beyond the reach of the people.[38] Placing EMBs in the constitution ensures they cannot easily be tampered with, as constitutional amendment rules generally require significant agreement beyond a simple majority in the legislature. While formal amendment may be easier in some democracies than others,[39] and constitutions may even be mere "parchment barriers"[40] to the raw exercise of self-interested political power, constitutional status can provide significant protection. Insulation from regular political majorities means that the bar is raised much higher for elected representatives to eliminate the election commission or to alter the portions of its mandate or structure outlined in the constitution.

The fourth branch model notably recognizes that institutions are required to breathe life into rights, including democratic ones.[41] It moves beyond protecting certain electoral practices to guaranteeing a particular institutional set-up for election administration. Rights to democratic participation guaranteed in bills of rights — such as the rights to vote, stand as a candidate, or engage in political speech — are insufficient on their own in this model. These constitutions elevate election administration and the particular institution tasked with it up the constitutional hierarchy, on the understanding that EMBs are necessary to achieve electoral integrity in contemporary democracies. They reflect broader trends in constitutional design to emphasize not only rights, but also institutions. Recent constitution making has prioritized the institutional features of the democratic architecture, rather than bills of rights alone.[42]

Although the timeline is far from a clean one, the move to a fourth branch model can be seen as part of the historical evolution of constitutions to protect

38 Samuel Issacharoff, "The Democratic Risk to Democratic Transitions" (2014) 5 Constitutional Court Rev 1; see also "Fragile Democracies" (2007) 120:6 Harv L Rev 1407, and *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015) for further elaboration of his argument. Issacharoff points to the Mexican EMB's famous role in deciding the disputed election of 2007 as an exemplar of the power of independent election administration to fuel democratic entrenchment: *ibid* at 208.

39 Tom Ginsburg and James Melton, "Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty" (2014) University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 682, online: <http://ssrn.com/abstract=2432520>.

40 For a recent take on the meaning of "parchment barriers", see Darryl Levinson, "Parchment and Politics: The Positive Puzzle of Constitutional Commitment" (2011) 124:3 Harv L Rev 657.

41 See Robert A Pastor, "The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research" (1999) 6:4 Democratization 1.

42 Sujit Choudhry, "After the Rights Revolution: Bills of Rights in the Postconflict State" (2010) 6 Annual Rev L & Social Science 301.

democracy in ever greater detail. Early democratic constitutions, such as that of the United States, had no explicit protection for right to vote but did view political expression as worthy of protection. Later versions such as Canada's 1982 amendments embraced the right to vote, which is now a generally accepted component of bills of rights. Newer constitutions tend to protect not just political expression and voting, but also the rules surrounding elections and the election commission tasked with enforcing or applying them. South Africa (1996) is a main example here. Early adopters, such as India (1950) and some Latin American democracies, prevent any linear trajectory of the evolving notion of how democracy should be constitutionally protected. Yet it is clear that there is an evolving "best practice" for constitutional design and election administration reflecting in broad strokes Ackerman's call for a "democracy branch" in addition to the usual tripartite separation of powers.

I turn now to analyzing the content of the constitutions adopting the fourth branch model. The main relevant criteria for evaluating the effectiveness of EMBs and degree of insulation from partisan interference are the authority granted to the EMB, the relationship established between the branches, and the rules structuring the EMB such as those around appointment and tenure.

i) Authority

There is a spectrum of ways in which different constitutions characterize the authority of the EMB.[43] Some constitutions grant general responsibility over elections to the EMB and leave the specific content of that authority undefined in the constitution; the blanks are left to be filled in by the practice of the commission and by legislation. Other constitutions provide more detail on the particular activities the EMB must engage in to fulfill its mandate. This second approach has the consequence of also clarifying which aspects of election administration are beyond the reach of regular legislation.

One of the templates here has been the 1950 Constitution of India. Article 324(1) assigns the Electoral Commission of India (ECI) the "superintendence, direction and control" of elections. This language is echoed in other

43 They also vary with regard to the jurisdictions and types of elections they oversee. India for example grants its commission authority over parliamentary, presidential, and municipal elections (India, Const, ch II, Part XV, art 324 (1949) [*Constitution of India*]). South Africa's EMB has responsibility for national, provincial, and municipal elections (Republic of South Africa, Const, ch IX, art 190(1)(a) (1997) [*Constitution of South Africa*]). Contrast this approach with that in Canada, and Australia, where the federal EMB has responsibility only for federal elections, with state/provincial or municipal authorities in charge of sub-national elections.

constitutions, including for example in Costa Rica[44] and Afghanistan.[45] South Africa adopts different but similarly broad language; it directs its Electoral Commission to "manage" elections and to ensure they are "free and fair."[46] Political actors in these democracies cannot eliminate the EMB without passing a constitutional amendment. There remains significant scope for legislative action on election law and administration, however, as elected representatives can still dictate the rules that the EMB must apply, within the limits set by the guarantee of democratic rights in their constitutions. Under the Indian and South African approaches, the legal specifics of the general language stand to be determined, particularly by courts, in disputes about the boundary line between authority reserved for the EMB and that remaining with the legislature.

On the other end of the spectrum is Kenya. Kenya's 2010 Constitution was drafted after disputes involving the partisan capture of its election commission. It establishes an Independent Electoral and Boundaries Commission[47] and then delineates specific sets of responsibilities, including over voter registration, electoral boundary delimitation, candidate nomination and registration, money in politics, legislative compliance, voter education, election monitoring, and dispute resolution.[48] Kenya exemplifies an approach wherein legislative authority over election administration is curtailed as explicitly and directly as possible.

Mexico's Constitution represents a hybrid between generality and specificity on the authority of the EMB. Its Constitution sets out broad authority for its election commission, but leaves the content of that power largely unspecified, to be filled in by the EMB's practice and by legislation. The Constitution, however, dictates that the Federal Electoral Institute (FEI) has the power to

44 Republic of Costa Rica, Const, art 99 (1949) [*Constitution of Costa Rica*] exclusively grants the "organization, direction and supervision" of elections to the Supreme Electoral Tribunal. Republic of Korea, Const, ch VII, art 114 (1987) establishes the National Election Commission "for the purpose of fair management of elections and national referenda, and dealing with administrative affairs concerning political parties."

45 Afghanistan, Const, ch XI, art 156 (2004) creates an Independent Elections Commission to "administer and supervise every kind of elections." Article 156, however, is listed under "Miscellaneous Provisions," which is very different for example than the central status of EMBs in the constitutional text of many other democracies. Article 156 says nothing else about the Commission.

46 *Constitution of South Africa, supra* note 43, art 190(1)(b). Republic of Fiji, Const, ch III, part C, art 75 (2013) also applies the "free and fair" language with regard to the Fiji Elections Office.

47 Kenya, Const, ch VII, part II, art 88(1) (2010) [*Constitution of Kenya*].

48 *Ibid*, art 88(4). This approach follows that in Articles 42 and 42A of the previous version of the *Constitution of Kenya* that had been in place from Independence in 1963 until the promulgation of the current *Constitution* in 2010. These predecessor sections required the Election Commission to engage in redistricting every 8-10 years, register voters and maintain a registry, administer presidential, parliamentary, and local elections, promote free and fair elections as well as voter education, and to fulfill other duties as prescribed by Parliament.

oversee in particular campaign finance, including the spending of political parties, and the allocation of broadcasting time to parties. This constitutional language reflects particularly sensitive areas of electoral regulation within Mexican politics.[49]

Placing the EMB in the constitution should be seen as a first step toward reducing partisan interference with election administration. The fourth branch model prevents a hostile government from eliminating the EMB. However, much still turns on how courts interpret the separation of powers between the EMB and the elected branches and the relationship between the EMB and those it regulates. To the extent that the details of the EMB's role are left to the elected branches by the constitution, there is still ample room for partisan interference. The Indian model of assigning general responsibility, but providing no detail, does not necessarily prevent a government cutting away aspects of an EMB's jurisdiction. A government could choose to take away the EMBs authority to oversee campaign finance through regular legislation, for example, if constitutional designers have not explicitly carved that area out of the legislature's purview.

The more detailed approach characterizing Kenya's constitutional provisions is also not without its risks. Where a constitution establishes the specific responsibility of the EMB, its drafters are unlikely to have anticipated all areas of election administration that deserve protection, given the evolution of political practices and citizens' expectations. Take rules on voter identification, for example. Voter identification laws have recently proven controversial and the site of robust partisan contestation in many democracies, as with the *Fair Elections Act* in Canada, but also in the United States, India, and South Africa. Allegations have been made that these rules have been deliberately put in place to disenfranchise specific groups of voters.[50] Standards on voter identification are a natural candidate for inclusion in a list of responsibilities specifically given to an EMB by a constitution. As recently as a decade ago, however, such rules were unlikely to have been considered by drafters in new democracies as being of sufficient importance to include them in the constitution itself.

49 The Maldives also reflects a hybrid approach. Republic of Maldives, Const, ch VII, art 170 (a) (2008) *[Constitution of Maldives]* states that the Elections Commissions must "conduct, manage, supervise, and facilitate all elections" and to ensure elections are conducted "freely and fairly." Sub-sections (b)-(h), however, then extensively outline specific tasks such as maintenance of electoral rolls and educational initiatives.

50 In the United States, see the decision in Wisconsin of *Frank v Walker,* 769 F 3d 494 (7th Cir 2014).

ii) Relationship to the other branches

In democracies that elevate EMBs to a higher status, an important issue to be resolved is the relationship between a constitutionally entrenched election commission and the legislature, executive, and judiciary. Constitutional designers have chosen to address this question by introducing rules to establish either the hierarchy, or lack thereof, in the relations between the branches. One constant is that fourth branch constitutions typically enshrine the principle of independence for election commissions.[51] The concept of independence implies that an institution has both freedom from interference and freedom to act within its sphere of authority.[52] Independence can also be assessed from a "reasonable person" standard, by asking "whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features."[53] The EMB is frequently positioned as independent from the political branches and, sometimes, even the judiciary. Some of the rules structuring the relationships between the four branches specifically bar political interference in the workings of the EMB and may go so far as to impose positive obligations on the legislature and executive to assist the fourth branch in its duties. Normal functions of the judiciary, such as resolving electorally related disputes, are at times also carved out and placed within the purview of the EMBs.

Costa Rica's Constitution is notable for not just explicitly creating a fourth branch, but deliberately establishing its EMB as on par with the other branches.[54] Article 9 of the Constitution creates the Cost Rican Republic as "popu-

51 *Constitution of Costa Rica, supra* note 44, art 99; *Constitution of South Africa, supra* note 43, art 181(2); People's Republic of Bangladesh, Const, part VII, art 118(4) (2011)[*Constitution of Bangladesh*]; *Constitution of Maldives, supra* note 49, art 167; United Mexican States, Const, ch II, art 41(V) (1917) [*Constitution of Mexico*]. The Mexican constitutional provision for example states that the FEI must carry out its work according to the principles of "certainty, legality, independence, impartiality and objectivity."

52 For an operationalization of independence, see Wall, *supra* note 1 at 9 and Norm Kelly, *supra* note 10 at 32. The Venice Commission (European Commission for Democracy Through Law) of the Council of Europe also helpfully details factors that contribute to independence: Council of Europe, Venice Commission, 87th Plenary Session, *Compilation on the Ombudsman Institution,* Documents, CDL 079 (2011), online: Council of Europe <http://www.venice.coe.int/webforms/documents/CDL%282011%29079-e.aspx>. There is an analogy to be made between the independence of EMBs and that of the judiciary that I do not have space to elaborate upon, but which is likely to be a fruitful area for further investigation.

53 *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa,* 2015 (2) SA 1 (CC) (2014) at para 31, [2014] ZACC 32 [*Helen Suzman Foundation*]. The case involved allegations of interference by the South African government with the supposedly independent prosecutorial services. The Constitutional Court outlined a variety of indicia of independence for arms-length institutions, including: finances, oversight by the political branches, coordination with the executive, appointment, tenure, removal, and jurisdiction.

54 *Constitution of Costa Rica, supra* note 44, arts 9, 99-104.

lar, representative, participatory, alternative and responsible," with sovereignty embodied in the people and institutionalized through the three main branches of government.[55] Article 9(3) creates the Supreme Electoral Tribunal "with the rank and independence of the Government Branches." Article 101 gives members of the Supreme Electoral Tribunal the same "immunities and privileges" as the other branches. Notably, the election administrator is given powers upon which the political branches cannot intrude. The political branches must consult with the EMB in order to amend electoral laws and, where the Tribunal has objected, can only pass bills with a 2/3 legislative super-majority. Within 6 months of an election, if the EMB disagrees with a proposed amendment, the Constitution bars its enactment even if there is a legislative super-majority. The Costa Rican body conducting election administration rests on equal footing with the other branches.

Chapter 9 of the South African Constitution creates a group of institutions to serve functions including but not limited to election administration that together constitute a fourth branch of government. These institutions are designed to protect constitutional democracy.[56] Included are the Electoral Commission, the Public Prosecutor, Human Rights Commission, Commission for Gender Equality, the Auditor-General, and the Broadcasting Authority.[57] Chapter 9 is premised on a view of the EMB as one of among several institutions necessary to achieve Ackerman's goal of checking abuses of power by the state within the state itself.[58]

These institutions buttress the rights guaranteed by the South African Bill of Rights.[59] The Electoral Commission in particular operates in conjunction with the suite of entrenched democratic rights, including the right to partici-

55 *Ibid*, art 9(1).

56 *Constitution of South Africa, supra* note 43, art 181.

57 The status of the Commission is elaborated upon in *ibid,* arts 190-191. On the independence of Chapter 9 institutions generally, see Pierre Vos, "Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy" in Danwood Chirwa & Lia Nijzink, eds, *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (Tokyo: United Nations University Press, 2011) 160, and K Govender, "The Reappraisal and Restructuring of Chapter 9 Institutions" (2007) 22:1 South African Public L 190.

58 Independent officers of Parliament have also been the subject of analysis as a fourth branch in the Canadian context: Jeffrey Graham Bell, "Agents of Parliament: A New Branch of Government?" (2006) 29:1 Can Parliamentary Rev 13 at 14. There is a credible argument that these are integral parts of what Ackerman terms the "integrity branch" at 694. Though not concerned with election administration, at a high level of abstraction all officers of Parliament serve the same role as EMBs: checking political actors who have gained power over the state.

59 The Venice Commission, *supra* note 52, recommends constitutional status for Ombudspeople and Human Rights Defenders, which can be understood as offices that monitor the integrity and responsiveness of the state.

pate in a political party,[60] to free, fair, and regular elections,[61] to vote and to stand for public office,[62] freedom of expression,[63] and equality.[64] South Africa's constitutional designers explicitly sought to create new institutions, in recognition that rights alone were insufficient without the institutional apparatus to give them meaning in the face of intransigence by elected representatives.

The South African Constitution also reflects the assumption that constitutional protection for these new bodies is required on terms similar to those of the political branches themselves. Section 181 therefore sets out guiding principles for these institutions that prevent capture by elected representatives or the misuse of their authority. The fourth branch is "independent", "must be impartial", and its institutions are to exercise their authority "without fear, favour or prejudice."[65]

The Constitution remarkably invokes a positive obligation on elected representatives to aid the fourth branch in its mission: "Other organs of states, through legislative and other measures, must assist and protect [the fourth branch bodies] to ensure the independence, impartiality, dignity and effectiveness of these institutions."[66] Bangladesh follows the South African model, as its Constitution places a "duty [on] all executive authorities to assist the Election Commission in the discharge of its functions."[67] South Africa's Constitution goes further by also imposing a principle of non-interference, stating that "[n]o person or organ of state may interfere with the functioning of these institutions."[68] Anticipating conflict between the EMB and the political branches, the South African Constitution therefore places an onus on elected representatives to uphold the values of independent and impartial election administration, even if this may be against their own partisan interests. Section 181 curtails legislative and executive discretion by rendering any attempt to change the fundamental values of the Electoral Commission unconstitutional.

Some constitutions address the relationship of the EMB to the judiciary. Constitutional designers diverge here on whether courts should be treated as potential partisans, and therefore threats, or as non-partisan institutions whose

60 *Constitution of South Africa, supra* note 43, art 19(1).
61 *Ibid,* art 19(2).
62 *Ibid,* art 19(3).
63 *Ibid,* art 16.
64 *Ibid,* art 9.
65 *Ibid,* art 181(2).
66 *Ibid,* art 181(3).
67 *Constitution of Bangladesh, supra* note 51, art 126.
68 *Constitution of South Africa, supra* note 43, art 181(4).

privileged constitutional status can be helpful to EMBs. An independent, impartial, and un-elected judiciary does not have the same direct incentives to capture election commissions as the political branches do. Judges do not have to face election on the rules administered by the EMB.

Where courts might reasonably be anticipated to behave as partisan actors, however, the EMB requires protection from interference from the courts as well as the political branches. Some constitutions insulate the EMB from the judiciary just as they have from the legislature and executive. In Costa Rica, Article 9 bars the judiciary from overturning the results of the Supreme Electoral Tribunal. Claims of partisanship in election administration among lower bodies in the states are investigated and assessed by the Tribunal, thereby bypassing the courts.[69] Mexico's Constitution similarly dictates that appeals from decisions of the FEI do not go through the courts. These are reasonable options if a constitutional designer fears that the courts will behave in partisan ways when electoral results, for example, are disputed.[70]

Where courts are assumed to operate impartially and independent of the government of the day, constitutions define the relationship of the EMB to the judiciary with a different tenor. In these scenarios designers have sometimes anchored newly created fourth branch institutions to the courts with the intention that they will operate with equivalent constitutional status.[71] The EMB piggybacks on the legitimacy of the courts in this approach. The Mexican Constitution specifies that FEI Commissioners be given status on par with Supreme Court Justices, with equivalent salaries, for example. The Chief Electoral Commissioner in India can only be removed according to the same stringent conditions as a Justice of the Supreme Court of India.[72] Costa Rican constitutional designers were of two minds with regard to the courts. They granted the EMB and not the judiciary the exclusive authority to resolve electoral disputes, yet they also tied the selection process for commissioners to

69 *Constitution of Costa Rica*, *supra* note 44, art 102(5).

70 The need for speedy resolution of electoral disputes may also weigh as a factor in removing power from the judiciary, if the courts move slowly.

71 Stephen Gardbaum argues that the institutional failings of legislatures, including party discipline and executive dominance of the legislature, have raised doubts about the effectiveness of political accountability among the elected branches within parliamentary democracies and therefore contributed to the expansion of judicial review: Stephen Gardbaum, "Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)" (2014) 62:3 Am J Comp L 613. This argument is very persuasive with regard to election administration, which is particularly subject to partisan considerations.

72 *Constitution of India*, *supra* note 43, art 324(5).

the courts, with a vote of 2/3 of the Supreme Court required for appointment to the EMB.

iii) EMB structure

Democracies that constitutionalize the EMB generally build the structure of the institution into the text. Constitutions adopting the fourth branch model have often taken great pains to detail rules around appointments to the EMB, its composition, the salary and tenure of commissioners, and even internal decision-making. This focus makes sense given the risk of partisan capture. These features of an EMB are potential levers where politicians can apply pressure to push commissioners in a partisan direction. In doing so, these democracies attempt to come up with institutional designs that will curtail the ways in which political majorities could attack the independence or impartiality of the EMB. The inner workings of an EMB may seem too trivial to place in a democracy's founding document, but it may be necessary. As will be discussed in Section IV, where an EMB's structure has not been elaborated upon, elected representatives have often exploited the gaps.

The Mexican Constitution likely sets the high watermark for specificity regarding the structure of the EMB. Article 41[73] stipulates that the FEI's staff must be "independent" and "professional." The EMB is composed of a Chairman on a six year term, eight Councilors with nine year terms, plus members from among the elected representatives in the legislature, and an Executive Secretary. The provision shows a somewhat mixed approach regarding partisanship. The commissioners drawn from the legislature are partisan elected officials, and it is left to legislation to define the qualifications of the other non-partisan members of the EMB, which could be subject to manipulation. Article 41 also works to enhance independence, however, within this partisan structure. The Constitution necessitates a 2/3 vote by the Chamber of Deputies to remove a commissioner, implying the need for cross-partisan support. A "no revolving door" provision prevents commissioners from holding political appointments or offices for two years after any election that they have supervised. This presumably weakens incentives to toe the partisan line in the hope of a quick post-election reward. The political appointees are permitted by the Constitution to attend FEI meetings, but are expressly barred from voting at them. The supervision of political party finances is a perennially sensitive matter of electoral regulation, particularly in Mexico. A 2/3 vote of the commission

73 *Constitution of Mexico, supra* note 51, art 41.

is therefore required in order to appoint the sub-body tasked with overseeing party finances.

Scholarly literature on the FEI has examined whether it has functioned well despite its partially partisan structure.[74] While largely ignoring the constitutional side of the story, the literature has generally concluded that the degree of specificity in the Mexican Constitution has deterred partisan outcomes that its membership might have otherwise suggested. The internal decision-making rules in particular reduce opportunities for partisan appointees to skew election administration. The political branches still have some say on how the FEI functions, but their room for discretionary decision-making, and therefore potentially for partisan interference, is relatively limited.

The Indian Constitution is also instructive.[75] 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.[76] The Chief Commissioner is given protections in Article 324 (5), as he serves until age 65 and his conditions of service cannot be varied to his disadvantage. The President may appoint an unspecified additional number of Election Commissioners if deemed necessary.[77] The drafters envisioned more commissioners being appointed when the ECI's workload was high, especially

74 Jonathan Hartlyn, Jennifer McCoy & Thomas M Mustillo, "Explaining the Quality of Elections in Contemporary Latin America" (2008) 4:1 Comparative Political Studies 73; Guillermo Rosas, "Trust in Elections and the Institutional Design of Electoral Authorities: Evidence from Latin America" (2010) 29:1 Electoral Studies 74; Federico Estévez, Eric Magar Guillermo Rosas, "Partisanship in Non-Partisan Electoral Agencies and Democratic Compliance: Evidence from Mexico's Federal Electoral Institute" (2008) 27:2 Electoral Studies 257; and Fabrice E Lehoucq, "Can Parties Police Themselves? Electoral Governance and Democratization" (2002) 23:1 Intl Political Science Rev 29.

75 On the ECI, see Susanne Hoeber Rudolph & Lloyd I Rudolph, "New Dimensions of Indian Democracy" (2002) 13:1 J of Democracy 52 at 59, and "Redoing the Constitutional Design: From an Interventionist to a Regulatory State" in Atul Kohli, ed, *The Success of India's Democracy* (Cambridge: Cambridge University Press, 2001); Alistair McMillan, "The Election Commission" in Niraja Gopal Jayal & Pratap Bhanu Mehta, eds, *The Oxford Companion to Politics in India* (Oxford: Oxford University Press, 2010) and "The Election Commission of India and the Regulation and Administration of Electoral Politics" (2012) 11:2 Election LJ 187.

76 The assumption that the President would behave impartially has turned out to be flawed, given the requirement that he adhere to the wishes of the Prime Minister, who is an elected member of a political party. India, *Constituent Assembly Debates*, Vol VIII (16 May-16 June, 1949) at 905-930 [*Constituent Assembly Debates*]. See *Dhanoa v Union of India,* [1991] 3 SCR 159 at 170-74 (India) [*Dhanoa*]; *Seshan v Union of India,* [1995] 4 SCR 611 (India) [*Seshan*]; and Rekha Saxena, "The Election Commission and Indian Federalism" (2012) 15(1) Think India Quarterly 194 at 201-02.

77 *Constitution of India, supra* note 43, art 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."

in the lead-up to an election.[78] 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. The Constitution left open the possibility the ECI could function with multiple members, and if multiple members are appointed, whether the Chief Commissioner is superior in rank to the other Commissioners.[79] The gaps in the Indian regime have led to attempts at partisan capture of the ECI through the appointment process and the rules on internal decision-making, as discussed below.

IV. Building on the fourth branch model

The fourth branch model improves upon the statutory one by providing enhanced protection from partisan interference. This model as adopted in the countries discussed in this article, however, has not been without failings. If the constitutional approach to election administration is to be emulated, whether by new or established democracies, there are some broad lessons to be drawn from these experiences. These lessons apply to both constitutional design and to the need for courts to recognize the importance of protecting independent and impartial election administration.

First, partisan manipulation of electoral rules does not end simply because of the entrenchment of the EMB in a constitution. The EMB gains power to administer elections, but the legislature retains significant authority in the area. All of the fourth branch democracies provide scope for the legislature to write election laws. Their constitutions remove significant chunks of legislative discretion, by mandating an EMB with a certain format and powers. They bar governments from moving election administration under the auspices of a cabinet minister or the bureaucracy. The independent and impartial EMB, however, can only apply the election laws on the books. This leaves ample opportunity for elected representatives to engage in partisan law-making.

An independent and impartial EMB, for example, can only interpret and apply the voter identification legislation as passed by the legislature, even if

78 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 76, and McMillan, "The Election Commission," *supra* note 75 at 99-101.

79 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.

these rules are likely to have a partisan or discriminatory impact. An EMB has no discretion to decline to apply the legislation, even if the partisan impact favouring the governing party is at odds with the EMB's non-partisan mandate. South Africa's Electoral Commission was obliged to follow rules discriminating against prisoners exercising their right to vote until the Constitutional Court eventually struck them down.[80] Fourth branch constitutional design does not solve the riddle of how to prevent partisan self-dealing when elected representatives control the rules of the electoral game. The Costa Rican requirement of a super-majority in order for the legislature to ignore the opinion of its EMB shows one way in which the authority of elected representatives over elections can be circumscribed. A super-majority decision procedure increases the likelihood that there will be cross-party support for an amendment to an election law. This decreases the risk of partisan dealing by one party, although it cannot prevent different parties joining together as a cartel or oligopoly.[81]

Second, constitutionally protected EMBs are also still vulnerable to the same two forms of partisan capture that statutory bodies are. These EMBs can be captured in their initial design within the constitution itself. An EMB may be protected by the constitution, but partisan membership and control could also be entrenched, as in the Mexican Constitution. Partisan capture can also occur after the creation of the commission. Loopholes within the constitutional text itself are at risk of being exploited. If details regarding appointment to the EMB, the tenure of commissioners, funding for the body or some other relevant factor are omitted from the constitution, then the gaps may be filled by partisan rules.

The gaps in the Indian Constitution are instructive here. The appointment power to the ECI rests with the President, who acts on the advice of the Prime Minister and Cabinet. The Prime Minister is therefore, in effect, able to make appointments directly to the institution in charge of overseeing elections. This creates the possibility of capture through the appointment process. This flaw was compounded by the Presidential authority to appoint additional members. The ECI can be stacked with pliant Commissioners if the government of the day dislikes the approach of the Chief Commissioner.

80 *August v Electoral Commission,* [1999] 3 SA 1 (South Africa), and *Minister of Home Affairs v National Institute for Crime Prevention (NICRO).* [2005] 3 SA 280 (South Africa).

81 For parties as cartels, see the classic article by Samuel Issacharoff and Richard H Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50:3 Stan L Rev 643.

The issue of partisan appointments first came to a head in *Dhanoa v Union of India*.[82] 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 Commissioner in 1989. This was the first time the government had used the power to appoint additional Commissioners, as the ECI had functioned as a single-member body from 1950. These appointments brought the total membership in the ECI to three and allowed Gandhi's two selections to form a voting majority over the Chief Commissioner, who had been appointed by a different government and was seen as hostile to the Congress Party.

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."[83] The two new Commissioners overcame the objections of the Chief Commissioner, clearly indicating partisan capture of the commission by a government facing a difficult re-election campaign. 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.

After the ex-Commissioners challenged their removal, the Supreme Court held that the *Janata Dal* government had the power to remove the Commissioners, mainly on the logic that their appointment and subsequent behavior hindered the ECI's independence.[84] The Court found that 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."[85] It held 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."[86] With this ruling, the Supreme Court acted to preserve the independence of the EMB.

82 *Dhanoa, supra* note 76. See also Saxena, *supra* note 76 at 202-04.
83 *Dhanoa, supra* note 76 at para 18.
84 *Ibid* at para 20.
85 *Ibid.*
86 *Ibid* at para 23.

Kenya provides another example of a fourth branch democracy where a sitting government exploited constitutional gaps with dramatic consequences. Kenya's 2007 election was marred by credible claims of electoral fraud against the Election Commission of Kenya (ECK) itself. The ECK declared sitting President Kibaki the winner, but there were immediate allegations that the challenger had in actuality won by a relatively clear margin. The crisis culminated in hundreds of deaths, extensive ethnic conflict, and drama surrounding whether there would be charges before the International Criminal Court.[87] After peace-brokering on behalf of the African Union by ex-United Nations Secretary General Kofi Annan, the report by the Independent Review Commission (IREC) found the ECK had cheated on behalf of the President.[88] The report concluded that there was profound corruption in voter registration, redistricting, at the ballot box, and in election result transmission and tallying.[89] IREC recommended that the ECK could only be fixed by "radica[l] reform" or creating an entirely new national electoral commission.[90] The IREC called the appointment process, as well as the operations of the ECK, "materially defective," claiming that they caused a "serious loss of independence."[91]

President Kibaki gamed the election by capturing the ECK. Beginning in 2005, the President expanded the membership of the ECK to the maximum permitted and proceeded to appoint partisan allies to 17 out of the 22 posts.[92] The IREC report found that the ECK had significant institutional independence, but that it suffered from a lack of financial independence and was hindered by the "general political behaviour of the various actors in Kenyan elections."[93] President Kibaki exposed the frailties in the design of the Kenyan EMB.[94] The controversial 2007 election and the failure of the EMB were moti-

87 President Uhuru Kenyatta was the first sitting head of state to appear before the International Criminal Court, for his role as a partisan on behalf of previous President Kibaki: Faith Karimi, "Kenyan President Uhuru Kenyatta at ICC Over Charges Linked to 2007 Violence," *CNN* (8 October 2014), online: <http://www.cnn.com/2014/10/08/world/africa/kenya-icc-status-hearing/>. The charges were subsequently dropped.

88 African Union, *Independent Review Commission Report on the General Elections of 27 December 2007* (Nairobi: African Union, 2008) [*IREC*].

89 *Ibid* at x.

90 *Ibid.*

91 *Ibid* at 10.

92 Partisanship in the appointment process was a long-standing political issue, with a Parliamentary report in 1997 raising particular flags about this unchecked Presidential power. The timing of commission appointments in election years as 5 year terms expired was deemed particularly unhelpful by the IREC as it opened the door to partisan interference: *ibid* at 49.

93 *Ibid* at 29.

94 These have been lessened by the 2010 constitutional amendments.

vating forces in the country adopting a new Constitution in 2010 that reduced the risk of partisan capture of election administration.

South Africa provides a cautionary tale as well. In *New National Party of South Africa v the Government of South Africa*,[95] a dispute about voter identification requirements led to a challenge to the government's attempts to breach the Commission's independence. The African National Congress government implemented rules that required identification documents containing bar codes in order to vote in elections. The Electoral Commission objected, on the basis that 5 million people would be disenfranchised for lack of the proper documents. It noted that the government proposed to introduce the restrictive rules without taking steps to provide the necessary identification documents to those who lacked them.

The majority of the Constitutional Court held that the voter identification requirements were consistent with the democratic rights guaranteed by the new South African Constitution. In so ruling, however, it also opined on the government's political interference with the Commission, counter to the clear design of the EMB as independent and impartial. The Court held that various ministries were treating the Electoral Commission as a line department accountable to bureaucratic higher-ups and elected representatives, rather than as an independent body. Government departments sidelined the Electoral Commission in their interactions with Parliament, attempted to control the spending of the EMB, and purported to direct its staffing. All of these were discomforting facts in light of the South African government's pattern of capture of independent institutions to serve the interests of the dominant African National Congress.[96] The Constitutional Court has further elaborated that the Electoral Commission must be seen as distinct and independent from government.[97]

Third, an overall lesson to be gleaned from the experiences of India, South Africa and Kenya is that EMBs should be defined as specifically as possible in the constitution. Gaps around the appointment process, the number of appointees, funding, interactions with the legislature, and other specifics can all be exploited by those antagonistic to the independent workings of the EMB.

95 *New National Party of South Africa v the Government of South Africa*, [1999] 3 SA 191 (South Africa).

96 Sujit Choudhry, "'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" (2010) 2 Constitutional Court Rev 1. See also the discussion of interference with the prosecutorial services in *Helen Suzman Foundation, supra* note 53.

97 *Independent Electoral Commission v Langeberg Municipality,* [2001] 3 SA 925 (South Africa).

The argument for detail in the constitutional design of election administration should be a familiar one in most democracies. The inner complexities of the other branches are often covered with specificity in constitutions, such as how membership in a legislature is to be distributed among component parts of a federation, or the relationship between the lower and upper legislative houses, or the number of Supreme Court justices and their rules of selection, and so on. The experiences in the fourth branch democracies suggest that the structure of EMBs should also be scrupulously detailed in the constitution.

Fourth, constitutional protection for the existence and functioning of an EMB has potential disadvantages with respect to accountability. Creating an EMB with constitutional status involves a tradeoff between independence and accountability. The more independent the EMB, the harder its own misbehaviour will be to check. Insulating the EMB from the influence of elected representatives by entrenching it in the constitution reduces opportunities for interference, but also for legitimate oversight.

The reign of T.N. Seshan as Chief Commissioner in India at the top of the ECI illustrates the risk of empire building by constitutionally entrenched EMBs. Seshan was notoriously outspoken, particularly with regard to the corruption he saw in Indian politics and the need for the ECI to play a role in curtailing it. However laudable his goals, Seshan's activism at times veered into an outsized assessment of the Chief Commissioner's role or, worse, a search for personal aggrandizement. A former head of the influential civil service, he mused about forming his own political party to fight corruption while in office.[98]

The Supreme Court of India felt obliged to chastise Seshan on several occasions. The unanimous Court in *Seshan v Union of India*[99] 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 case involved a dispute regarding whether Seshan as Chief Commissioner was superior in rank to the other Election Commissioners. The Court held that, "[n]obody can be above the institution which he is supposed to serve" and viewed Seshan as illegitimately attempting to elevate himself as superior to the other Commissioners and organs of the Indian state.[100] Seshan did in fact use the ECI as a platform for his political career, as he eventually ran unsuccessfully for the Presidency in 1997. As the attacks on election commission independence detailed in this article demon-

98 *Seshan, supra* note 76.

99 *Ibid.*

100 *Ibid* at para 18.

strate, some decreased accountability is worth the enhanced independence for the EMB. The implication is that courts must be attuned to the need to check improper behaviour by the EMB itself, however, if it strays beyond its legitimate role.

V. Conclusion

The move to create a fourth branch of government in India, South Africa, Mexico, and other democracies represents an institutional response to the problem of partisan capture of election commissions and administration. It reflects a move in constitutional design away from emphasizing rights to ensuring institutions capable of protecting those rights. Despite ongoing challenges with protecting impartial and independent election administration, the model stands as an attractive alternative for both new and established democracies searching to enhance electoral integrity.

The statutory model is no longer the gold standard. Constituting EMBs as part of a fourth branch of government is a preferable model. The Canadian experience with the *Fair Elections Act* and the decade of conflict between the former Conservative federal government and Elections Canada suggests that even in long established democracies election administration is not immune from partisan interference. The same can be said for other successful democracies, such as the United Kingdom and Australia, which also adopt the statutory model of election administration. Fair elections are essential to democracy, and the ground rules for political competition should not be subject to partisan games. Theories of the separation of powers that advocate additional branches beyond the traditional three, such as that offered by Ackerman, and the constitutional practice in countries such as India, South Africa, Mexico, and Kenya, have passed the statutory model by.

This new model for constitutionalizing election administration, however, raises a number of questions deserving further inquiry. One question that the shift to a fourth branch of government raises that deserves study is how courts have adapted and should adapt to this evolution, as it raises a number of challenges for them. Courts have been granted, through provisions entrenching the EMB, direction to limit executive and legislative authority. This requires displacing traditional understandings of the primacy of the executive and legislature over administrative institutions that may be difficult to dislodge. The boundary line between the discretion remaining within the political branches over electoral law and that within the EMB over election administration is inevitably the subject of contestation. Different approaches

by courts to preserving the independence and impartiality of EMBs should be further investigated.

The appeal of constitutional entrenchment of EMBs also poses a challenge for established democracies. It reverses the long-standing assumption in much comparative scholarship that the flow of constitutional ideas moves from older to newer democracies. It is an open question whether long established democracies will be willing to look to newer ones as sources of inspiration.

Another significant question will be how enduring the model will prove to be among its main adopters. The Election Commission of India has tremendous popular support and has now been entrenched for more than 65 years, despite frequent amendments to other parts of the Constitution of India. It is a success story, but an anomaly because of its longstanding presence. The South African constitutional provisions on its EMB have now lasted since 1996. Whether the constitutionally entrenched EMBs in newer constitutions will have the same staying power remains to be seen. Their longevity will go a significant way to determining whether the appeal of EMBs as a fourth branch of government endures.

Plutocracy and Partyocracy: Oligarchies Born of Constitutional Interpretation

*Timothy K Kuhner**

Economic and political inequality could not endure and continue to grow at present-day levels if popular governance were not kept in check. A comparative view of the financing of political parties and campaigns exposes two main options for doing so: allow economic elites to control democracy or allow elites from within major political parties to do so. Whether a product of the undue influence of wealthy donors and spenders or the power of major parties to increase their own public financing and exclude minor parties, many advanced democracies have broken their core promises of equality, popular participation, representation, and accountability. Unpopular laws and public disenchantment abound. This article suggests that enduring patterns within political finance have led to the consolidation of two forms of oligarchy: plutocracy, or government of, by, and for the wealthy, which represents the decay of liberal democracy; and partyocracy, government by party elites who have appropriated state power, which represents the decay of social democracy. Together, these legal forms of corruption co-opt democracy's values and outputs. The law of political finance must account for these pathological forms of democracy that produce unfair elections, unrepresentative governance, and unpopular laws and policies.

L'inégalité économique et politique n'aurait pas pu durer et grandir comme elle l'a fait si les aspects participatif, égalitaire et représentatif de la démocratie n'étaient pas contenus. Un aperçu comparatif du financement des partis et des campagnes politiques révèle deux options principales pour ce faire : permettre à l'élite économique de contrôler la démocratie ou permettre aux élites à l'intérieur des grands partis politiques de le faire. Que cela soit un produit de l'influence indue des donateurs fortunés et des gens dépensiers ou le pouvoir des grands partis à augmenter leur propre financement public et exclure les petits partis, de nombreuses démocraties avancées ont rompu leurs promesses fondamentales d'égalité, de participation populaire, de représentation et d'obligation de rendre compte. Les lois impopulaires et le désenchantement public abondent. Selon l'auteur de cet article, des tendances tenaces à l'intérieur de la finance politique ont entraîné la consolidation de deux formes d'oligarchie : la ploutocratie, ou le gouvernement des riches pour les riches, qui représente le déclin de la démocratie libérale; et la gouvernance par les partis, un gouvernement par les élites du parti qui se sont appropriés le pouvoir étatique, qui représente de déclin de la social-démocratie. Ensemble, ces formes légales de corruption récupèrent les valeurs et les résultats de la démocratie. La loi de la finance politique doit prendre en compte ces formes pathologiques de démocratie qui produisent des élections inéquitables, une gouvernance non représentative et des lois et des politiques impopulaires.

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As of the 1970s, liberalism — the political philosophy and mode of government — was still broad enough to accommodate ethical concerns over market excesses, equality, the development of capacities, and meaningful political participation for ordinary citizens. Democratic governments took programmatic steps that reflected not just classical liberalism, but also ethical and social liberalism, to the happy effect that one could mention John Locke as well as the other Johns (Stuart Mill and Rawls) in the same sentence. The reach of the market was often circumscribed in the interest of community values and public goods, including the stability of the market itself. In sum, Keynesians and neoclassicists still enjoyed a healthy rivalry.[1]

Sporadically in the 1980s and consistently thereafter, however, neoliberalism gained ground on liberalism. An economic and political rejection of social, ethical, and regulatory stances, neoliberalism brought about the "'economization' of political life"[2] for the purpose of "capital enhancement."[3] Finance capital, trade treaties, corporate lobbies, supranational institutions, and political parties succeeded in carrying out privatization and austerity measures on a global scale.[4] As David Harvey notes, "[t]here has everywhere been an emphatic turn in political-economic practices and thinking since the 1970s[:] Deregulation, privatization, and withdrawal of the state from many areas of social provision have been all too common."[5]

The implementation of this neoliberal program involved a complex set of factors and events, but it certainly included a solid degree of government capture by elites and an equally solid degree of ideological drift towards economic conceptions of political values. This article posits that some of that capture and drift occurred between 1970 and 2014 within a body of law called political finance. While the term "campaign finance" is more common in presidential systems and "party finance" in parliamentary systems,[6] both terms are included in "political finance," which refers to "disclosure, transparency, expenditure

1 Charles Derber & Yale R Magrass, *Capitalism: Should You Buy It? An invitation to Political Economy* (Boulder: Paradigm, 2014) at 33-34, 51-52.

2 Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015) at 17.

3 *Ibid* at 22.

4 See e.g. Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford: Oxford University Press, 2015); David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2007) [Harvey]; Kerry Anne Mendoza, *The Demolition of the Welfare State and the Rise of the Zombie Economy* (Oxford: New Internationalist, 2014).

5 Harvey, *supra* note 4 at 2-3.

6 Arthur B Gunlicks, ed, *Campaign and Party Finance in North American and Western Europe* (Bloomington, Ind: iUniverse Publishing, 2000) at vii [Gunlicks].

and contribution limits, as well as direct forms of public subsidies to parties and candidates."[7]

Martin Gilens and Benjamin Page point to the dominance of large donors and spenders as an explanation for the remarkable findings of their 2014 study, *Testing Theories of American Politics*. From a statistical analysis of policy outcomes across nearly 2,000 issue areas in the United States at the federal level, Gilens and Page reached a striking conclusion: "Economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence."[8] Their conclusion could hardly be ignored: "America's claims to being a democratic society are seriously threatened" because "policymaking is dominated by powerful business organizations and a small number of affluent Americans."[9] Indeed, an earlier study by Gilens suggested that patterns of government responsiveness "often corresponded more closely to a plutocracy than to a democracy."[10]

Meanwhile, high state subsidies designed partly to increase political equality and pluralism appear to backfire frequently. In perhaps the leading work on the tyranny of political parties, Katz and Mair cite "a tendency in recent years towards an ever closer symbiosis between parties and the state, and that this then sets the stage for the emergence of a new party type, which we identify as 'the cartel party.'"[11] High courts and leading scholars in European states have echoed this finding, suggesting that political parties have systematically insulated themselves from popular demands and outside competitors by gaining power over state subsidies for their electoral and ordinary expenses.

7 See e.g. Herbert E Alexander & Joel Federman, *Comparative political finance in the 1980s* (New York: Cambridge University Press, 1989) at 1.

8 Martin Gilens & Benjamin I Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens* (2014) 12:3 Perspectives on Politics 564 at 564 [Gilens & Page].

9 *Ibid* at 577.

10 Martin Gilens, *Affluence & Influence: Economic Inequality and Political Power in America* (Princeton: Princeton University Press, 2012) at 234.

11 Richard S Katz & Peter Mair, "Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party" (1995) 1:1 Party Politics 5, online at 6: <https://perma.cc/HP8L-SK4G> [Katz & Mair].

Competing forms of democracy, competing forms of political finance

The ancient Greeks employed the word "oligarchy" to denote a system of rule by the few, whose purpose they commonly understood to be moneymaking.[12] Far from a bygone relic, oligarchy is ascendant in the Russian businessmen and party elites who captured the benefits of liberalization; Chinese officials administering capitalism to their benefit; the wealthy Americans who control superPACs and dominate campaign finance; European political parties that collude with each other to capture electoral subsidies and exclude minor parties that would challenge economic arrangements; and the global financial elite that governs through debt.[13] Out of this great variety of oligarchic threats, only two have credibly justified their existence as a matter of democratic values. Those justifications have obtained the status of binding law through constitutional drafting and constitutional interpretation. American style plutocracy and European style partyocracy have distinguished themselves in these regards, relying, respectively, on notions from liberal democracy and social democracy.

The structural and ideological arrangements in play have long been clear. In 1977, Charles Lindblom described the primary difference between governments as despotic versus libertarian — that is, governments that were inherently oppressive versus those that sought to employ freedom as their organizing principle.[14] This was a common way to distinguish the forces at work during the Cold War. However, Lindblom then perceived the central question that would determine the shape of social order after communism's collapse: "Aside from the difference between despotic and libertarian governments," he wrote, "the greatest distinction between one government and another is in the degree to which market replaces government or government replaces market."[15] Also writing in 1977 and perceiving the same distinction, C. B. Macpherson noted

12 David Tabachnick & Toivo Koivukoski, eds, *On Oligarchy: Ancients Lessons for Global Politics* (Toronto: University of Toronto Press, 2011) at ix [Tabachnick & Koivukoski].

13 See e.g. Azar Gat, "The Return of Authoritarian Great Powers" (July/August 2007) 86:4 Foreign Affairs, online: <www.foreignaffairs.com/articles/china/2007-07-01/return-authoritarian-great-powers>; Fareed Zakaria, "The Rise of Illiberal Democracy" (November/December 1997) 76:6 *Foreign Affairs*, online: <www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy>; Maurizio Lazzarato, *Governing by Debt*, translated by Joshua David Jordan (Los Angeles: Semiotext(e), 2013); Tabachnick & Koivukoski, *supra* note 12 at ix (noting the "close relationship between corporate executives and American government" and "the formation of a global network of cosmopolitan, technocratic managers").

14 Charles E Lindblom, *Politics and Markets* (New York: Basic Books, 1977) at ix.

15 *Ibid.* Lindblom considered this to be the matter on which "[t]he operation of parliaments and legislative bodies, bureaucracies, parties, and interest groups depends.": *Ibid.*

that "liberal democracy" was associated with two very different types of societies: "the democracy of a capitalist market society" or "a society striving to ensure that all its members are equally free to realize their capabilities."[16]

In pursuing the latter course, social democracy brings about a social form of capitalism. Clauss Offe describes that type of capitalism, which has been meaningfully tempered by democracy, as "'organized,' 'embedded' and 'regulated' capitalism,"[17] and as (Continental) European capitalism.[18] Informed by "the precepts of a 'social' market economy, Offe contrasts it with the liberal or Anglo-American form of capitalism. While European versus Anglo-American is the "coarsest distinction" between different forms of capitalism,[19] it is important to consider their broad contours, as the material and ideological battles of recent years have unfolded along them:

> [E]quality versus efficiency, collective bargaining versus individual contracting, cooperation versus conflict, rights versus resources, wage moderation versus distributive conflict, ... social partnership versus class conflict, proportional representation versus majoritarianism, associational collectivism versus individualism, social security versus competitiveness, [and] politics versus markets [20]

Offe explains that a defining feature of European capitalism and social order is its tendency towards the first choice in each pairing above.

The connection between political finance and the competition between liberal democracy and social democracy is immediately clear. There are three basic options facing states with regard to political finance: "[l]aissez-faire and self-regulation," "transparency or 'non-regulatory intervention,'" and "regulation."[21] Choices between and within these categories surely depend on myriad factors, including history, geography, socioeconomic stratification, constitutional text, judicial review, ideology, electoral system, and politics,[22] but what moves such factors and what explains the importance of the choice between regulation and laissez faire?

16 See CB Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press 2012).

17 Claus Offe, "The European Model of 'Social' Captialism: Can it Survive European integration?" (2003) 11:4 Journal of Political Philosophy 437 at 447.

18 *Ibid* at 441.

19 *Ibid.*

20 *Ibid.*

21 KD Ewing & Samuel Issacharoff, eds, *Introduction to Party Funding and Campaign Financing in International Perspective* (Oxford: Hart Publishing, 2006) at 2-3.

22 *Ibid* at 6-7.

To begin adding the necessary context, one must look to where each of the categories above draws its funds. Arthur Gunlicks offers a useful framework in his description of the "three types of party and campaign financing: plutocratic, grassroots, and public funding."[23] These types of financing can be categorized as large donations from few sources, small donations from many sources, and half or more of all political funds coming from state subsidies. The first is common in parties on the Right, the second in parties on the Left, and the third is a general rule throughout Europe.[24]

Each state thus categorized is commonly home to competing tendencies within its political finance regime.[25] Within West German political finance, for example, Christine Landfried found both "etatization" and capitalization to be at work. Respectively, these terms signal "the danger posed [from public subsidies] when parties become more dependent on the state than on membership dues" and "the process of increased 'big' donations to political parties in exchange for concessions and privileges."[26] With international, regional, national, and more localized levels of politics all subject to many variables within each country, it is unusual for any one such tendency to completely eclipse the rest.

Still, whenever the reigning factors (history, economics, politics, ideology, judicial review, etc.) converge, or when one or several of them dominate the rest, "regulatory trajectories" surface.[27] In regulatory trajectories, Ewing and Samuel Issacharoff locate the underlying theme of all such variables and issues.[28] Within each country, the question is whether the particular constellation of variables and issues is producing a move from laissez faire and self-regulation to regulation and state funding, or a move in the opposite direction.

In observing a divide between public financing and private financing in North American and Western European countries, Gunlicks complicates the analysis by adding additional explanatory factors, such as: federalism, single member district plurality electoral systems versus proportional representation, presidential versus parliamentary systems, and political culture.[29] In the end, however, Gunlicks attributes those competing regulatory trajectories to com-

23 Gunlicks, *supra* note 6 at 13.

24 *Ibid.*

25 See Christine Landfried, "Political Finance in West Germany" in Herbert E Alexander & Rei Shiratori, eds, *Comparative Political Finance Among the Democracies* (Boulder, CO: Westview Press, 1994) at 133 [Alexander & Shiratori].

26 *Ibid.*

27 Ewing & Issacharoff, *supra* note 21 at 8.

28 *Ibid.*

29 Gunlicks, *supra* note 6 at 7-8.

peting political cultures, the most important variable in his view. He describes two political cultures: first, "[a]ttitudes generally hostile to taxes and big government, or even to government at all" that were "tapped and further encouraged by … [Ronald] Reagan," and second, attitudes that favor "lessening the influence of wealthy individuals" and producing "fairer, more open and equal elections."[30] Gunlicks notes that the second sort of political culture, clearly social democratic in nature, was linked to public funding by political leaders who saw subsidies as the means to achieving those preferences for less private wealth and greater equality.[31]

This leads back to familiar sets of competing values — hostility to government and taxes (i.e., greater reliance on markets) versus fairness and equality concerns. These values go a tremendous distance toward describing the difference between liberal democracy and social democracy, as noted above. The overlap is programmatic and ideological. Therefore, one would also expect it to be historical. Indeed, "North European social democracies" pioneered state subsidies for political parties in the 1950s and 1960s.[32] Ewing and Issacharoff note that "[t]his was a period of the expanding State, in terms of budgets and functions, and the idea was widely adopted."[33] Then, in the mid to late 1970s, the U.S. Supreme Court pioneered the antiregulatory stance integral to plutocracy.[34] Far from the ideology of North European social democracies, the Burger Court relied on free-market theory and veered away from the Warren Court's progressive jurisprudence.[35]

What remains to be fleshed out, then, are the constitutional and ideological underpinnings of these distinct regulatory trajectories (one towards private funding and laissez-faire, the other towards state funding and regulation), and the sense in which both can lead to the deformation and corruption of their respective social orders: liberal democracy and social democracy. Those who benefit from the prevalence of market arrangements in liberal democracy are those who benefit from plutocracy. Those who benefit from the comparatively statist features of social democracy are those who benefit from partyocracy: political parties.

30 *Ibid* at 8.

31 See *ibid*.

32 Ewing & Issacharoff, *supra* note 21 at 5.

33 *Ibid*.

34 See Timothy K Kuhner, *Capitalism v. Democracy: Money in Politics and the Free Market Constitution* (Redwood City, CA: Stanford University Press, 2014) ch 2-4.

35 See *ibid*.

The distinction between plutocracy and partyocracy is not the presence or absence of oligarchy. Referencing the "elitist model of American society," Darcy Leach notes that "it is certainly plausible that a powerful elite could constitute an oligarchy, without necessarily serving as elected officials in the political apparatus."[36] Furthermore, her definition of oligarchy would accommodate both control by big donors and spenders and control by party elites: "a concentration of entrenched illegitimate authority and/or influence in the hands of a minority, such that de facto what the minority wants is generally what comes to pass, even when it goes against the wishes (whether actively or passively expressed) of the majority."[37] For purposes of differentiating between plutocracy and partyocracy, the questions are simply, *which* minority? And *which* illegitimate mode of authority and/or influence?

Plutocracy

Karl-Heinz Nassmacher traces the label of a "plutocratic" regime of political finance back to 1983. He writes that "[w]hereas democracy is a political system based on equal participation by the multitude, plutocracy is a system dominated by the riches of an affluent minority." Contrasting it to grassroots financing through small donations, Nassmacher calls plutocratic financing "the capitalist dimension of party funding."[38] In this regard, Nassmacher's definition of corruption is right on point: "the clandestine exchange between two markets, the political or administrative market and the economic or social market."[39] The designation "plutocracy" simply removes the word "clandestine" from Nassmacher's definition of corruption, giving us a legal market for political influence. Plutocracy, as an official system of rule, is distinct from kleptocracy and other forms of abject corruption that may amount to plutocracy in practice, but are not *official systems of rule.*

The difference lies between that which is merely practiced and that which is both practiced and honored. Consider, for example, this exchange between Socrates and Adeimantus: "Socrates: Surely, when wealth and the wealthy are honoured in the city, virtue and the good men are less honourable. Adeimantus: Plainly. Socrates: Surely, what happens to be honoured is practiced, and what

36 Darcy Leach, "The Iron Law of What Again? Conceptualizing Oligarchy Across Organizational Forms" (2005) 23:3 Sociological Theory 312 at 317 [Leach].

37 *Ibid* at 329.

38 Karl-Heinz Nassmacher, *The Funding of Party Competition: Political Finance in 25 Democracies* (Baden-Baden: Nomos, 2009) at 239.

39 *Ibid* at 21.

is without honour is neglected."[40] Supreme Court decisions have created a plutocracy not just by striking down numerous campaign finance reforms, but also by providing justificatory claims that serve to legitimize and even honor a controlling role for wealth in democracy.

As a response to Socrates, consider Justice Alito's majority opinion in the 2008 case *Davis v FEC*. The Court struck down a provision of McCain-Feingold that helped candidates who ran against wealthy, self-financing opponents on the basis that it leveled the power of wealth. "Leveling electoral opportunities," wrote Justice Alito for the majority, "means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election."[41] He went on to list those strengths: "Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name."[42] These four strengths comprise Justice Alito's exhaustive list. He did not mention democratic strengths, only those that relate to wealth, fame from the entertainment industry, and family privilege. The Amendment was unconstitutional in its attempt "to reduce *the natural advantage* that wealthy individuals possess in campaigns for federal office."[43]

In the 2010 case *Citizens United v FEC* the Court struck down a prohibition on corporate general treasury spending in the weeks leading up to an election. Justice Kennedy's majority opinion states, "It is irrelevant for purposes of the First Amendment that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas." "All speakers," the Court announced, "use money amassed from the economic marketplace" and "[m]any persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary."[44] Here, the Court admitted that its self-styled political marketplace operated through the economic marketplace, importing uneven outcomes in dividends, interests and salaries into the political sphere. Discussing the effects of corporate expenditures, the Court claimed that "influence over or access to elected officials does not mean that those officials are corrupt."[45]

40 Tabachnick & Koivukoski, *supra* note 12 at ix.

41 *Davis v Fed Election Comm'n*, 554 US 724, 742 (2008).

42 *Ibid* at 742.

43 *Ibid* at 741 [emphasis added].

44 *Citizens United v Fed Election Comm'n*, 558 US 310, 351 (2010), quoting *Austin v Michigan Chamber of Commerce*, 494 US 652, 707 (Kennedy J. dissenting) [*Citizens United*].

45 *Ibid* at 359.

This line of cases culminated in 2014 in *McCutcheon v FEC*,[46] which laid out a blueprint for plutocracy:

> [G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. 'Ingratiation and access … are not corruption.' They embody a central feature of democracy — that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.

Thus, the Court redefined representative democracy as attention by officeholders and candidates to the interests of their financial contributors.

To ensure that this representative dynamic would not be disturbed, the Court reminded its readers:

> We have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others …. No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equalize the financial resources of candidates.'

These remarks stand as the reasoning for the Court's decision to strike down a $123,200 limit on each individual's campaign donations per two-year election cycle.[47] With that limit in place, each individual donor's financial reach was meaningfully restricted. Each donor could only give the maximum amounts — $2,600 per candidate per cycle, $32,400 per year to a national party committee, $10,000 to a state or local party committee, and $5,000 to a political action committee — for a short amount of time before running up against the aggregate two-year limits of $48,600 to federal candidates and $74,600 to other political committees.[48] Declaring aggregate limits unconstitutional, the Court ushered in a new era of multi-million dollar donors giving sums of the sort not seen since Watergate. As Justice Breyer's dissenting opinion put it, "without an aggregate limit, the law will permit a wealthy individual to write a check, over a two-year election cycle, for $3.6 million — all to benefit his political party and its candidates."[49]

46 *McCutcheon* v *FEC*, 134 S Ct 1434 (2014).

47 *Ibid.*

48 *Ibid* at 1442-43.

49 *Ibid* at 1442-43, 1473 (Breyer J. dissenting). Justice Breyer was joined by Justices Ginsburg, Sotomayor and Kagan. See *Ibid* at 1442-43.

In the end, *Citizens United* and *McCutcheon* strengthen an aristocracy of wealth. Let us begin with outside expenditures. Take two of the largest Super PACs operating in the 2014 elections: the Senate Majority PAC (liberal) and American Crossroads (conservative). Two-thirds of the $90 million that they raised came in donations of $500,000 or more, meaning that less than 200 donors provided the great majority of funds.[50] The same can be said of the $1.1 billion in outside spending during the 2012 elections: the top 200 donors to outside expenditure groups supplied approximately 80% of all money.[51] Those 200 people represent .000084% of the U.S. adult population, meaning that the outside speech environment was shaped (if not controlled) by an unfathomably small portion of Americans.

Turning from outside advertisements to the funding of campaigns, one finds similar dynamics of concentrated influence and rising costs. While not as small as the percentage of Americans funding Super PACs, the great majority of campaign donations since 1992 have been controlled by less than one percent of the US population.[52] In the 2014 elections, just .3% of the adult population supplied 66% of the sum total of cash.[53] The rise in total campaign donations has been striking, although it has not been as extreme as the rise in outside expenditures. Between 2000 and 2012, for example, the total amount raised by both major party general election presidential candidates rose from $325 million (Bush versus Gore) to $2 billion (Romney versus Obama), an increase of over 600%.[54] The direction of change was constant, with each presidential race significantly surpassing the cost of the one before it.

50 Carrie Levine & David Levinthal, *Surprise! No. 1 super PAC backs Democrats* (3 November 2014), online: The Center for Public Integrity <www.publicintegrity.org/2014/11/03/16150/surprise-no-1-super-pac-backs-democrats>.

51 Meredith McGehee, *CLC Blog: Only a Tiny Fraction of Americans Give Significantly to Campaigns* (18 October 2012), online: The Campaign Legal Center <www.clcblog.org/index.php?option=com_content&view=article&id=482:only-a-tiny-fraction-of-americans-give-significantly-to-campaigns>.

52 Center for Responsive Politics, *Donor Demographics: Election Cycle 1992-2012*, online: Open Secrets.org <www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012&filter=A> (for elections between 1992 and 2012); see also Lawrence Lessig, "What an Originalist Would Understand 'Corruption' to Mean" (2014) 102:1 Cal L Rev 1 at 5; Jamin Raskin & John Bonifaz, "Equal Protection and the Wealth Primary" (1993) 11:2 Yale L & Pol'y Rev 273 at 294; Lee Drutman, *On FIRE: How the Finance, Insurance and Real Estate Sector Drove the Growth of the Political One Percent of the One Percent* (26 January 2012), online: Sunlight Foundation <www.sunlightfoundation.com/blog/2012/01/26/on-fire-how-the-finance-insurance-and-real-estate-sector-drove-the-growth-of-the-political-one-percent-of-the-one-percent/>.

53 See Center for Responsive Politics, *Donor Demographics*, online: Opensecrets.org <www.opensecrets.org/overview/donordemographics.php>.

54 See Jonathan D Salant, "Spending Doubled as Obama Led Billion-Dollar Campaign (Update 1)", *Bloomberg News* (27 December 2008), (providing numbers for total spending and individual

By 2012, the average price tags of political offices had reached alarming levels: $1 billion for the presidency, over $10.4 million for a senate seat and $1.6 million for a seat in the House of Representatives.[55] Even in the election years with the deepest donor base, less than .6% of all citizens of voting age supply most of the money — that would be just 1.5 million out of 270 million American adults today. In the 2014 elections, however, just over 800,000 citizens, .3% of the voting-age population, provided the great majority of funds. In total, these statistics convey the essential fact of political finance in the United States: privatization. All of this information makes Gilens and Page's findings ("average citizens have little or no independent influence"[56]) entirely predictable.

As anti-plutocratic forces in political finance jurisprudence, we can consider several points of contrast to the U.S. Supreme Court. In political finance cases, the Supreme Court of Canada has long held that "the political equality of citizens . . . is at the heart of a free and democratic society."[57] Similarly, the European Court of Human Rights (ECtHR) concluded in *Bowman v UK* that "securing equality between candidates" falls within "the legitimate aim of protecting the rights of others, namely the candidates for election and the electorate."[58] Validating a prohibition on ads by social advocacy groups in the *Animal Defenders* case, decided three years after *Citizens United*, the ECtHR agreed that the ban "was necessary to avoid the distortion of debates on matters of public interest by unequal access to influential media by financially powerful bodies."[59] The Court accepted the argument that this function "protect[ed] effective pluralism and the democratic process."[60] It worried that "powerful financial groups ... could obtain competitive advantages in the area of paid advertising and thereby curtail a free and pluralist debate, of which the State remains the ultimate guarantor."[61]

candidate spending in the 2008 election); Charles Lewis, *The Buying of the President* (New York: Avon Books, 1996) at 4.

55 Sarah Wheaton, *How Much Does a House Seat Cost?* (9 July 2013), online: The Caucus: Pol. and Gov't Blog of the New York Times <www.thecaucus.blogs.nytimes.com/2013/07/09/how-much-does-a-house-seat-cost/?_r=0>; Stephen Braun and Jack Gillum, "2012 Presidential Election Cost Hits $2 Billion Mark" *The Huffington Post* (6 December 2012), online: The Huffington Post <www.huffingtonpost.com/2012/12/06/2012-presidential-election-cost_n_2254138.html>.

56 Gilens & Page, *supra* note 8.

57 *Harper v Canada* (Attorney General), 2004 SCC 33 at para 86, [2004] 1 SCR 827, quoting *Libman v Quebec* (Attorney General) [1997] 3 SCR 569, 151 DLR (4th) 385.

58 *Bowman v United Kingdom*, 1998-I ECHR 175, para 38.

59 *Animal Defenders International v United Kingdom* [GC], No 48876/08 (22 April 2013) at para 99, 57 EHRR 21.

60 *Ibid.*

61 *Ibid* at para 112.

Perhaps the starkest contrast came in September of 2015, when the Supreme Federal Tribunal of Brazil struck down the legal provision that allowed corporate donations to political parties.[62] The Brazilian electoral system is similar to that of the United States in a number of ways: a large geographic area, numerous population, candidate-centered elections, and a history of expensive campaigns.[63] And similar to the U.S. panorama of roughly half a percent of adult citizens supplying most of the funds relied upon by political parties and just .000084% of adult citizens supplying most of the funds relied upon by independent expenditure groups, Brazil has seen a clear plutocratic dimension in their political finances, as noted by Maria D'Alva Gil Kinzo:

> [T]he main method of funding campaigns in Brazil is through private firms … especially those in the civil construction and banking sectors… In the [1994] presidential election, 93 per cent of private contributions to the eventual winner came from business donations…The staggering role played by business in financing campaigns is not limited to parties on the right… even in the case of Lula — the Workers' Party presidential candidate — private firms' contributions amounted to 41 per cent of this party's total expenditure.[64]

D'Alva goes on to list many elections where private sources provided 94-99% of total campaign funds. Writing thirteen years before D'Alva, Roberto noted that "[c]ampaigns are funded mainly by bankers, industrialists, traders, and livestock breeders [and that] the way in which power is structured in Brazil has led to its concentration in the hands of a few."[65]

Deciding the case in 2015, the Supreme Federal Tribunal faced up to an especially powerful political panorama. In the 2014 election campaigns for the presidency, senate and congress, "[a]round 76% of the over R$3bn ([US]$760m) donated … came from corporate entities" and that money was fairly equally distributed between "the ruling leftwing Partido dos Trabalhadores (PT) and the main opposition Partido da Social Democracia Brasileira (PSDB)," suggest-

62 Ação Direta de Inconstitucionalidade 4650, discussed in English here: Bruce Douglas, "Brazil bans corporations from political donations amid corruption scandal" *The Guardian* (18 September 2015), online: The Guardian <www.theguardian.com/world/2015/sep/18/brazilian-supreme-court-bans-corporate-donations-political-candidates-parties>.

63 Maria D'Alva Gil Kinzo, "Funding Parties and Elections in Brazil" in Peter Burnell & Alan Ware, eds, *Funding Democratization*, 2nd ed (New Brunswick, NJ: Transaction Publishers, 2007) 116 at 117-22 [Burnell & Ware].

64 *Ibid* at 130.

65 Roberto Aguiar, "The Cost of Election Campaigns in Brazil" in Alexander & Shiratori, *supra* note 25 at 79.

ing that corporations were hedging their bets.[66] A 2014 study by Boas, Hidalgo, and Richardon found that corporate donors to the PT in the 2006 elections received between 14 to 39 times the value of their donations in government contracts.[67]

The Brazilian Ministers who voted 8-3 to strike down corporate donations perceived the problem not just as one of corruption, but of plutocracy. Their reasoning would have sent shockwaves through the U.S. Supreme Court. Minister Marco Aurélio stated that "the value of political equality had been replaced by the wealth of large firms that give donations in order to control the electoral process"[68] and ventured that "we do not live in an authentic democracy, but rather a plutocracy — a political system in which power is exercised by the wealthiest group, leading to the exclusion of the less fortunate."[69] Minister Aurélio's conclusion affirmed that "we are living in a historic moment [in which] the private financing of electoral campaigns and political parties has not allowed democracy to be affirmed as a fundamental right." He further argued that "if democracy is a fundamental right, then plutocracy, now in force within our political-electoral system, is a violation of that right."[70] Minister Luiz Fux, the reporter for the case, began this string of opinions in 2013 by alleging that "there truly exists a representative crisis in the country, juxtaposing citizens ... with members of the political class who often privilege their own particular interests to the detriment of the public interest."[71]

As though offering an Orwellian response to the Brazilian decision, Chief Justice Roberts and Justice Alito wrote in *Citizens United* that "First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy."[72] Indeed, the

66 Bruce Douglas, "Brazil Bans Corporations from Political Donations Amid Corruption Scandal", *The Guardian* (18 September 2015), online: The Guardian <www.theguardian.com/world/2015/sep/18/brazilian-supreme-court-bans-corporate-donations-political-candidates-parties>.

67 Taylor C. Boas, F. Daniel Hidalgo & Neal P Richardson, "The Spoils of Victory: Campaign Donations and Government Contracts in Brazil" (2014) 76:2 Journal of Politics 415 at 415, online: <www.mit.edu/~dhidalgo/papers/political_investment_2014.pdf>.

68 Online: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4650relator.pdf>.

69 Online: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4650relator.pdf>.

70 *Ibid* citing Timothy K Kuhner, "The Democracy to which We Are Entitled: Human Rights and the Problem of Money in Politics" (2013) 26:1 Harv Hum Rts J 39, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211299>.

71 Online: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4650relator.pdf>. Minister Fux noted "an increasing influence of economic power over the political process in recent years" and stated that increases in candidate and party expenditures could not be explained by inflation or the growth of GDP."

72 *Citizens United*, *supra* note 44 at 917 (Roberts CJ concurring).

European, Canadian, and Brazilian cases illustrate the profound choice the US Supreme Court has made by construing equality concerns as "wholly foreign to the First Amendment,"[73] restraints on general treasury fund spending as unconstitutional in "'muffl[ing] the voices that best represent the most significant segments of the economy,'"[74] and a concern over the undue influence of aggregated wealth as "interfer[ing] with the 'open marketplace' of ideas protected by the First Amendment."[75]

The plutocratic US approach opposes government intervention and redescribes the dominance of wealth over politics in the positive language of individual speech rights. The competing judicial approaches from Brazil, the Council of Europe, and Canada start from different premises — namely, that concentrated financial power is dangerous in politics, that fairness and equality are important grounds for government intervention, and that all of these concerns hold high enough rank to carry the day in constitutional analysis. It mattered little that these various high courts were deciding the fates of different laws on the basis of different constitutional (and treaty) provisions. A superseding value conflict — indeed, a resurgence of the ideological competition between liberal and social democracies — controlled the legal exercise.

Partyocracy

Partyocracy in theory

In 1965, the Italian political theorist Giovanni Sartori made a powerful observation about political parties. He argued that they have become "such an essential element in the political process that in many instances we might legitimately call democracy not simply a party system but a 'partyocracy' (partitocrazia)."[76] Over twenty years later, Sartori repeated the same point and ventured this definition: "a party tyranny in which the actual locus of power is shifted and concentrated from government and parliament to party directorates."[77] The German sociologist Robert Michels considered it a "sociological law" that the organizational form of political parties "is the mother of the rule of the elected over the electors."[78] By this phrase, Michels did not mean representative de-

73 *Buckley v Valeo*, 424 US 1, 48-49 (1976).
74 *Citizens United*, *supra* note 44 at 907 (Roberts C.J. concurring).
75 *Ibid* at 906.
76 Giovanni Sartori, *Democratic Theory* (New York: Praeger, 1965) at 120.
77 Giovanni Sartori, *The Theory of Democracy Revisited* (Chatham, NJ: Chatham House Publishers, 1987) at 148.
78 *Ibid* at 175, n 48.

mocracy. He meant oligarchy.[79] His thesis, "democracy leads to oligarchy,"[80] was echoed many times throughout the years, including, for example, by Henry Kariel who traced the decline of pluralism to "oligarchically governed hierarchies" that began as "voluntary organizations or associations."[81]

Recall our definition of oligarchy as "a concentration of entrenched illegitimate authority and/or influence in the hands of a minority, such that de facto what the minority wants is generally what comes to pass, even when it goes against the wishes (whether actively or passively expressed) of the majority."[82] If we are to distinguish partyocracy from plutocracy, we must answer the questions, *which* minority? And *which* illegitimate mode of authority and/or influence? This returns us to the "party directorates" referenced by Sartori.

Recall Katz and Mair's key observation: "a tendency in recent years towards an ever closer symbiosis between parties and the state, and that this then sets the stage for the emergence of a new party type, which we identify as 'the cartel party.'" [83] The modus operandi and claim to legitimacy of the cartel party are in direct conflict with "the socialist/mass-party model [which] provide[d] for prospective popular control over policy, in that the voters are supporting one or other party and its well-defined programme, and the party (or coalition of parties) with a majority of the votes gets to rule."[84] From this conception of parties, a powerful justificatory claim has arisen: parties "provide the (not an) essential linkage between citizens and the state."[85]

Katz and Mair state that this justificatory claim soon became inapplicable and was replaced by a new one. In that past world of mass parties legitimacy was a function of "direct popular involvement in the formulation of the party programme [which required] an extensive membership organization of branches or cells in order to provide avenues for mass input into the party's policy-making process."[86] With the success of the welfare state,[87] the weakening of separate social identities, and the rise of the mass media, the catch-all

79 R Michels, *First lectures in political sociology*, translated by Alfred de Grazia (Minneapolis: University of Minnesota Press, 1949) at 149. Michels wrote that "[h]e who says organization, says tendency to oligarchy.": *Ibid.*

80 *Ibid.*

81 Henry S Kariel, *The Decline of American Pluralism* (Redwood City, CA: Stanford University Press, 1961) at 2.

82 Leach, *supra* note 36 at 329.

83 Katz & Mair, *supra* note 11 at 6.

84 *Ibid* at 7.

85 *Ibid.*

86 *Ibid.*

87 *Ibid* at 12.

party came to predominate. Under its mode of operation, the "formation of … policies or programmes became the prerogative of the party leadership rather than of the party membership." Claims to legitimacy remained not on the basis of prospective popular control and accountability, a choice between "clearly defined alternatives," but rather retrospectively, "on the basis of experience and record."[88]

Still, even the catch-all party sought "to influence the state from outside, seeking temporary custody of public policy in order to satisfy the short-term demands of its pragmatic consumers."[89] As regards their relationship to the state, parties went from "delegates" of their supporters to "entrepreneurs."[90] The corruption of political parties and social democracy through the emergence of partyocracy comes about only in the next step, one from "entrepreneurs" to "semi-state agencies."[91] Katz and Mair describe a "movement of parties from civil society towards the state [to] such an extent that parties become part of the state apparatus itself"[92] and contend that "this is precisely the direction in which the political parties in modern democracies have been heading over the past two decades,"[93] 1975-1995.

As with "plutocracy," Katz and Mair's party typologies (mass, catch-all, and cartel) are "heuristically convenient polar types,"[94] meaning that any particular party need not entirely correspond to just one category.[95] Quite consistently with the descriptive findings of the comparative political finance literature cited above, Katz and Mair clearly describe cartel parties in terms of *a trajectory* over those two decades culminating in certain dominant and worrisome tendencies. Those tendencies include: (1) collusion between parties to produce rising state subsidies; (2) criteria for the awarding of those subsidies that disadvantage minor parties and other challengers; (3) all major parties remaining "in" rather than "out," hence losing their incentive to be responsive to the citizenry, and hence authoritatively re-defining democracy as "a means by which the rulers control the ruled, rather than the other way around;" (4) a

88 *Ibid* at 8.
89 *Ibid.*
90 *Ibid* at 16.
91 *Ibid.*
92 *Ibid* at 14.
93 *Ibid* at 14-15.
94 *Ibid* at 19.
95 Indeed, even the plutocratic United States has an important feature of partyocracy in that "the structure of federal public financing law actually enhances the majoritarian bias of public opinion formation during campaigns by providing an extra boost to candidacies supported by political majorities." James A Gardner, "The Incompatible Treatment of Majorities in Election Law and Deliberative Democracy" (2013) 12:4 Election LJ 468 at 479.

decline in public support for parties and participation in elections; and, (5) "a revision of the normative model of democracy."[96] Significant within that revision is that democracy consists "in the currying of public favor by elites, rather than public involvement in policy-making."[97]

In the end, Katz and Mair conclude that "[d]emocracy becomes a means of achieving social stability rather than social change" and elections in particular cease to provide civil society a way to control the state. Instead, elections are "a service provided by the state for civil society," which at most provide "feedback" to rulers about the acceptability of their choices.[98] Despite claims that parties have declined or been weakened, Katz and Mair conclude that they enjoy increased financial resources due to their control of state subsidies and that this offsets the decrease they have experienced in intensity of loyalty and volume of membership.[99]

With this, we can return to the second question posed by our definition of oligarchy: What is the illegitimate mode of authority and/or influence employed by political parties? What is the source of party directorates' "domination ... of parliamentary democracy?"[100] There are, of course, many causal variables, such as electoral systems — consider, for example, how a closed list system of proportional representation allows parties to choose the order of candidates and limit citizen choice. In order to rise to power, however, parties require funds for electoral expenses and general operational expenses. We must therefore return to the elementary observation that "[a]ll the undertakings necessary to bring democracy to life ... turn indispensably on the most base of commodities: money."[101] And to that observation, Katz and Mair add the observation that parties have taken over the state and colluded in order to increase state subsidies and exclude minor parties.

Partyocracy in practice

As of 2012, French political parties received approximately "70 million euros per year plus 50 per cent reimbursement of electoral campaign spending (about

96 Katz & Mair, *supra* note 11 at 21.

97 *Ibid* at 22.

98 *Ibid.*

99 *Ibid* at 25.

100 Peter Russell, "McGuinty Acting Like Absolute Monarch of Old", *Ontario News Watch* (9 September 2013), online: Ontario News Watch <http://ontarionewswatch.com/onw-news.html?id=427>.

101 Ewing & Issacharoff, *supra* note 21 at 1.

80 million per year)."[102] German political parties, meanwhile, received "about 130 million euros per year, and the *stiftungen* (think-tanks directly linked to parties) receive more than 300 million."[103] Public subsidies in Italy and Spain came to approximately 200 and 130 million euros per year, respectively.[104] While not close to the astronomical figures seen in the United States and Brazil, these numbers nevertheless represent a high degree of public financing, a massive contrast to the plutocratic foundation of a high degree of private financing.

What, then, is partyocracy's parallel to plutocracy? The negation of democratic integrity and responsiveness. Just as the constitutional values of liberal democracy can be interpreted as guaranteeing a constitutional order of corporate speakers, multi-million dollar donors and spenders, superPACs, and dark money groups competing in an open market for political power, the constitutional values of social democracy can be interpreted as guaranteeing an ossified regime of cartel parties that have appropriated the power of the state. The ambiguity is nothing less than social democracy's inherent vulnerability to partyocracy.

Let us take Spain and Germany as examples. The Spanish and German constitutions both define their political orders as social democracies and explicitly provide for popular sovereignty.[105] Section 20 of the German Basic Law states:

> (1) The Federal Republic of Germany is a democratic and social federal state.
>
> (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

Sections 1 and 2 of the Spanish Constitution state:

102 Valentino Larcinese, "The UK should embrace the European model for public financing for political parties", (19 April 2012), *The London School of Economic and Political Science* (blog), online: London School of Economics Blog <http://blogs.lse.ac.uk/europpblog/2012/04/19/europe-political-party-funding/>.

103 *Ibid.*

104 *Ibid.*

105 All translations of the German Basic Law are taken from an official English version: Saarbrücken, *Basic Law for the Federal Republic of Germany*, translated by Christian Tomuschat & David P Currie, online: Federal Ministry of Justice <www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_150653.pdf>; All translations of the Spanish Constitution are taken from the official English version: *Spanish Constitution of 1978* (6 December 1978), online: Congress <www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf>.

> 1. Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system.
>
> 2. National sovereignty belongs to the Spanish people, from whom all State powers emanate.

Next, both documents contain essentially the same provision on political parties, establishing their constitutional function of helping to cultivate and express the will of the people.[106] In one relevant respect, the two Constitutions differ. Article 38 of the German Basic Law states:

> Members of the German Bundestag ... shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.

This provision gives rise to an inference, not found in Spain, that elected legislators should not be subject to an overweaning measure of party discipline.

On the bases of the essentially identical provisions found in the two Constitutions, Germany and Spain arrived at radically different postures as regards the threat of partyocracy.

Spain. Spain's latest legislation on party finance, effective as of March 2015, counteracts certain threats that had run rampant in prior decades. It begins by affirming that "political parties are essential actors in political, economic, and social life [as] the channel for participation by citizens in public affairs."[107] The affirmation continues: "Political parties ... give voice to political pluralism and participate in the formation and manifestation of the popular will."[108] Such ideas contextualize the major changes introduced by this legislation, especially the limits and prohibitions contained in the revision to article 5 of the prior legislation: "Political parties cannot accept or receive directly or indirectly anonymous donations, donations from natural persons in excess of

106 Article 21 (1) of the German Basic Law provides:

> Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

Section 6 of the Spanish Constitution reads:

> Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people and are an essential instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and their functioning must be democratic.

107 Ley Orgánica 3/2015, 77 Boletín Oficial del Estado at 27186 (31 March 2015).

108 *Ibid* at 27187.

50,000 euros per year, or donations [in any quantity] from legal persons."[109] Relating to the prohibition on corporate donations, the new law also prohibits the forgiving of debt by credit agencies, meaning that a major source of undue influence has been closed — a longstanding practice by which banks issue loans to political parties to cover their operational expenses and then forgave those loans, offering in essence a large political contribution.

These new measures appear to intend to address the corruption scandals that have recently horrified the electorate[110] as well as some systematic forms of corruption relating to banks and corporate donations. It is unlikely, however, that they will affect other dimensions of Spanish political finance that have long added up to partyocracy. The first such dimension is "the absolutely predominant role of public financing, perhaps the most notable feature of our entire [political finance] regime."[111] In this regime of predominantly public financing, parties have served as both judge and jury in their own case, succeeding in approving their own funding and substantial increases therein.[112] Indeed, under the 2007 party finance law, there are no limits placed on public funds and, on the other side of the spectrum, the law's provisions on party debt and the renegotiation of that debt with private creditors amount to unlimited private donations.[113] Surely this combination of unlimited public financing and (effectively) unlimited private financing is not what was intended by the 1987 Law on the Financing of Political Parties that established public financing and private financing as the two legitimate pillars of the system.[114] That regime was intended to satisfy the constitutional nature of political parties as private associations that exercise public functions.[115]

109 *Ibid* at 27191.

110 See e.g. Agence France-Presse, "Spain's ruling party ran secret fund for 18 years, investigating judge finds", *The Guardian* (23 March 2015), online: The Guardian <www.theguardian.com/world/2015/mar/23/spain-ruling-peoples-party-secret-fund-18-years-investigating-judge> (discussing the "Barcenas case"); "A Lot of Bad Apples: a wave of arrests upends the political establishment", *The Economist* (8 November 2014), online: The Economist <http://www.economist.com/news/europe/21631126-wave-arrests-upends-political-establishment-lot-bad-apples> (detailing corruption scandals that year).

111 Gaspar Ariño Ortiz, La Financiación de los Partidos Políticos (Madrid Ediciones Cinca, SA, Foro de la Sociedad Civil, 2009) at 20.

112 María Holgado González, La Financiación de los Partidos Políticos en España (Tirant Lo Blanch: Valencia 2003) at 19.

113 Gaspar Ariño Ortiz, La Financiación de los Partidos Políticos (Madrid Ediciones Cinca, SA, Foro de la Sociedad Civil, 2009) at 25-26.

114 See María Holgado González, La Financiación de los Partidos Políticos en España (Tirant Lo Blanch: Valencia 2003) at 31-35.

115 See generally *ibid* at 131-48.

María Holgado González notes that "the scarce role of party members in the party's own financial upkeep has done nothing but increase the directorate's autonomy and, accordingly, the oligarchic functioning of the organization itself."[116] She identifies parties' lack of any need to raise funds from their base and sympathizers as the reason that parties have become dependent on economically powerful groups and hence altered the representative function of democracy.[117] The combination of high public finance, few donations from grass roots party sympathizers, and large donations from banks and corporations has led to the distancing of political parties from society and an accompanying unrepresentativeness.

Spanish scholars report an additional source of unrepresentativeness: the major parties have acted as a cartel in order to exclude minor parties from public subsidies. The oligarchic function mentioned above is not simply that political parties in general have cornered the market for political power; just a few parties have succeeded in doing so and they have colluded to maintain their power. Óscar Sánchez Muñoz notes the irony:

> The public financing of political parties is demanded by the principle of equality of opportunity [but] instead of configuring a system destined to equalize gaps between parties and make visible different political options for the electorate to choose from, Spanish legislation on the requirements for access to public financing and the criteria for its dispersal achieves the opposite effect ... . [T]he rules in force disproportionately benefit large parties, which have the greatest access to private sources of political finance, and penalize smaller parties. This serves to increase the petrification of the party system, making it nearly impossible for new options to emerge and challenge the status quo.[118]

As Sánchez Muñoz suggests, the main issue is access to public financing. Public subsidies for election-related expenses are awarded based on votes and parliamentary seats obtained. Holgado remarks that this formula discriminates against extraparliamentary parties.[119] She recommends a new rule, taking into account only the number of votes obtained independently of whether parliamentary representation was obtained,[120] citing France and Germany as two examples in which parliamentary representation has been abolished as a criterion

116 *Ibid.*

117 *Ibid.*

118 Óscar Sánchez Muñoz, La Igualdad de Oportunidades en las Competiciones Electorales 364 (Madrid 2007, Centro de Estudios Políticos y Constitucionales).

119 María Holgado González, La Financiación de los Partidos Políticos en España (Tirant Lo Blanch: Valencia 2003) at 65-68.

120 *Ibid* at 260.

for the receipt of public funds. Holgado concludes that "there is no justification for the discrimination in effect today between parliamentary parties and extra-parliamentary parties, which contributes to the freezing of the system and the erosion of political pluralism."[121]

Perhaps what Holgado means to say is that there is no *satisfactory* justification for the discriminatory system in effect. As she herself notes, the Spanish Constitutional Court has justified the exclusion of minor parties on the basis of what it identified as two compelling state interests.[122] Consider this remarkable quote from the Constitutional Court:

> [T]he electoral process, as a whole, is not just a channel for the exercise of individual rights (whether personal or associational) that are recognized in article 23 of the Constitution. It is also a means to bestow expressive capacity upon the institutions of the democratic state and to provide effective centers of political decision that ensure that the state's actions are publicly oriented. Experience ... shows ... that the atomization of political representation poses a risk for these objectives.

To that concern over stability, the Court added a stipulation about representation:

> Those rights [to annual public subsidies] are not recognized on the basis of the fact of political parties' simple existence, but rather as a function of participation in the manifestation of popular will. In order to claim these rights, it is necessary to [first] take part in elections.[123]

It was on this basis of these twin objectives, governability and preserving broad scale stability of political representation, that the Court upheld the constitutionality of a discriminatory formula for awarding public subsidies.

Holgado González concludes that "the historic concern over governmental stability prevail[ed] over the concern over representation."[124] In her estimation, "the Spanish system is one of the most effective of all western electoral systems in reducing the number of political parties with a presence in parliament. Sánchez Muñoz concurs, noting that "political stability is a legitimate objective, one compatible with the constitutional order, but the search for stability taken to the extreme leads to a dangerous ossification of the democratic system."[125]

121 *Ibid.*
122 *Ibid* at 69.
123 STC 3/1981, February 2, FJ. 2nd. quoted in *ibid.*
124 STC 75/1985, 21 June, quoted in *ibid* at 70.
125 Sánchez Muñoz, La Igualdad de Oportunidades en Las Competiciones Electorales at 364.

Although Spain's well-intentioned system of generous public financing was intended to prevent plutocracy, it failed for decades to close the gaps that allowed for the insertion of large private funds and it failed to provide for equality between political parties. It achieved a partyocracy with strong plutocratic elements.

Germany. The German system, specifically the German Constitutional Court, has taken decisive measures to curb partyocracy. In the *Party Finance II Case*,[126] the Constitutional Court struck down public financing for the ordinary expenses of parties represented in the Bundestag out of a concern over partyocracy:

> In creating a free, democratic basic order, the framers of the Basic Law chose to advance a free and open process of forming public opinion and the will of the state. It is incompatible with this choice for the state to finance all political party activities ... In a democratic system the formation of the people's will must take place in a free, open, and unregimented manner ... The process culminates in a parliamentary election where a distinction must be made between forming the people's will and forming the will of the state.[127]

Indeed, the problem with partyocracy is that parties take over the state and appropriate its funds. The Court noted that the state's will and the people's will are intertwined but that, in a democracy, the formation of the popular will "must start with the people, and not with the organs of the state."[128] In a position that looks superficially like that of the US Supreme Court, the Constitutional Court wrote that the formation of the people's will and opinion "must, as a matter of principle, remain 'free of state control.'"[129]

The meaning of freedom from state control here, however, is not located in a free market, but rather in a mix of state and private financing intended to make political parties accountable to the people. This is accomplished both by protecting political parties from the state and by protecting the state from political parties. Observe the two functions noted by the Court in 1966:

> The constitutional requirement that the formation of public opinion and the will of the state remain fundamentally free of state control [1] insulates party activity

126 20 BverfGE 56 (1966), excerpted in Donald P Kommers & Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed (Durham, NC: Duke University Press, 2012) [Kommers & Miller].

127 *Ibid* at 275.

128 *Ibid.*

129 *Ibid.*

> against the overarching influence of government and [2] prohibits the incorporation of political parties into the state's apparatus.[130]

The Court further elaborated upon its concern over parties appropriating the state and distancing themselves from their supporters in the *Party Finance VI Case* (1992). Kommers describes the policy judgment the Court sought to enact in these words: "the established parties were becoming too entrenched, building and reinforcing their internal bureaucracies at the state's expense and thus widening the distance between themselves and their voters." Therefore, "the Court sought to … require the parties to depend on their own resources and fund-raising capabilities to a greater extent than in the past."[131]

Although the Court did allow the provision of state subsidies for "general political activities," not just electoral expenses, a major reversal to be sure, the Court hastened to require that public funding be counterbalanced by the party's social embeddedness. "The principle of party autonomy," it wrote, "is violated when state financial subsidies discourage political parties from taking the steps needed to raise funds voluntarily from their own members and electoral supporters."[132] From this reasoning, it derived a relative upper limit: "The total amount of state subsidies provided to a political party must not exceed the sum it receives from its own fund-raising efforts."[133] To incentivize a robust degree of private monetary support for parties, German law provides that "up to 50 per cent of membership fees and donations ('contributions') paid, *inter alia*, to political parties are tax deductible up to the amount of 825 Euro (or 1,650 Euro for jointly assessed spouses)."[134]

In addition to that relative upper limit, the Court further derived an absolute upper limit: "The amount of financial support provided to the political parties from public funds during the years 1989-1992 must be considered sufficient…"[135] In 2011, that objective limit stood at 141.9 million Euros; and

130 *Ibid* at 276.

131 *Ibid* at 283.

132 *Ibid* at 282.

133 *Ibid.* For an articulation of this rule today, see German Bundestag, *State funding of political parties in Germany* (1 November 2012), online at 3-4: <www.bundestag.de/htdocs_e/bundestag/function/party_funding/index.html> [German Bundestag, *State funding*]. Regardless of the objective limit on total party funds, each individual party must provide at least half of their funds. See also Hans Herbert von Arnim, "Campaign and Party Finance in Germany" in Gunlicks, *supra* note 6 at 209.

134 Group of States Against Corruption, *Third Evaluation Round: Evaluation Report on Germany on Transparency of Party Funding* (4 December 2009), online at 11: Council of Europe <https://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2009)3_Germany_Two_EN.pdf>.

135 *Supra* note 126.

in 2012, the objective limit was 150.8 million Euros.[136] Again, the purpose of these provisions was to avoid "direct dependence on the state" and to implement what Gunlicks called "the idea that the parties should be free of the state" in order to deepen their roots in society.[137]

Moving from concerns over state-capture and independence from society, the Court addressed the exclusionary effect of partyocracy in the *Party Finance II Case* (1966):

> [T]he principle of strict formal equality of opportunity requires that the legislature consider all parties that have participated in the campaign when distributing funds. It is inconsistent with the principle of equal opportunity for [the legislature] to provide state funds only to parties already represented in Parliament or to those that ... win seats in Parliament.[138]

The Court even went so far as to prevent the condition that a party must obtain 5 percent of the votes cast in order to receive public finances. Although this was a valid criterion for parliamentary presence, the Court alleged that this criterion in public subsidies would function to "prevent a new party from being seated in Parliament."[139] The Court "nullified a provision of the Political Parties Act that limited funding eligibility only to parties securing at least 2.5 percent of the total list or second-ballot vote." The Court deemed this baseline impermissibly high, holding that "that any party receiving 0.5 percent of the vote should be eligible for public funding."[140]

These differing interpretations of similar constitutional provisions in Spain and Germany suggest another superseding value conflict that controls the legal exercise. The Spanish Constitutional Court and Spanish electoral law do not recognize large parties' dominion over public financing or the exclusion of minor parties as serious dangers. Instead, they re-describe the dominance of large parties in the positive language of the general will and political stability. In contrast, the German Constitutional Court has recognized the dangers of political parties taking over the state, excluding competitors, and distancing themselves from society. Rather than resting on individualistic or anti-regulatory assumptions, its antidote to partyocracy defends equality and representation, and seeks to prevent political parties from co-opting the state.

136 German Bundestag, *State funding*, *supra* note 133 at 3-4.
137 Kommers & Miller, *supra* note 126 at 283.
138 *Ibid* at 277.
139 *Ibid.*
140 *Ibid* at 280.

Conclusion

Whether we speak of the entrenched authority of private wealth or major political parties, constitutional interpretation turns on competing views of oligarchy: elite control is described either as a systemic form of corruption to be avoided and usurpation of others' rights, or as the culmination of rightful authority and an expression of sacred constitutional values. Never has *constitutional law* been more faithful to the ordinary meaning of the phrase: the law that determines the structure and make-up of a country. The distribution of sovereign power cannot help but determine such things.

Plutocracy designates a state of affairs in which the market has taken over politics. It functions as a means of political exclusion based on wealth, which represents the corruption of the values of freedom and competition in their political applications. Partyocracy, on the other hand, corrupts the egalitarian, collective, and associational aims of social democracy. Social democracy becomes organized to the point of being exclusive, and regulated to such an extent as to bind the state together with certain political parties. It functions as a means of political exclusion based on power within, or influence over, the major political parties.

Despite their basis in opposing ideological principles, as exemplified by the US and Spanish sources described above, plutocracy and partyocracy achieve the same results: the distortion of representative democracy (with small, elite groups being represented far more significantly than the general public) and the simultaneous destruction of popular sovereignty (with the general public playing no appreciable role other than to vote for a pre-established menu of market dominant and party dominant actors). Given their unaccountable and opaque natures, such systems create openings for privatization, austerity, and inequality. The prevalance of those trends suggests that the German, Brazilian, Canadian, and European Court of Human Rights' approach to political finance has been less influential than its plutocratic and partyocratic rivals.

Why would political elites under plutocracy or partyocracy support neoliberalism, given that it seems to leave them with an increasingly limited range of action? Consider that Ewing and Issacharoff cite "the strategies of privatisation and deregulation pursued by all countries in an increasingly globalised world"[141] as the reasons that today's "national political systems ... in many cases have less control over national policy than perhaps at any time since the

141 Ewing and Ischaroff, *supra* note 21 at 1-3.

industrial revolution."[142] Burnell and Ware concur, noting that "[t]he dominant neo-liberal agenda recommends initiatives to 'downsize' or at least restrain the size of the public sector, and to reduce social welfare provision."[143] Those changes make it harder to "shape public policy and public spending in ways intended to mobilize electoral support."[144] However, perhaps national control and the need for popular support are the obstacles, not the goals, and plutocracy and partyocracy have served to remove them.

Indeed, governance has remained a valuable commodity all along. While creating limitations for progressive actors, the implementation of the neoliberal agenda has created opportunities "for *enterprising* actors to make substantial gains from the processes by which countries' economies are being reformed, as well as the greater market orientation that results."[145] Burnell and Ware list as examples of such opportunities "contracting out of economic activities formerly in the state sector and the privatization of public assets and associated income streams," and the subsequent "windfall financial gains [that] will then be channeled to those political forces ... which ... provide a secure policy environment and ... guarantee the arrangements that made the gains possible."[146] It stands to reason that this agenda has been the motivating factor behind plutocracy's and partyocracy's development over the past four decades. For anyone concerned by the dominant trends sweeping the globe, these systems' normative claims and practical results both merit the closest possible scrutiny.

142 *Ibid* at 2-3.
143 Burnell & Ware, *supra* note 63 at 13.
144 *Ibid.*
145 *Ibid.*
146 *Ibid* at 14.

The Supreme Court in Canada's Constitutional Order

*Kate Glover**

The majority opinion in the Supreme Court Act Reference *tells a story about the role of the Supreme Court of Canada within the Canadian constitutional order. The story chronicles the evolution of the Court since Confederation, culminating in the conclusion that the Court and some of its key features are now essential to the Constitution of Canada. This account relies on well-established ideas in Canadian constitutionalism, in particular, that the constitutional work of the Court is captured by the metaphors of 'umpire' and 'guardian,' and that the Court is the final legal voice on matters of constitutional interpretation. This paper contests the narrative told in the* Reference*, arguing that the story tidies up Canadian constitutionalism in ways that cultivate an inaccurate account of the Supreme Court's relationship to the constitution. In particular, the account overestimates the supremacy of the Court's constitutional interpretations and understates the nature of the Court's role in constitutional disputes. Moreover, it mischaracterizes the stability of the Court's position in the constitutional architecture. That position is not enshrined at the apex of a legal pyramid, but rather shifts within the architecture of the constitution as interpretive authority is taken up by a range of decision-makers. Ultimately, the arguments offered in this paper do not target the outcome of the* Reference*. Instead the aim is to enrich the starting point for assessing the ways in which the Court might — and might not — be "constitutionally essential."*

L'opinion majoritaire dans le Renvoi relatif à la Loi sur la Cour suprême *raconte une histoire sur le rôle de la Cour suprême du Canada au sein de l'ordre constitutionnel canadien. Cette histoire fait la chronique de l'évolution de la Cour depuis la fédération, menant à la conclusion que la Cour et certaines de ses caractéristiques clés sont désormais essentielles à la Constitution du Canada. Ce compte rendu se fonde sur des idées bien établies dans le constitutionnalisme canadien, notamment que les travaux constitutionnels de la Cour sont rendus par les métaphores suivantes : « arbitre » et « gardien » et que la Cour est la voix juridique suprême en matière de questions portant sur l'interprétation constitutionnelle. L'auteure de cet article conteste le récit raconté dans le Renvoi et soutient que cette histoire range le constitutionnalisme canadien d'une façon qui cultive un compte rendu inexact du rapport de la Cour suprême à la constitution. En particulier, ce compte rendu surestime la suprématie des interprétations constitutionnelles de la Cour et sous-estime la nature du rôle de la Cour dans les litiges constitutionnels. En outre, il représente mal la stabilité de la position de la Cour dans l'architecture constitutionnelle. Cette position n'est pas consacrée au sommet de la pyramide juridique mais plutôt, comme le pouvoir d'interprétation est accaparé par divers décideurs, elle se déplace à l'intérieur de l'architecture de la constitution. En fin de compte, les arguments invoqués dans cet article ne visent pas le résultat du Renvoi. Le but est plutôt d'enrichir le point de départ d'un examen des moyens que la Cour pourrait — et ne pourrait pas — être « essentielle sur le plan constitutionnel ».*

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Introduction

The majority opinion in the *Supreme Court Act Reference*[1] ("*Reference*") tells a story about the role of the Supreme Court of Canada within the Canadian constitutional order. The story chronicles the evolution of the Court since Confederation and culminates in the conclusion that the Court and some of its key features are now essential to — and therefore entrenched within — the Constitution of Canada. This account has elements that have long been part of the dominant narrative of Canadian constitutionalism, in particular, that the constitutional work of the Court is captured by the metaphors of 'umpire' and 'guardian,' and that the Court is the final legal voice on matters of constitutional interpretation.

This paper contests the narrative recounted in the *Reference*. It does so by first pointing to aspects of Canadian constitutionalism that are absent from the majority's reasoning, drawing particular attention to the absence of the enduring character of the constitution's tensions, the horizontal dimensions of Canada's constitutional architecture, and the many interpreters of constitutional text and principle. In so doing, this paper shows that the vision of Canada's constitution captured in the *Reference* is at odds with prominent themes of Canadian public law. It then considers the consequences of this incomplete constitutional picture. It argues that the story told by the majority in the *Reference* tidies up Canadian constitutionalism in ways that are perhaps understandable given the task that was before the Court, but which cultivate an inaccurate account of the Supreme Court's relationship to the constitution. In particular, the account overestimates the supremacy of the Court's constitutional interpretations, mischaracterizes the stability of the Court's position in the constitutional architecture, and understates the nature of the Court's role in constitutional disputes.

This paper is part of larger conversations about the constitutional character of the Court and the nature of the Canadian constitutional order. Other scholars have studied the constitutional status and narratives of the Supreme Court. For example, at the time of patriation, Scott contended that the new constitutional amending procedures were not merely placeholders, but rather shielded the Supreme Court from major unilateral reform.[2] In 2000, to mark the 125th anniversary of the Court, Van Praagh looked to questions of identity

1 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 [*Reference*].

2 Stephen A Scott, "Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes" (1982) 20:2 UWO L Rev 247; Stephen A Scott, "The Canadian Constitutional Amendment Process" (1982) 45:4 Law and Contemporary Problems 249.

and diversity and argued that the Court is just one (albeit one active and important) participant in the shared project of determining how to live together in a multicultural society.[3] More recently, Newman reasoned that the constitution, maintenance, and organization of the Court are entrenched within the Constitution of Canada by virtue of a "purposive and progressive" interpretation of section 101 of the *Constitution Act, 1867*.[4] After the *Reference*, Mathen examined the context in which the *Reference* was decided, contending that the constitutional forces at stake amounted to a "perfect storm of law and politics."[5] And Daly argued that the autobiographical story told by the majority in the *Reference* is selective and fails to address the ways in which the Court has used its own jurisprudence to enhance its institutional significance within Canada's constitutional architecture.[6]

In this paper, I too contest the stories told in the *Reference* and explore the character of the Supreme Court's place in Canada's public life. However, unlike much of the existing scholarship that takes up these tasks, the starting point of this paper is the body of work that explores how normative diversity tests the prevailing theories and stories of Canadian constitutionalism.[7] In an example of this work, Macdonald challenges accounts that ignore or undervalue the law-making capacities of individuals.[8] His work encourages more attention to

3 Shauna Van Praagh, "Identity's Importance: Reflections of — and on — Diversity" (2001) 80 Can Bar Rev 605. Van Praagh resists the tendency of jurists to presume the "paramount importance" of law — and consequently of the Supreme Court and the *Charter* — when seeking answers to questions about identity, diversity, and belonging. Her argument is based on an understanding of law as "but one set of influences that direct our behaviour and relationships" and the accompanying claim that "the meaning of identity cannot be discovered in the judgments or in the notion of multiculturalism embodied in s. 27 of the *Charter*." Rather, Van Praagh notes, "[t]he Court finds its place in a complex web of factors — for example, family relations, workplace organization, education — that direct the shaping of diversity in Canada": *ibid* at 608.

4 See Warren J Newman, "The Constitutional Status of the Supreme Court of Canada" [2009] 47 SCLR (2d) 429.

5 Carissima Mathen, "The Shadow of Absurdity and the Challenge of Easy Cases: Looking Back on the *Supreme Court Act Reference*" (2015) 71 SCLR (2d) 161 at 162.

6 Paul Daly, "A Supreme Court's Place in the Constitutional Order — Contrasting Recent Experiences in Canada and the United Kingdom" (2015) 41:1 Queen's LJ 1.

7 For a general account of how a legal pluralist understanding of law can inform the study of the Supreme Court and its work, see e.g. Kate Glover, "The Supreme Court in a Pluralistic World: Four Readings of a Reference" (2015) 60:4 McGill LJ 839. For examples that focus on the Court in more specific contexts, see Van Praagh, *supra* note 3; Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39:1 Queen's LJ 175; and Roderick A Macdonald, "Was Duplessis Right?" (2010) 55:3 McGill LJ 401.

8 Generally, see e.g. Martha-Marie Kleinhans & Roderick A Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS 25. In the constitutional context, see e.g. Roderick A Macdonald, "Kaleidoscopic Federalism" in Jean-François Gaudreault-DesBiens & Fabien Gélinas, eds, *Le federalism dans tous ses états: gouvernance, identité et méthodologie* (Cowansville, QC: Éditions Yvon Blais, 2005) at 261.

institutional forms and processes that engage citizens in the project of just law-making, interpretation, judgment, and reform.[9] Similarly, Webber contests narratives that pay too little attention to the role of disagreement as an abiding feature of the constitution.[10] In contrast to constitutional accounts that seek to alleviate the tension between competing values, Webber's analysis describes the Canadian constitutional order as agonistic. For Webber, this means that Canada's constitution is animated by contending, often irreconcilable, positions, and that these positions "are not neatly contained within a comprehensive, overarching theory," but rather persist in tension in Canadian public life.[11]

More of these constitutional counterclaims are found in the work of Borrows, Berger, and MacDonnell. Borrows draws on the lived experience and institutional frameworks of indigenous legal traditions to establish that law's dominant narratives do not speak to the multijuridical character of Canadian constitutionalism, but that they should.[12] Berger disrupts conventional accounts of constitutionalism, revealing the hubris of the constitutional rule of law's claims of independence from culture, and destabilizing entrenched accounts of law's relationship to religious difference in Canadian constitutional life.[13] In so doing, Berger establishes the promise and limits of more nuanced appreciations of cultural and normative encounter in modern constitutionalism. And MacDonnell contests the prevailing judicialized lens of understanding the constitution by establishing that political actors and civil servants are constitutional agents, in particular in the realm of interpreting and implementing *Charter* rights.[14]

9 See e.g. Roderick A Macdonald, "Law Reform for Dummies (3rd Edition)" (2014) 51:3 Osgoode Hall LJ, and Roderick A Macdonald, "The Integrity of Institutions: Role and Relationship in Constitutional Design" in Law Commission of Canada, *Setting Judicial Compensation: Multidisciplinary Perspectives* (Ottawa: Law Commission of Canada, 1999). See also Hoi Kong, "The Unbounded Public Law Imagination of Roderick A Macdonald" in Richard Janda, Rosalie Jukier & Daniel Jutras, eds, *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (Montreal: McGill-Queen's University Press, 2015) 73.

10 Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 [Webber, "Legal Pluralism"].

11 Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 8 [Webber, "Contextual Constitution"].

12 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Indigenous Constitution*]; John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010).

13 See e.g. Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015).

14 Vanessa MacDonnell, "The Constitution as Framework for Governance" (2013) 63:4 UTLJ 624 ["Framework"]; Vanessa MacDonnell, "The Civil Servant's Role in the Implementation of Constitutional Rights" (2015) 13:2 Intl J Constitutional L 383.

This paper draws on the insights of these and other scholars, as well as examples from public law jurisprudence, to argue that Canada's constitutional imagination — including its understanding of the constitutional character of the Supreme Court — is richer than the account offered in the majority opinion in the *Reference*. That said, in pointing to the absences and shortcomings in the majority's narrative, the goal of this paper is not to challenge the outcome of the *Reference*; instead, the aim is to enrich the starting point for assessing the ways in which the Court might — and might not — be "constitutionally essential."

The remainder of this paper proceeds in three parts. Part I sets out the facts and reasoning of the majority in the *Reference*. Part II recounts the story that the majority opinion tells about Canada's constitutional order and the place of the Supreme Court within it. Part III considers what is missing from this story and the effects of these omissions. It shows that the constitutional account provided in the *Reference* neglects important tensions and structural features of Canada's constitution. It then begins to outline how the narrative about the Supreme Court's constitutional roles shifts when these dimensions of Canadian constitutionalism are accounted for. In particular, it suggests that the Supreme Court's constitutional position is not enshrined at the apex of a judicial pyramid, but rather shifts within the architecture of the constitution as interpretive authority is taken up by a range of decision-makers. Relatedly, it points out that the Court's role includes a dispute maintenance function in addition to a dispute resolution function. As is discussed in Part III and in the conclusion to this paper, these observations contest and add nuance to the majority's conclusion that the Supreme Court and some of its characteristics are essential within Canada's constitutional order.

I. The *Supreme Court Act Reference*

In October 2013, Justice Marc Nadon was sworn in as the newest member of the Supreme Court of Canada. His appointment was swiftly challenged; a reference ensued. The issue driving the *Reference* was whether Justice Nadon met the statutory eligibility criteria for appointment.

The *Supreme Court Act* provides that any current or former judge of a provincial superior court is eligible for appointment to the Court. Anyone with ten years of membership in a provincial bar is also eligible.[15] Yet three seats on the Court's bench are reserved for judges of Quebec. These seats are the subject

15 *Supreme Court Act*, RSC 1985, c S-26, s 5 [*Supreme Court Act*].

of section 6 of the *Act*. Section 6 provides that "at least three" judges must be appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec" or "from among the advocates" of Quebec. Therein lies the problem. At the time of his appointment, Justice Nadon was a judge of the Federal Court of Appeal. He had spent his judicial career in the Federal Court system, not in the courts of Quebec. That said, before being appointed to the bench, Justice Nadon had been a member of the Barreau du Québec for more than ten years. The legal question, therefore, was whether former membership status satisfied the statutory eligibility criteria for appointment to a Supreme Court seat reserved for judges of Quebec.

A majority of the Court held that it did not; current membership was required. According to the majority opinion, section 6 was intended to ensure sufficient civil law expertise on the Court, as well as sufficient representation of Quebec's legal traditions and social values. Section 6 was also intended to cultivate and enhance the Court's legitimacy by inspiring confidence among the people of Quebec.[16] While Parliament could have pursued these aims differently, it chose to do so by requiring current bar membership for appointees from Quebec. The practical consequence of the Court's conclusions was that judges of the Federal Court and the Federal Court of Appeal, including Justice Nadon, are ineligible for appointment to the seats on the Court reserved for judges of Quebec.

The *Reference* dealt with a second issue, this one a constitutional question. The issue was whether Parliament could unilaterally add provisions to the *Supreme Court Act*. The sections proposed by the government declared that former members of provincial bars were eligible for appointment, including former members of the Quebec bar.[17] By the time the *Reference* was heard, such sections — sections 5.1 and 6.1 — had been enacted and received royal assent.[18]

16 *Reference*, *supra* note 1 at paras 56, 59.

17 The second reference question asked: "Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No 2*?"

18 Section 5.1 provided, "For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province." Section 6.1 provided, "For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province."

On its face, the constitutional issue appears straightforward. Section 101 of the *Constitution Act, 1867* authorizes Parliament to create, maintain and organize a general court of appeal for the country and to establish additional courts for the better administration of the laws of Canada.[19] This constitutional authority empowers Parliament to create and configure the Supreme Court however it pleases. But the simplicity of this argument is confounded by the constitutional amending procedures, set out in Part V of the *Constitution Act, 1982*. The procedures provide that amendments to the Constitution of Canada in relation to the "composition of the Supreme Court" require unanimous consent of both houses of Parliament and the provinces, and that amendments in relation to the "Supreme Court of Canada" trigger the 7/50 rule.[20] The question then was whether sections 5.1 and 6.1 amend the Constitution of Canada such that they cannot be enacted by Parliament alone.

A majority of the Court concluded that Parliament had the constitutional authority to enact section 5.1, as it was truly declaratory and within the scope of Parliament's jurisdiction under section 101. Section 6.1, however, was of a different character. The majority concluded that section 6.1 changed the *Act* such that a new group of people — former members of the Barreau du Québec — would be eligible for appointment to the Supreme Court. For reasons discussed in greater detail in Part II, this amounted to a constitutional amendment in relation to the composition of the Supreme Court. It could therefore be implemented only with the unanimous consent of the houses of Parliament and the provincial legislatures.

II. The story about the Court in the *Reference*

In order to answer the constitutional question at stake in the *Reference*, the Court had to determine the constitutional status of the Supreme Court and some aspects of its design. If the eligibility criteria codified in section 6 were entrenched within the Constitution of Canada, then section 6.1 would constitute a constitutional amendment and, as a result, be beyond Parliament's unilateral authority.[21] It was here, in assessing the Court's current constitutional status,

19 *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, s 101, reprinted in RSC 1985, App II, No 5.

20 *Constitution Act, 1982*, ss 41(d), 42(1)(d), being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

21 Justice Moldaver did not address the second reference question; it was unnecessary given his conclusion on the first. In *obiter*, Moldaver J agreed that Quebec's entitlement to three Supreme Court judges was constitutionally entrenched and protected from unilateral change by section 41(d) of the *Constitution Act, 1982*. That said, Moldaver would not agree that the eligibility requirements are similarly entrenched. "Put simply," he said, "I am not convinced that any and all changes to

that the judges told a story about the Supreme Court's evolution within the constitutional order of Canada.

The story told in the *Reference* repeats a narrative that is well-established in Canadian legal culture.[22] It is a retrospective in which the Court sheds its reputation as a "quiet court" and rises to prominence as an institution of national importance. According to the story, the modern significance of the Court emerged incrementally. The first moment in the Court's evolution was its creation in the late nineteenth century after several years of opposition from Quebec. Agreement was reached only with "the guarantee that a significant proportion of the [Court's] judges would be drawn from institutions linked to Quebec civil law and culture."[23] This agreement reflected the bijural character of Canada's constitution, aiming to ensure that the Supreme Court would represent both the common and civil law traditions.

An early turning point in the Court's institutional life is said to be the abolition of appeals to the Judicial Committee of the Privy Council (JCPC) in the mid-twentieth century. With abolition, the Supreme Court inherited the Council's role as the "ultimate judicial authority over all legal disputes in Canada,"[24] rendering the Court "a key matter of interest to both Parliament and the provinces."[25] As the story goes, the abolition of appeals to the Privy Council elevated the Supreme Court's position within the Canadian legal system:

> With the abolition of appeals to the Judicial Committee of the Privy Council... [t]he Court assumed a vital role as an institution forming part of the federal system. It became the final arbiter of division of powers disputes and became the final word on matters of public law and provincial civil law. Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly to the development of a unified and coherent legal system.[26]

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the eligibility requirements will necessarily come within 'the composition of the Supreme Court of Canada' in s. 41(*d*)" (*Reference*, *supra* note 1 at para 115).

22 See e.g. Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008); Sopinka, J "The Supreme Court of Canada" (speech delivered on 10 April 1997 in Toronto), published in Brian A Crane & Harry S Browne, *Supreme Court of Canada Practice 2012* (Toronto: Carswell, 2012) at 521; Peter McCormick, *Supreme At Last: The Evolution of the Supreme Court of Canada* (Toronto: Lorimer, 2000); James G Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press & The Osgoode Society, 1985).

23 *Reference*, *supra* note 1 at para 93.

24 *Ibid* at para 82.

25 *Ibid* at para 85.

26 *Ibid* at para 85.

According to the narrative, the second turning point came in 1975 when the *Supreme Court Act* was amended. The Court gained control over much of its docket and a threshold for granting leave to appeal of "matters of public importance" was adopted for most cases.[27] In this moment, the Court's role is said to have shifted from a court of correction to that of a true supreme court, responsible for the sound and just evolution of Canada's legal doctrine. These legislative amendments "further enhanced" the Court's status within the constitutional order, rendering it "essential under the Constitution's architecture" as the "final, independent judicial arbiter of disputes over federal-provincial jurisdiction" and the "exclusive ultimate" word on public and provincial civil law in the country.[28]

The final pivotal moment in the Court's history occurred with the patriation of Canada's constitution. As the majority recounts in the *Reference,* patriation confirmed the Court's status as a constitutionally essential institution. The judiciary became the interpreter and remedial hand of the newly-adopted *Charter*, as well as Canada's constitutional guardian.[29] Within this institutional matrix, the Supreme Court became a "foundational premise of the Constitution."[30] In addition, the newly adopted amending procedures provided that reform of the Supreme Court and its composition was possible only with federal and provincial consent, thereby protecting the Court's functioning and legitimacy from incursions by either Parliament or the provinces acting alone.[31]

The moral of this historical account is that the Supreme Court of Canada is now a "constitutionally essential institution."[32] According to the majority in the *Reference*, the Canadian constitution necessarily contemplates a supreme court that is independent, bijural, and serves as the country's final general court of appeal, including in matters of constitutional interpretation.[33] It follows, as the majority notes, that Parliament is no longer simply *authorized* to establish a supreme court under section 101, a power that would arguably allow Parliament to dismantle the Court if it so chose. Rather, given the trajectory of constitutional history in Canada, Parliament is now *obligated* to "maintain — and protect — the essence of what enables the Supreme Court to perform

27 *Ibid* at para 86.
28 *Ibid* at paras 83-84, 86, 88.
29 *Ibid* at paras 88-89.
30 *Ibid* at paras 88-89.
31 *Ibid* at paras 90-94.
32 *Ibid* at para 87.
33 *Ibid* at para 94.

its current role."[34] This means that while Parliament alone can legislate for the purposes of "routine" maintenance of the Court under section 101, it cannot unilaterally alter the Court's configuration or its "fundamental nature and role."[35] Any "substantive change" to the Court's existence or key features requires the consent of Parliament and either a substantial segment or all of the provincial legislatures.[36]

III. The Supreme Court and the Constitution

This story about the Court's evolution in Canada's constitutional order, from quiet and contingent to prominent and entrenched, is familiar. It has gained traction as the explanation for how the Court became one of the country's most powerful institutions,[37] now one whose existence and essence are guaranteed by the constitution and shielded from unilateral change by virtue of the constitutional amending procedures. These conclusions reflect ideas about the Court that are widely repeated in Canadian constitutionalism. One idea provides that the traditional metaphors of constitutional "guardian" and "umpire" or "referee" of the division of powers capture much of the Court's role in constitutional disputes.[38] A second points to the position of the Supreme Court as the final court of appeal for Canada, and thus the final legal voice in matters "concerning all the laws of Canada and the provinces."[39]

This narrative reflects certain choices about what themes and values to privilege over others. This section explores some of those choices and considers implications of choosing differently. It focuses on the vision of Canadian constitutionalism that underlies the narrative and the implications of this vision as a starting point for assessing the Court's constitutional significance. This exploration shows that the narrative presupposes a constitutional vision that favours institutional and interpretive hierarchies, political roles and actors, and bijurality, over elements of the constitution that point towards pluralism,

34 *Ibid* at para 101.

35 *Reference re Senate Reform*, 2014 SCC 32 at para 48, [2014] 1 SCR 704 [*Senate Reference*].

36 *Reference, supra* note 1 at paras 90-106; *Constitution Act, 1982*, *supra* note 20, ss 41(d), 42(1)(d). Unanimous consent is required for all reform in relation to the "composition of the Supreme Court" pursuant to section 41(d) of the *Constitution Act, 1982*. Constitutional reform in relation to all other matters dealing with the Supreme Court are subject to the 7/50 rule under section 42(1)(d).

37 See *Reference, supra* note 1 and the sources cited *supra* note 22.

38 For references to these metaphors in the case law, see e.g. *Re Anti-Inflation Act*, [1976] 2 SCR 373 at 405 (guardian), *United States v Burns*, 2001 SCC 7 at paras 35, 38, 71, [2001] 1 SCR 283 (guardian); *R v Lippé*, [1991] 2 SCR 114 at 137 (umpire); *Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66 at paras 105, 116, [2004] 3 SCR 381 (referee).

39 *Reference, supra* note 1 at para 95.

agonism, deference, and horizontal institutional relationships. Further, it suggests that accounting for these latter elements reveals that the Court's role in constitutional and administrative law disputes includes maintaining tension, as well as offering final answers. The Court's position within the architecture of Canadian constitutionalism is thus fluid rather than fixed.

A. The majority's constitutional vision

The majority opinion in the *Reference* sends mixed signals about Canada's constitutional order. On the one hand, the reasoning tells of a constitution that expresses evolving historical attitudes, values, and institutional arrangements. On this reading, the constitution is less a text than it is a collection of practices, principles, and experiences. We see this understanding reflected in the majority's story about the Court's evolution within Canada's constitutional architecture, growing incrementally as compromises were made between English and French officials, as access to the Privy Council eroded, and as statutory and constitutional configurations were transformed. We also see this in the Court's conclusion that section 101 of the *Constitution Act, 1867* has evolved from a permissive provision to a mandatory one. "The unilateral power found in s. 101 of the *Constitution Act, 1867* has been overtaken," the majority writes, "by the Court's evolution in the structure of the Constitution, as recognized in Part V of the *Constitution Act, 1982*."[40] This is a constitution of context, inheritance, and practice.

Yet the majority's reasoning also contemplates a constitution that is static and hierarchical. We see this side of the constitution in descriptions of the Court as the "final word" on matters of law,[41] the "final arbiter" of division of powers disputes,[42] and the "apex" of the legal system.[43] We see it further in the majority's descriptions and invocations of the constitutional amending procedures. For instance, the majority explains that the amending formulas protect the essential features of the Court, not as they evolve over time, but as they were understood in 1982.[44] On this reading of the *Reference*, the constitution offers authoritative final answers, contemplates normative and institutional hierarchies, and is frozen by the intent of its framers.

40 *Ibid* at para 101.
41 *Ibid* at para 85.
42 *Ibid* at para 85.
43 *Ibid* at para 84.
44 *Ibid* at paras 92-94.

These messages may be mixed, but they are not irreconcilable. No constitution is static or acontextual and every constitution provides guidance and some measure of predictability to the people it is intended to govern. These contending features of evolution and stasis, flexibility and consistency, can sit together within one constitutional order;[45] Canadian constitutionalism is no exception. Yet noticing the competing messages described above sets the stage for noticing other gaps found in the *Reference* opinion, namely those gaps between the constitutional landscape painted by the majority and a more expansive constitutional vision contemplated in other cases and experiences of Canadian constitutionalism. As is outlined in the following few paragraphs, each chasm cleaves along the boundary between dimensions that tend to make constitutional life bigger and messier (pluralism, agonism, horizontal architecture) and those that render that life smaller and tidier (bijuralism, political divisions, vertical hierarchies). The gaps are often difficult to notice because the narrative told in the *Reference* is a familiar one based on well-established assumptions about law and the constitution.

First, the narrative presupposes a constitutional order in which the key constitutional participants and actors are defined by political roles and borders. These participants and actors emerge from the perceived realities of Canadian federalism and include the federal and provincial orders of government, Quebec and the rest of Canada, and Parliament and the Court. In the *Reference,* these constituencies are particularly noticeable when the majority interprets the constitutional amending procedures and analyzes legislative proposals to reform the Supreme Court. "Requiring unanimity for changes to the composition of the Court," the majority reasoned, "gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent."[46] That is, "[p]rotecting the composition of the Court under s. 41(*d*) [the unanimity formula] was necessary because leaving its protection to s. 42(1)(*d*) would have left open the possibility that Quebec's seats on the Court could have been reduced or altogether removed without Quebec's agreement."[47] The majority in the *Reference* further highlighted the relevance of political roles and divisions in its constitutional outlook when it concluded that the existence of the Supreme Court is entrenched in the constitution. To find otherwise, "would mean that Parliament could unilaterally and fundamentally change

45 Roderick A Macdonald, "The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity: the Canadian Experiment" in K Kulcsar & D Szabo, eds, *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Budapest: Royal Society of Canada - Hungary Academy of Sciences, 1996) 52 at 53-61.

46 *Reference*, *supra* note 1 at para 93.

47 *Ibid.*

the Court, including Quebec's historically guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces."[48]

Consider also the majority's description of Canada's federal structure and the role of the Court in the configuration of federalism. Disputes over federalism are, according to the majority, disputes over the boundaries between Canada's two orders of government — the federal and the provincial. The majority opinion in the *Reference* highlights the dualist, political nature of Canadian federalism when describing what the Court gained when appeals to the Privy Council were abolished. In short, the Court gained the authority to decide, with finality and authority, disputes over the division of powers:[49]

> The need for a final, independent judicial arbiter of disputes over federal-provincial jurisdiction is implicit in a federal system:
>
> > Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers.... That impartial arbiter is the judiciary, charged with "control[ling] the limits of the respective sovereignties."[50]

The Court went on to say that when appeals to the Privy Council were abolished, the "continued existence and functioning of the Supreme Court of Canada became a key matter of interest to both Parliament and the provinces" and the "Court assumed a vital role as an institution forming part of the federal system" as the "final arbiter of division of powers disputes, and ... the final word on matters of public law and provincial civil law."[51]

Second, the majority's reasoning rests on an understanding of the constitutional architecture in which there is a stable hierarchy of authoritative interpreters. On this understanding, judges are authoritative and the Supreme Court — the highest court — is the ultimate interpretive authority. As the majority explains in the *Reference*, at the time of patriation, "the Supreme Court was already essential under the Constitution's architecture as the final arbiter of di-

48 *Ibid* at para 99.

49 *Ibid* at para 83.

50 *Ibid*, citing to cases spanning thirty years of constitutional jurisprudence: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 124; *Northern Telecom Canada Ltd v Communication Workers of Canada*, [1983] 1 SCR 733; *Reference re Securities Act*, 2011 SCC 66 at para 55 [*Securities Reference*]; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53 [*Secession Reference*].

51 *Reference*, *supra* note 1 at para 85.

vision of powers disputes and as the final general court of appeal for Canada,"[52] yet patriation enhanced its position with the adoption of the *Charter* and the principle of constitutional supremacy:

> Patriation of the Constitution was accompanied by the adoption of the *Canadian Charter of Rights and Freedoms*, which gave the courts the responsibility for interpreting and remedying breaches of the *Charter*. Patriation also brought an explicit acknowledgement that the Constitution is the "supreme law of Canada." ... The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause. The judiciary became the "guardian of the constitution." ... As such, the Supreme Court of Canada is a foundational premise of the Constitution.

Third, the majority's account in the *Reference* presupposes a bijural constitutional order. Reading the *Reference* opinion gives the impression that only two legal traditions — the common law and civil law — shape the Canadian constitution. On this account, the Court, through guarantees of civil law representation on the bench and its role as the "'court of last resort for *all* Canadians,'"[53] both acquires legitimacy as an institutional manifestation of Canada's bijuralism and exercises a constitutional role in supervising the evolution of both the common law and civil law. The majority explains:

> Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system.[54]

B. Accounting for other constitutional values

The above account suggests that three elements are particularly prominent in the vision of the constitution that is reflected in the *Reference:* political authorities and federalism, institutional and interpretive hierarchy, and bijuralism. As is always true in any judgment or narrative, by prioritizing particular values, the majority downplays others. This raises the question of which elements were excluded from the majority's vision of the constitution. Or, more precisely, does the majority's vision exclude elements of the constitution that ought to have been included? The considerations introduced in this section establish that the answer to this last question is *yes*.

52 *Ibid* at para 88.

53 *Ibid* at para 84 [emphasis added].

54 *Ibid* at para 85.

First, the majority's reasoning in the *Reference* reflects a dualist understanding of both Canadian federalism and of the legal traditions that comprise the constitution of Canada. This commitment to dualism, tethered to the workings of the political state, is consistent with long-standing understandings of Canadian federalism and the history of Canada's constitution as founded on the common and civil law traditions.[55] Yet the choice to privilege these accounts of federalism and Canada's constitutional traditions neglects the multijural character of Canadian constitutionalism and the multiple normative forces that bear on constitutional life. For example, it neglects the plural character of Canada's constitutional order as "civil law, common law, and Indigenous legal traditions organize dispute resolution in our country in different ways."[56] Indeed, Canadian constitutionalism cannot be properly understood without attending to Indigenous legal traditions,[57] which enrich, legitimize, and make sense of the rule of law in Canada.[58] Similarly, the constitutional vision presupposed in the *Reference* neglects the complexities that flow from the many normative forces, both formal and informal, that inform everyday life. We are all touched and shaped by various "meaning-giving frameworks" when we "come before the bar of law."[59] These frameworks interact in deep ways as people and communities live out their lives, ensuring that "the constitutional rule of law is always in competition with other cultures, other compelling and rich ways of generating meaning and giving structure to experience."[60]

The multifaceted character of claims of identity and meaning with constitutional significance is also embedded in conceptions of Canadian federalism. Long established in the jurisprudence as the answer to the question of how to reconcile diversity and unity within a state, federalism in Canada is most often presented as a matter of managing the political boundaries of federal-provincial relations. Of course, there are many ways to categorize individual and community identities other than in relation to the political state and its borders. As Macdonald argues, "[t]he federal conception of identity — whether national identities, subnational identities, or particular relational identities — peremptorily denies to legal subjects the possibility of negotiating the contours,

55 See e.g. *Secession Reference*, *supra* note 50 at paras 33-47, 55-60.

56 Borrows, *Canada's Indigenous Constitution*, *supra* note 12 at 8.

57 See e.g. the arguments in Borrows, *Indigenous Constitution*, *supra* note 12; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*]; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

58 Borrows, *Indigenous Constitution*, *supra* note 12.

59 Berger, *supra* note 13 at 172.

60 *Ibid.*

contents, and cardinality of their multiple identities."[61] By virtue of presenting Canada's constitution in terms of two legal traditions rather than multiple cultures and communities that speak to identity and belonging, the constitutional vision that underpins the Court's story in the *Reference* risks inaccuracy, failing to capture the experiential character of that which Canadian constitutionalism aspires to and allows for.

Second, the majority's reliance on institutional hierarchies to explain the constitutional supremacy and necessity of the Court obscures the horizontal dimensions of constitutional architecture, well-established in modern Canadian administrative law, through which public authorities operate and interact. As the Court explained in the *Senate Reform Reference*, the "notion of [constitutional] architecture expresses the principle that the 'individual elements of the Constitution are linked to the others.'"[62] In Canada's constitutional architecture, each institutional actor works in relation to, and in interaction with, the other such actors, all in service — and as a manifestation — of the structure of government that the constitution is intended to implement.[63] This description reflects an understanding of the courts as engaged in horizontal relationships with other public institutions that shift across time and circumstance, rather than in static hierarchical arrangements.

A more expansive understanding of constitutional structure resists the strict court-centric models of constitutionalism, which cultivate beliefs in judicial monopolies on constitutional interpretation. That said, an expansive vision does not (and should not) fully dismantle the traditional judicial pyramid to which the majority refers in the *Reference*. It does not undermine the Supreme Court's official position as the final general court of appeal for Canada.[64] However, when we examine the context of Canadian public law more broadly, we see that the judicial pyramid exists and operates within a constitutional framework that is built out as much as it is built up. When the horizontal dimensions of Canada's constitutional architecture are accounted for, the links between institutions flatten and peak depending on the issue, requisite expertise, and attitude of those who are, by operation of constitutional law, authorized to assume a hierarchical position. The relationships between institutions shift, as do the influence and authority that they exert over each other in any particular case.

61 Macdonald, "Kaleidoscopic Federalism", *supra* note 8.

62 *Senate Reference*, *supra* note 35 at para 26, citing *Secession Reference*, *supra* note 50 at para 50.

63 *Senate Reference*, *ibid* at para 26; *Secession Reference*, *supra* note 50.

64 *Supreme Court Act*, *supra* note 15; *Reference*, *supra* note 1.

Such a constitutional outlook bears witness to the range of actors that interpret, implement and enforce the constitution through their actions and interactions. This theme, largely absent from the *Reference*, permeates Canadian public law. Contemporary administrative law in Canada, for example, respects the interpretive authority of statutory decision-makers by virtue of deference in the exercise of judicial review of administrative decision-making.[65] While courts retain authority as reviewing bodies, statutory decision-makers operate within a realm of deference that is "justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state."[66] The actors that bring the administrative state to life — ranging from ministers to the civil service — exercise discretion and decision-making authority simply by virtue of carrying out their statutory mandates. This authority extends to interpreting and applying the constitution, in the formal ways imagined by *Martin* and *Conway*,[67] in the inherent ways contemplated in the work of MacDonnell,[68] and in the necessary but sometimes implicit ways required by *Slaight Communications, Doré v Barreau du Quebec,* and *Loyola*.[69]

The stability of institutional, interpretive hierarchies is further nuanced by approaches to precedent. *Stare decisis* has undergone shifts in ways that encourage lower courts to rethink binding law when circumstances call for it.[70] The Supreme Court held in *Carter v Canada (AG)* that "*stare decisis* is not a straitjacket that condemns the law to stasis."[71] Rather, lower courts should "reconsider settled rulings of higher courts when a new legal issue is raised and when there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate.'"[72]

An appreciation of a more horizontal understanding of Canadian constitutionalism can also be found in dialogue theory and jurisprudence that has embraced it.[73] In these cases, principles of constitutional supremacy and legislative

65 See *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

66 *Doré v Barreau du Québec*, 2012 SCC 12 at para 30 [*Doré*], citing *Dunsmuir, ibid* at para 49.

67 *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, [2003] 2 SCR 504; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504; *R v Conway,* 2010 SCC 22, 1 SCR 765 [*Conway*].

68 See the work of MacDonnell, *supra* note 14.

69 *Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038; *Doré, supra* note 66; *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613.

70 *Canada (AG) v Bedford,* 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*]; *Carter v Canada,* 2015 SCC 5, [2015] 1 SCR 331 [*Carter*].

71 *Carter, ibid* at para 40.

72 *Ibid*; *Bedford, supra* note 70.

73 See e.g. *R v Mills*, [1999] 3 SCR 668 [*Mills*]; *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309 [*Hall*].

supremacy are moderated by the movement of issues back and forth between the courts and Parliament, with neither institution having a definitive claim to the "final word." On this understanding of institutional relationships, the notion of "supremacy" amongst institutions is situational rather than certain, and integrated rather than hierarchical.

A third set of examples that contest the constitutional outlook that is reflected in the majority's reasoning in the *Reference* is captured by the "agonistic" dimensions of Canadian constitutionalism, described above. In an agonistic constitutional order, there may be circumstances in which the courts — usually thought to resolve disputes — instead acknowledge the contending constitutional tensions without offering a way out. In these circumstances, the courts provide guidance on how the parties can conceive of the tensions in dispute rather than offering a substantive resolution of the issue. The parties are then left to negotiate, devise their own ways to navigate the competing values, and resolve their differences accordingly. Webber points to the *Secession Reference* as an example of this approach. It is a case in which the Court recognizes the agonistic dimensions of the constitution and aims to sustain rather than suppress the contending positions in play.[74] As Webber explains, the Court opted not to determine Quebec's claim to the power to secede merely under the text (and absence of text) setting out the amending procedure. Instead, the Court looked to constitutional history and practice to identify several underlying and unwritten principles of the constitution — democracy, federalism, constitutionalism, and minority rights. Invoking these principles, the Court held that all parties had a duty to negotiate secession in the event of a clear expression of public support. In doing so, the Court provided guidance on the content of the constitutional principles at stake without relieving the tension between them.

The Court has played a similar role in other cases of constitutional amendment. In the *Senate Reform Reference*, for example, the Court provided an interpretation of the constitutional amending procedures that maintained the tensions between democracy, federalism, and the rule of law on issues of Senate reform, while providing guidance on the procedural framework governing the implementation of reform.[75] In other words, the Court's approach was to set the procedural parameters that bind political actors engaged in constitutional reform efforts, while empowering those actors to maintain and reconcile competing tensions at stake in their negotiations. A similar judicial approach can

74 Webber, "Contextual Constitution", *supra* note 11 at 261.

75 *Senate Reference*, *supra* note 35.

be found in cases dealing with the duty to consult in the context of aboriginal rights, and with cooperative federalism.[76]

Each of these examples — dealing with constitutional amendment, the duty to consult, and cooperative federalism — represent ways in which the constitution was understood as providing space for navigating difference, diversity, and disagreement, and revealed how the Court can respect that space.

C. The supremacy and significance of the Court

Looking to the choices and omissions discussed above, we cannot avoid the question of why the majority told the story in the *Reference* the way it did. Why does it privilege dualism over pluralism and hierarchy over integration, when these values are also prominent in Canadian constitutionalism? A legal realist might speculate that the Court's choices were politically motivated, strategically placed in order to justify what was, in effect, an exercise of self-entrenchment. A constitutional minimalist might contend that the Court's choices were designed to avoid difficult issues, such as Indigenous representation on the Court, and bilingualism as a matter of eligibility, in relation to the "composition of the court" question. This account would assume that the Court's constitutional vision in the *Reference* was a manifestation of constitutional humility and restraint, limited to what was necessary to answer the reference questions and what was put forward by the parties.

But of greater moment for this paper is a consideration of the implications of telling the story in this way. Does the telling of this restrained, arguably "tidy" constitutional story matter?

One implication of the majority's choices is that they convey the message that the courts are the primary site for establishing constitutional meaning and resolving constitutional disputes. Above, this paper notes that this kind of court-centricity gives the impression that constitutional meaning, legitimacy, authority, and implementation are grounded in judicial interpretation rather than in the effective action of government, the lived experience of citizens, or the inheritances of tradition. This does not accord with the full picture of Canadian constitutionalism. In addition, by writing non-judicial actors out of the story, the majority's narrative gives the misleading impression that the

76 See e.g. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Tsilhqot'in*, *supra* note 57; *Securities Reference*, *supra* note 50. In contrast, see cases in which agonism does not prevail, for instance, in the religious freedom context, e.g. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567; *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551.

Court's status as both essential and expert is absolute. It locks the Court in a self-fulfilling prophecy. In essence, the majority's argument is that the Court is constitutionally significant because courts are the guardians of the rule of law. But by positing itself as the guardian of the rule of law, the Court guarantees its own constitutional significance.[77] This fuels well-established concerns about the legitimacy of judicial review and the power of the courts.

This section turns the corner on these implications in order to consider whether a more expansive constitutional outlook adds to our understanding of the Court's constitutional character and significance. In other words, it begins to outline a response to the question: when we account for pluralism, horizontal architecture, and the ways in which disagreement and tension animate Canadian constitutional life, what effect does this have on the expectations that we should have of our national supreme court?

The point of contesting the dominant narrative about the Court's significance is not to deny the importance of an independent high court in a federal constitutional democracy. Nor is it to diminish the symbolic and functional significance of ensuring that Canada's final appellate court has the representativeness and expertise necessary to perform its role or to contend that the Court's most significant roles are those outside the traditional metaphors, whether as an educative institution,[78] a constitutional court,[79] a scapegoat, or a "dance partner."[80] Rather, the point is to do justice to both the institutional limits and the potential of the Court within a constitutional landscape that strives to account for the people to whom and the contexts in which the constitution is supposed to speak.

Such an account starts from the contextual and limited nature of law. If a constitution is a "matter of a community governing itself" and if that governance ideally takes place through "an array of well-considered and well-coordinated institutions" that are "sustained and given life by its members,"[81] then unpacking the stories we tell about the Court is an attempt first, to discern how this particular institution can and should contribute and, second, how we as citizens can and should sustain it.

77 On the Court protecting its own constitutional significance, see Daly, *supra* note 6.

78 Christopher L Eisgruber, "Is the Supreme Court an Educative Institution?" (1992) 67:1 NYU L Rev 961.

79 This refers to the Court's advisory functions, when undertaken in constitutional cases, under section 53 of the *Supreme Court Act*. See also Jamal Greene, "The Supreme Court as a Constitutional Court" (2014) 128:1 Harv L Rev 124.

80 Van Praagh, *supra* note 3.

81 Webber, "Contextual Constitution", *supra* note 11 at 265.

Relatedly, from a constitutional outlook that appreciates the horizontal dimensions of Canada's constitutional architecture, the Court is not merely an apex institution, but rather is one institutional actor — and one constitutional voice — amongst many. At times, the Court's position at the acme of the judicial pyramid is prominent and far-reaching, such as when the Court concludes that legislative action is unconstitutional.[82] Some other times, the Court shows deference to other decision-makers, such that the Court's status as "supreme" is suspended or nuanced within the constitutional matrix.[83] At yet other times, the Court's relational status is at the fore, as in "second look" cases or when lower courts push against the boundaries of *stare decisis*.[84] Within this network of institutions and decision-makers, the Court is neither an island nor a guiding star. The actors within the network experience shifts in power and significance, depending on the dispute at stake and the decision-makers involved. The Court's position in the constitutional architecture at any particular moment is always subject to how its judgments play out in the world.[85] In this way, the normative weight ascribed to the Court's judgments — and the weight of the Court's significance based on the impact of its work — can never be assumed.

This leads to a final observation, one which speaks to the Court's adjudicative role. As an adjudicator, the Court plays an important function in offering ways to settle legal disputes. Courts provide a formal, public mechanism through which competing normative claims can be resolved, at least provisionally, and disputing parties can move forward.[86] A pluralistic and agonistic constitutional vision, however, directs our attention to the limits of this adjudicative description. It fails to capture what the Court does in all instances. As an adjudicator in an agonistic constitutional order, the Court need not always try to resolve the tensions on which a dispute rests. Rather, in such cases, the Court may choose to lean into the tension between contending considerations, going no further than to set out parameters within which disputants can navigate the interacting normative forces of public and private life. In effect, in this tension-sustaining role, the Court shows that it can be comfortable with the discomfort that often flows from unresolved conflict between competing principles.[87] It is

82 See e.g. *Reference*, *supra* note 1; *Carter*, *supra* note 70.

83 See e.g. *Conway*, *supra* note 67; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.

84 See e.g. *Mills*, *supra* note 73; *Hall*, *supra* note 73; *Bedford*, *supra* note 70.

85 See the jurisprudential assessments in Kislowicz, *supra* note 7 and Van Praagh, *supra* note 3.

86 Webber, "Legal Pluralism", *supra* note 10 at 180-82. See also Robert Cover, "Nomos and Narrative" (1983) 97 Harvard L Rev 4.

87 Of course, this role is not limited to the Supreme Court. These comments apply to courts generally.

a role in which the Court respects the capacity of communities and individuals — whether office-holders or otherwise — to deliberate and exercise judgment on issues of law and governance.[88]

IV. Conclusion

The privileging of certain values within a constitutional vision is inevitable and has implications for the way that constitutional questions and answers are framed. In the *Reference,* the majority's privileging of federalism, hierarchy, and dualism shapes its analysis of the Court's significance and essential nature. This makes sense: there is a reciprocity between these issues, each reflecting and shaping the other.[89] The functions that the Court should play within the constitutional order necessarily depend on what that constitutional order is understood to entail.

Yet Canadian constitutionalism is a compilation of contending stories and counter-narratives. The Supreme Court's judgment in the *Reference* gives the impression that it is telling a definitive version of the constitutional story and the Court's significance in that narrative. In doing so, it both over- and underestimated the Court's place in the institutional framework within which the constitution of Canada lives and breathes. This paper contests that conventional narrative. By expanding the constitutional lens through which the story is told, this paper has pointed to the Court's role in sometimes maintaining constitutional tension, and thereby preserving space for office holders and citizens to negotiate their own resolutions to disputes. In this sense, the Court is only one site, albeit an influential one, to look to when governments and communities encounter constitutional discomfort. Further, the observations set out in this paper qualify the conclusion that the Court is "constitutionally essential" by calling attention to the ways in which the Court is integrated within a complex, relational architecture of public institutions. Within this architecture, the Court not only adjudicates disputes, provisionally settles norms, and acknowledges tensions, but also interacts with and defers to the expertise of other institutions, decision-makers and agents. This observation is a reminder not only that the Court's "supreme" status is tempered by the institutional matrix in which it operates, but also that constitutional meaning is made by many actors, in various sites, most of which are, quite rightly, independent of the Court.

88 On the importance of this jurisgenerative capacity of individuals, see the sources cited *supra* notes 7, 8, and 9. In the particular context of Supreme Court jurisprudence, Kislowicz, *supra* note 7.

89 On this point generally, see e.g. Lon L Fuller, "Means & Ends" in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Oxford: Hart Publishing, 2001) at 69.