Abstract

This paper addresses the similarities and contrasts between Canadian and American electoral process jurisprudence. In part it is a response and challenge to the strain of academic literature and analysis that emphasizes the different approaches to constitutional interpretation and individual rights taken by the two nations' Supreme Courts. We demonstrate that, at least with regard to with campaign spending, the two courts have engaged in remarkably similar debates concerning the scope of the franchise, the relationship between campaign spending and political speech, and deference towards the legislature.

This confluence is remarkable for several reasons. First, it gives scholars a reason to reassess the many assertions of difference between the two nations. While the genesis of the *Charter* may have originally set the Canadian Supreme Court down a path different than that taken by its southern neighbor, we suggest that the intractability of questions concerning the electoral process and democratic politics in general has driven the two Supreme Courts in more or less the same direction.

The confluence with regard to electoral law (specifically campaign spending restrictions) notwithstanding, we also observe that the two courts have begun to speak in similar terms concerning the nature of individual rights. In fact, a majority of both the Canadian and American courts supported restrictions on third party spending because they perceived a need to balance both the collective, positive aspects of speech rights with their more negative, individualistic aspects. Similarly, the dissenters in both courts offered echoed each other as they argued against their respective majorities' deference offered to Parliament and the Congress.

This deference and the mutual agreement to balance collective and individual aspects of rights may at first seem to be an important advance in the debate concerning the role of courts and the grounds on which they engage in judicial review of legislation. As we discuss, both courts have acknowledged the need to be modest when assessing attempts by the legislature to balance collective and individual rights in the public interest.

Critics of American individualism would, no doubt, applaud this evolution in the American Supreme Court. We argue, however that the decision by both courts to defer more to their respective legislatures actually imperils both the collective and individual aspects of the speech right because it enables members of the Parliament and the Congress to entrench themselves while cloaked in the garb of pursuing the public interests, constraining excessive individualism and promoting a more equal political playing field. In fact, it is the judicial decision to forsake the individualistic aspects of the speech right that ends up entrenching legislative incumbents precisely because it allows the legislature to disarm the most powerful elements of civil society. Thus, by promoting equality at the expense of individual liberty, the courts of both nations have, we argue, forgotten one of the lessons taught by Alexis de Tocqueville *Democracy in the United States*.

Tocqueville cautioned that the democratic tendency to prefer equality to liberty was a threat to the health of a polity. The beauty of the American democracy was that Americans had learned to balance the desires for liberty and equality. While the rhetoric of the Canadian and American courts would seem to promote the sense of collective rights that Tocqueville cast in terms of "self-interest properly understood," we argue that the courts of both countries have, unwittingly laid the groundwork for the sort of legislative entrenchment that Tocqueville feared and which scholars such as John Hart Ely regarded as the principal threat to democracy.

Background and Introduction: Constitutional Silence

The Canadian *Charter of Rights and Freedoms* and the American Constitution are both silent or, at best, vague concerning the scope and definition of democratic rights. While section 3 of the Canadian *Charter* does, at least, guarantee a right to vote, the American Constitution only implies the existence of the franchise. As a result, the extension of the franchise to black, women and minors in the United States has required constitutional amendment.

Since the constitutional texts are not clear, the Supreme Courts of both nations have been thrust into political and legal controversies concerning the 1) scope and definition of the franchise and 2) the regulation of the electoral process. Both courts have thus rendered controversial decisions concerning:

- "rep by pop" in Canada or "one person, one vote" in the United States;
- fair standards for redistribution (Canada) and redistricting (United States);
- minority voting rights;
- campaign spending restrictions and their impact on free speech;
- the role and rights of political parties

An important element of these decisions concerns the vision of democratic rights that each court (or, more accurately, the individual members of each court) employs when interpreting and applying the respective constitutional texts. Canadian scholars in particular have emphasized the differences in the two nations' constitutional traditions and the correspondingly divergent paths taken by the two courts when interpreting democratic rights (see, e.g., Weiler, 1984). Mary Ann Glendon noted in 1991 that the Charter "diverges in both letter and spirit from its American counterpart in important respects….[it] has avoided hard-edged, American style proclamations of individual rights." As well, she notes that the framers of the Charter realized the importance of balancing individual and community interests (1991:167).

Scholars of election law emphasize the "marked contrast" of the Canadian experience to that of the United States concerning judicial oversight of laws concerning the electoral process. As John Courtney notes, the differences are "a product of the greater acceptance in Canada than in the United States of the responsibility of

government to establish electoral practices that are non-partisan and whose effect will be as widely inclusive of the citizenry as possible" (Courtney 2003: 2).

In some respects, the divergence of Canada from the United States is cast in terms of the natural, organic development of law. As Justice XYZ noted in *Law Society of Upper Canada* v. *Skapinker* (Glendon, 162 note 52): "The courts in the United States have had almost two hundred years experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States Courts." In others, however, the divergence represents a conscious attempt to take the jurisprudential road not taken by the United States (see, e.g., Bryden, 2002) and thereby establish a unique, Canadian approach to questions of rights in general and the electoral process in particular.

Jurist in Canada have expressed similar views. In *Carter* v. *Saskatchewan* (*Ref. Re: Provincial Electoral Boundaries (Sask.))* ((1991) 2 S. C. R. 158), Justice McLachlin dismissed the American "one person, one vote" standard for redistribution as "undesirable" and "radical" because "it has the effect of detracting from the primary goal of effective representation" (*Carter*, 184). Similarly, in *Sauve* v. *Canada*, Justice McLachlin once again distinguished the theoretical conceptions of rights that form the foundations for American and Canadian election law:

> To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility. The government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. That *not all self-proclaimed democracies* adhere to this conclusion says little about what the Canadian vision of democracy embodied in the *Charter* permits. (*Sauve*, para. 41; emphasis added.)

Finally, a more recent article on Canadian and American jurisprudence concerning third party spending limitations begins: "Opponents of the wholesale importation of U.S. political finance jurisprudence into the U.K. and Canada welcomed the recent decisions of the European Court of Human Rights…and the Supreme Court of Canada in *Bowman v. United Kingdom* and *Libman v. Quebec*, respectively" (Feasby 2003, 11). The desire to distance oneself from the United States is palpable.

Despite the many and ongoing assertions by Canadian scholars that Canadian and American electoral law have diverged, the jurisprudence of both countries shares important common characteristics that manifest similar struggles by both courts to come to grips with intractable questions of electoral fairness. Both courts have labored to set forth a coherent jurisprudence of the electoral process. Election law in both countries is characterized as "ambiguous" (see, e.g,. Geddes, 2004: 443). As well, the silence of both constitutions regarding the scope and definition of democratic rights has forced courts to navigate the terrain of election law without a compass (see, e.g., MacIvor 2002).

This is due, in significant part, to the inability of both courts' members to agree on the point at which to strike a balance between individual and collective visions of rights. As well, both courts have struggled to develop a consensus regarding the role of the state (read parliament) in overseeing the electoral process: is the state to be regarded as a benevolent steward of or a partisan player in the electoral process?

We turn now to offer a brief analysis of the differences that seem to exist between the Canadian and American jurisprudential traditions as they are manifested in electoral process decisions. We then discuss the recent decisions concerning campaign spending (*Harper* v. *Canada* and *McConnell* v. *Federal Election Commission*) to demonstrate the extent to which the two courts have actually converged in their approach to questions of electoral fairness. Our goal here is not to dismiss arguments that focus on jurisprudential differences. There is no doubt that the framers of the Canadian *Charter* consciously sought to avoid particular aspects of the American constitutional tradition (Weiler, 1984).

Instead, we emphasize that the intractability of questions concerning electoral fairness has actually drawn the two Courts together despite the different traditions of the Canadian *Charter* and the American Constitution. Both Supreme Courts find themselves mired in essentially the same position, engaging in the same debates about the same "political thicket" concerning questions of electoral fairness. Accordingly, differences in jurisprudential traditions may be blurred by the realities of difficult political questions.

We conclude that both courts have moved towards the establishment of a comparable balance between individual and collective visions of various electoral rights. However, in striking this balance, both courts also have ignored an unforeseen consequence of striking this particular balance. In both campaign spending cases, for example, judicial majorities ignored assertions by their dissenters that by upholding the challenged campaign spending restrictions, the majority was, in fact, further enhancing the entrenchment of incumbent legislators and political parties.

Rights Talk in Both Courts: The Apparent Differences

Judicial struggles to reconcile collective and individual visions (or, perhaps more accurately, interpretations) of democratic rights fall into two categories. The first deals with attempts to balance individual rights claims and those made by political groups.

An example of this sort of conflict concerns the struggle both courts endured with questions concerning reapportionment of legislative districts. In *Baker* v. *Carr* and *Reynolds* v. *Sims*, the American court established the one person, one vote standard.[1] In *Reynolds*, Chief Justice Warren asserted that the American conception of the franchise would be based on the one-person, one-vote principle: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests…. Overweighting and overvaluation of the votes of those living here has the

[1]. note here re: its nonapplication to state legislative districts. and the US Senate

certain effect of dilution and undervaluation of the votes of those living there" (*Reynolds*, 562-63).

The court's rigid adherence to this principle (at least with regard to Congressional districts) has led to intractable, unproductive conflicts concerning the decennial redistricting process. Insofar as the Court has endorsed the Justice Department's interpretation of section 2 of the Voting Rights Act (requiring states to draw districts in a manner that promotes minority representational opportunities),[2] its adherence to the one person, one vote requirement has necessitated the creation of legislative and congressional districts whose borders can be described only as "bizarre." Since minority populations are not always located in geographically compact areas, the state legislatures (who are constitutionally empowered to draw legislative and congressional districts), have had to draw bizarrely shaped districts that snake around, picking up pockets of minority voters until they are able to construct a district with a "majority-minority" population.

A more moderate resolution to this conflict between group rights to representation and individual rights to equal voting power is embodied in the Canadian Supreme Court's decision in *Carter*. There the Court rejected the rigid American one person, one vote rule and, instead, set forth a more flexible standard. As Justice McLachlin stated:

> Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed. (*Carter*, 184)

As a result, the Canadian process of drawing legislative district boundaries has been much less contentious and more consciously aimed at balancing individual and group claims to effective representation.[3]

An American Sea Change?

The American court's focus on individual rights and the importance of the one-person one vote rule has not prevented it from moderating its stance concerning group representation rights. In fact, the recent decisions in *Easley* v. *Cromartie* and *Georgia* v. *Ashcroft* demonstrate that a majority of the American court has accepted the inevitability of balancing group representation rights with individual voting rights claims (see Rush, 2005).[4]

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[2] cite Easley v. Cromartie; O'Connor's concurrence in Bush v. Vera

[3] Undoubtedly, the lack of controversy surrounding the redistribution process in Canada is due in no small part to its use of nonpartisan commissions to design legislative district boundaries. See Courtney 2001.

[4] the court's moderation of its stance with regard to minority voting rights reflects it moderation of its attitude towards affirmative action in general…

With regard to campaign spending restrictions and their impact on speech rights, the American court has sustained the constitutionality of spending restrictions based on

> the Government's interest in combating the appearance or perception of corruption engendered by large campaign contributions. Take away Congress' authority to regulate the appearance of undue influence and "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." (*McConnell*, 143-144)

In McConnell v. FEC

Outline

1. The Cases

- McConnell v. FEC
- Harper v. Canada
- Libman v. Quebec
- Figueroa?

All cases sustain campaign spending restrictions.

2. Distinctions noted by scholars

questions regarding:

- individual v. collective visions of the rights
- judicial deference to the legislature's vision of the common good (cold comfort)
- whether and how individual rights can be sacrificed to the public interest.

3. Commonality: both courts more or less accept the collective vision of the franchise and the speech right.

- discuss how both courts acknowledge importance of limiting individuals to prevent domination of political debate
- American concern with appearance of corruption
- Canadian concern with equality (and note corresponding emphasis on distinction with American individual/liberty approach)

4. Commonality: failure to acknowledge/respond to legitimate concerns re: lockup

- both courts' dissents note that incumbents are sheltered from criticism

- both note but do not discuss or give credence to impact on third parties (tie into Figueroa here)
- tie into Ely and Issacharoff—policing the political process (note Ely's ongoing relevance—Vriend v. Alberta)

5. Irony: confluence toward collective vision of speech right ultimately enhances government security at expense of pluralist competition and vibrance of civil society. Government and incumbents become dominant speakers

- not so bad but, in both cases, especially Canada, court distrusts legislature to discern public interest.
- simple conceptual blindness?
- regardless, the collectivist approach lays the framework for possibly less, not more speech—of lesser and controlled quality

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