

# The Promise and Limits of Citizens' Assemblies: Deliberation, Institutions and the Law of Democracy

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*Recent experiments with deliberative democracy in British Columbia and Ontario have brought new life to the debate over electoral reform in Canada and have called into question the roles of the judiciary and the legislature on electoral law. In both provinces, Citizens' Assemblies composed of randomly selected members were tasked with deliberating on electoral reform and bringing their recommendations to the electorate in a subsequent referendum. These Assemblies were lauded as innovative alternatives to the conventional legislative decision-making process. The author examines the potential and the limitations of the Assemblies, by situating the Citizens' Assembly model within broader discussions about the law of democracy. Specifically, he explores how well the Assemblies in British Columbia and Ontario insulated electoral reform from manipulation by elected representatives. Although he concludes that those Assemblies were less successful at keeping politics out of the process than many have suggested, he argues that the model nevertheless makes a valuable contribution to the ongoing debate between structural theory and rights theory regarding election law and the right to vote. In light of the fact that both sides of the debate are dissatisfied with the Supreme Court of Canada's meager section 3 jurisprudence, there are good reasons for both structural theorists and rights theorists to support the continued use of Citizens' Assemblies on issues of electoral reform. The author concludes by offering recommendations for improving the Citizens' Assembly process in the future.*

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## Introduction

British Columbia (BC) and Ontario have recently experimented with Citizens' Assemblies on electoral reform. Citizens' Assemblies are institutions, distinct from legislatures, executives and courts, in which randomly selected citizens deliberate on public policy or law.<sup>1</sup> The Assemblies in BC and Ontario deliberated on whether these provinces should keep the single-member plurality electoral system (SMP)<sup>2</sup> or adopt an alternative.

The willingness of BC and Ontario to consider electoral reform marked a sharp departure from past practice. Along with the United States, Canada is one of the few established democracies not to have engaged in significant electoral reform since World War II.<sup>3</sup> In contrast, Germany, Israel, Italy, Japan, Mexico, New Zealand, France and the United Kingdom

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1. The idea of deliberative bodies of randomly-selected citizens in American literature stretches back to Robert Dahl and students of the "Yale School". See JH Snider, "From Dahl to O'Leary: 36 Years of the 'Yale School of Democratic Reform'", online: (2007) 3:1 J Pub Deliberation 9 <<http://www.publicdeliberation.net.jpdl/>>.

2. SMP electoral systems generally involve single-member districts in which the candidate who gains a plurality (but not necessarily a majority) is elected. SMP is criticized for wasting the votes of all those who do not vote for the plurality winner and for resulting in disproportionality when a political party's seat count does not reflect its actual share of the popular vote.

3. See Arend Lijphart, *A Study of Twenty-Seven Democracies 1945-1990* (New York: Oxford University Press, 1994).

have all altered their electoral systems in recent years.<sup>4</sup> While neither the BC nor the Ontario Assemblies resulted in electoral reform, the use of these deliberative bodies has attracted significant academic study,<sup>5</sup> and has inspired other countries to launch similar experiments.<sup>6</sup>

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4. See Dennis F Thompson, "Who Should Govern Who Governs? The Role of Citizens in Reforming the Electoral System" in Mark E Warren & Hilary Pearse, eds, *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (New York: Cambridge University Press, 2008) 20 at 20, n 2; Pippa Norris, *Electoral Engineering: Voting Rules and Political Behaviour* (Cambridge: Cambridge University Press, 2004) at 4-6; David Farrell, *Electoral Systems* (New York: Palgrave, 2001) at 176-81.

5. See John Dryzek, "The Australian Citizens' Parliament: A World First", online: (2009) 5:1 J Pub Deliberation 9 <<http://www.publicdeliberation.net.jpdl/>>; Matthew Flinders & Dion Curry, "Deliberative Democracy, Elite Politics and Electoral Reform" (2008) 29:4 Pol'y Stud 371; Richard S Katz, "Democracy as a Cause of Electoral Reform: Jurisprudence and Electoral Change in Canada" (2011) 34:3 W Eur Pol 587; Amy Lang, "But Is It For Real? The British Columbia Citizens' Assembly as a Model of State-Sponsored Citizen Empowerment" (2007) 35:1 Pol & Soc'y 35; Lawrence Leduc, "Electoral Reform and Direct Democracy in Canada: When Citizens Become Involved" (2011) 34:3 W Eur Pol 551; Dennis Pilon, "The 2005 and 2009 Referenda on Voting System Change in British Columbia" (2010) 4:2-3 Can Pol Sci Rev 73 [Pilon, "The 2005 and 2009 Referenda"]; Jonathan Rose, "The Ontario Citizens' Assembly on Electoral Reform" (2007) 30:3 Can Parl Rev 9; Norman J Ruff, "Electoral Reform and Deliberative Democracy: The British Columbia Citizens' Assembly" in Henry Milner, ed, *Steps Toward Making Every Vote Count: Electoral System Reform in Canada and its Provinces* (Toronto: Broadview Press, 2004) 235; Laura B Stephenson & Brian Tanguay, "Ontario's Referendum on Proportional Representation: Why Citizens Said No" (2009) 15:10 IRPP Choices 2; Patrick Fournier et al, *When Citizens Decide: Lessons from the Citizens' Assemblies on Electoral Reform* (Oxford: Oxford University Press, 2011). In the large literature in the United States on the law of democracy, Citizens' Assemblies have been considered in their own right (see Snider, *supra* note 1), but also in relation to direct democracy processes such as citizen-led ballot initiatives. See John Gastil, Justin Reedy & Chris Wells, "When Good Voters Make Bad Policies: Assessing and Improving the Deliberative Quality of Initiative Elections" (2007) 78 U Colo L Rev 1435; Kevin O'Leary, "The Citizen Assembly: An Alternative to the Initiative" (2007) 78:4 U Colo L Rev 1489; Anonymous, "Making Ballot Initiatives Work: Some Assembly Required" (2010) 123:4 Harv L Rev 959.

6. For example, the BC Assembly influenced the Dutch *Burgerforum*. See Fournier et al, *supra* note 5 at 25-26. The two major issues facing the Dutch Assembly were whether to keep an open-list proportional representation (PR) system and whether to change the threshold of support needed for parties to be represented in parliament (*ibid* at 98). The Dutch Assembly differed from the BC Assembly as there was no referendum on the final recommendations in the Dutch case. See also Flinders & Curry, *supra* note 5, for an interesting discussion of the links between the BC Assembly, the Dutch Assembly and elite-driven reform in the United Kingdom.

This article investigates whether and to what extent the Citizens' Assembly model used in BC and Ontario holds promise as a new deliberative democratic institution. Academic commentary on Citizens' Assemblies has begun to weigh the promise and limits of the Citizens' Assembly model. The literature has focused on assessing whether the Assemblies created greater deliberation on electoral reform and/or measured up to the tenets of deliberative democratic theory. I seek to situate the Citizens' Assemblies among broader debates about the law of democracy, which refers to the laws, rules and institutions that govern the democratic process, and to evaluate them in light of this legal and institutional context. I assess Citizens' Assemblies by their ability to insulate choices on electoral reform from political interference and by their contribution to the ongoing debate between structural theory and rights theory with regard to jurisprudence on the right to vote.

Part I of this article outlines the design and operation of the Citizens' Assemblies and the referenda processes in BC and Ontario. Part II details the problem of self-interested manipulation of the democratic process by examining the extensive political science scholarship on the choice of an electoral system. The literature shows why institutions that insulate choices on electoral reform and election law from political interference are necessary to achieve a fair democratic process. I argue that while the Assemblies were admirably deliberative and innovative, they were insufficiently insulated from political interference both when the Assemblies were constituted and during the referendum stage. In Part III, I connect the use of Citizens' Assemblies to the debate in election law between structural and rights theorists. I claim that in spite of these problems, Citizens' Assemblies should be supported by both structural and rights theorists. I do so by considering the Supreme Court of Canada's jurisprudence on the right to vote in section 3 of the *Charter*.<sup>7</sup> I conclude by proposing options for improving the Citizens' Assembly process so that they can be used fruitfully in the future.

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7. *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.

## I. Deliberation and Electoral Reform: The Citizens' Assemblies in British Columbia and Ontario

In this section, I situate Citizens' Assemblies within the deliberative democratic critique of legislatures and elections.<sup>8</sup> Deliberative democratic theory seeks to enhance public reason-giving and accountability for political decision-making, as well as to expand citizen participation through deliberation.<sup>9</sup> Deliberative democratic scholarship is being developed not just to posit the shape of ideal deliberation, but also to critique existing institutions and to develop new ones.<sup>10</sup> Citizens' Assemblies are examples of deliberative democratic theory in action. They are responses to the flaws seen in legislatures from the perspective of deliberative theory. The Ontario and BC Assemblies were intended to investigate alternative types of electoral systems, but also to pioneer new models of deliberative decision-making. The Assemblies in BC and Ontario sought to ensure reasoned deliberation on at least one area of disagreement—electoral reform—by taking the issue out of the realm of interest-based political bargaining.

The deliberative critique of existing institutions finds an easy target in legislatures. Legislatures in Canada and other advanced democracies appear to be functioning in a less deliberative fashion than in the past. Donald J Savoie has called the current predicament in Canadian democracy “governing from the centre”.<sup>11</sup> Increasingly, power is concentrated in the

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8. The literature on deliberative democratic theory is expansive. See e.g. John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000); Jon Elster, ed, *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998); James S Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991); James S Fishkin, *The Voice of the People: Public Opinion and Democracy* (New Haven: Yale University Press, 1995); Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996).

9. See Simone Chambers, “Deliberative Democratic Theory” (2003) 6 *Am Rev Pol Sci* 307 (who calls this the “working theory” stage at 307).

10. *Ibid.*

11. *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

hands of the Prime Minister and Premiers, with legislatures reduced to hosting stage-managed events and with cabinet evolving into more of a focus group than a decision-making body. These realities are not recent anomalies, but reflect a decades-long trend.<sup>12</sup>

The lack of deliberation in legislatures contributes to the democratic deficit in Canada.<sup>13</sup> There is a broad range of literature staking convincing claims of disconnect between citizens and their governments.<sup>14</sup> The effectiveness and legitimacy of Canadian institutions has been undermined by recent political controversies, unsuccessful constitutional negotiations and periodic crises of national unity.<sup>15</sup> Elections resulting in “plurality reversals” (where the party that receives the most votes does not garner the most seats) generated by SMP have contributed to these problems.<sup>16</sup> The consequences of this democratic deficit include declining trust in political institutions, decreased voter turnout and political disengagement.<sup>17</sup>

Considering electoral reform and creating new democratic institutions with greater potential popular and theoretical legitimacy can be seen as responses to this democratic malaise. Members of the Assemblies

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12. John Uhr has described a similar phenomenon in Australia. John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge: Cambridge University Press, 1998).

13. Stephenson & Tanguay, *supra* note 5 at 3–4 (discussing mistrust of elected representatives and political institutions as factors).

14. Flinders & Curry, *supra* note 5 at 373–75 (summarizing some of this literature). For literature on democratic malaise, see Pippa Norris, ed, *Critical Citizens: Global Support for Democratic Government* (New York: Oxford University Press, 1999); Robert Putnam, ed, *Democracies in Flux: The Evolution of Social Capital in Contemporary Society* (Oxford: Oxford University Press, 2002); Brian Tanguay, “Reforming Representative Democracy: Taming Canada’s Democratic Deficit” in James Bickerton & Alain-G Gagnon, eds, *Canadian Politics*, 4th ed (Peterborough, Ont: Broadview Press, 2004) 263.

15. See Stephenson & Tanguay, *supra* note 5 at 3–6.

16. See Matthew Søberg Shugart, “Inherent and Contingent Factors in Reform Initiation in Plurality Systems” in André Blais, ed, *To Keep or To Change First Past The Post?: The Politics of Electoral Reform* (Oxford: Oxford University Press, 2008) 7 at 13, 23–24 [Shugart, “Inherent and Contingent Factors”]. Shugart discusses “systemic failures” of electoral systems. He identifies overly “lopsided majorities”, where the opposition wins few seats despite attracting a larger share of the vote, as another form of systemic failure (*ibid* at 13). See also Louis Massicotte, “Electoral Reform in Canada” in André Blais, ed, *To Keep or To Change First Past The Post?: The Politics of Electoral Reform* (Oxford: Oxford University Press, 2008) 112 at 116–17.

17. See Flinders and Curry, *supra* note 5 at 373–75.

were neither elected nor appointed, but chosen at random in order to approximate what deliberation would look like among the entire population. The random selection procedure closely mirrored that of the Athenian Ekklesia.<sup>18</sup> There were some constraints on the random selection process, however, such as controls for gender and electoral district.<sup>19</sup> One hundred and sixty individuals were chosen in BC (two from each of the 79 provincial electoral ridings, and two aboriginal members).<sup>20</sup> In Ontario, one person was chosen from each the 103 ridings, with at least one aboriginal member.<sup>21</sup>

The two Assemblies were structured to have learning, consultation and deliberation phases. The learning phase sought to inform non-experts of the advantages and disadvantages of each type of electoral system.<sup>22</sup> The consultation phase involved hearing from interested parties.<sup>23</sup> The deliberation phase required the members to evaluate families of electoral systems in light of specific values they had outlined, to narrow down the choice of alternatives, and to select either a reform option or the status quo (SMP).<sup>24</sup> After the Assemblies selected their preferred option—Single Transferable Vote (STV)<sup>25</sup> in the BC case and Mixed Member Plurality (MMP)<sup>26</sup> in Ontario—the electorate had a choice between the status quo and the Assemblies’ reform proposal in a referendum. The referenda meant that the government could not shelve or “pick and choose” from the recommendations of the Assemblies, as happened with the proposals

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18. See John Ferejohn, “Conclusion: The Citizens’ Assembly Model” in Warren & Pearse, *supra* note 4 at 210.

19. See Mark E Warren & Hilary Pearse, “Introduction” in Warren & Pearse, *supra* note 4 at 10 [Warren & Pearse, “Introduction”].

20. See *ibid*.

21. See Rose, *supra* note 5 at 9.

22. See *ibid* at 11–13; Warren & Pearse, “Introduction”, *supra* note 19 at 10.

23. See Rose, *supra* note 5 at 13–14.

24. See *ibid* at 14–15.

25. STV operates with multi-member constituencies, so that each electoral district has several representatives. Voters rank their candidates in order of preference. Multiple representatives are elected based on the proportion of the votes in the district. STV combines multi-member districts with preferential voting and PR.

26. MMP combines SMP with PR. The Ontario version would have involved constituency elections, but with additional representatives assigned to the Legislature from party lists to ensure that the number of votes cast for a political party overall reflected its number of seats in the legislature.

of the Lortie Royal Commission on Electoral Reform in 1991<sup>27</sup> and with those of the Netherlands Citizens' Assembly.<sup>28</sup>

The Assemblies appear to have embodied the deliberative ideal in most ways.<sup>29</sup> There is no one theory of deliberation used to assess elected bodies which can simply be transferred to the context of Citizens' Assemblies. Deliberative democracy is a highly contested topic with multiple competing interpretations. The Assemblies, however, succeeded at fostering deliberation among their members by most measures. First, they employed primarily reason-based rather than interest-based decision-making.<sup>30</sup> Second, non-experts became experts on electoral reform over the course of the learning phase.<sup>31</sup> Third, the deliberation phase was structured in each Assembly to stimulate reasoned debate. Finally, the procedures used were largely consistent with ideals of equal opportunity for all members to participate. When compared to other innovative institutions, such as citizens' juries and deliberative polls, Citizens' Assemblies fare well as impartial, deliberative bodies.<sup>32</sup>

The role of Assembly members was thus a deviation from standard practice in representative democracies. Having a nearly random selection of individuals to decide issues of fundamental importance is a departure from the idea that elected representatives accountable to the people should resolve issues of moral disagreement. The Assemblies were insulated from having to cater to existing preferences of the electorate as they were unelected and served one term. The problem of incumbent self-interest

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27. Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy* (Ottawa: Supply and Services, 1991). The Lortie Commission made recommendations on a wide range of matters relating to elections, though not the electoral system specifically. Future governments had no obligation to follow the recommendations.

28. The creation of the Dutch Assembly was pushed by one political party that was part of the governing coalition. The Assembly's recommendations were ignored after the coalition government fell and the reform-minded party was out of power. See Fournier et al, *supra* note 5 at 50, 110.

29. See Ferejohn, *supra* note 18 at 200.

30. See André Blais, R Kenneth Carty & Patrick Fournier, "Do Citizens' Assemblies Make Reasoned Choices?" in Warren & Pearse, *supra* note 4 at 144; Fournier et al, *supra* note 5 (concluding that "citizens can find their way to decide on complex and technical public policy issues like electoral reform" at 77).

31. See *ibid.*

32. See Mark E Warren, "Citizens Representatives" in Warren & Pearse, *supra* note 4 at 67–68 (an ecology of deliberative democratic institutions).

did not exist for Assembly members. The members were not designing a system that they would be subject to unless they chose to run for elected office. In contrast to elected representatives, however, the Assembly members were not politically accountable. Voters got the ultimate say in the referenda, but had no sanction against poorly performing Assembly members. Voters could not "throw the bums out". These departures have led Mark Warren to conclude that while the members of the Assemblies were a promising new form of "citizen-representative", they cannot replace elected representatives wholesale.<sup>33</sup> John Ferejohn has reached a similar conclusion.<sup>34</sup>

Although they adopted a new form of representation in a deliberative forum, the Citizens' Assemblies did use voting to resolve disagreements among their members rather than striving for consensus.<sup>35</sup> Voting is, of course, an aggregative rather than deliberative decision-making procedure. There were multiple votes in each Assembly on which proposal would go to the electorate. The first vote was on which type of alternative system would be pitted against the status quo in the Assemblies' deliberations. The second vote was whether STV in BC and MMP in Ontario were preferable to SMP. BC's Assembly employed a third vote to determine which variant of STV would be brought forward, as did Ontario to decide if MMP would go to the people.<sup>36</sup> The Assemblies used voting less and sought greater consensus than the Dutch Assembly.<sup>37</sup>

The main problem with the Assemblies from the point of view of deliberative theory is that they only responded to the problem of the lack of deliberation *within* legislatures. They did not solve a common problem facing both Citizens' Assemblies and legislatures—the lack of deliberation

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33. *Ibid* at 52, 69.

34. *Supra* note 18 at 210–13.

35. The use of aggregative procedures is controversial in deliberative democratic theory. See generally Jack Knight & James Johnson, "Aggregation and Deliberation: On the Possibility of Democratic Legitimacy" (1994) 22:2 *Pol Theory* 277 at 278–80, 286–87.

36. See Ontario Citizens' Assembly on Electoral Reform, *One Ballot, Two Votes: A New Way to Vote in Ontario—Recommendations of the Ontario Citizens' Assembly on Electoral Reform* (Toronto: Queen's Printer for Ontario, 2007) at 19; Fournier et al, *supra* note 5 at 106–07; R Kenneth Carty, André Blais and Patrick Fournier, "When Citizens Choose to Reform SMP: The British Columbia Citizens' Assembly on Electoral Reform" in André Blais, ed, *To Keep or To Change First Past The Post?: The Politics of Electoral Reform* (Oxford: Oxford University Press, 2008) 140 at 155.

37. See Fournier et al, *supra* note 5 at 106.

outside of democratic institutions. The Assemblies failed, as legislatures have largely failed in recent years, to produce “decentered” deliberation among citizens.<sup>38</sup> Simone Chambers argues that deliberative democratic theory must move out of “safe havens” and engage the populace more broadly.<sup>39</sup> Deliberative democracy is a poor theory indeed if it limits the call for deliberation to “constitutional conventions, Supreme Court opinions, or their theoretical analogues”.<sup>40</sup>

The limits to the Assemblies’ powers are evident. Though deliberation could not be expected to occur outside of the Assemblies to the same extent as within, they did not create the type of decentred deliberation that is ideal in deliberative democratic theory. In stark contrast to the Assemblies, voters in both BC and Ontario engaged in only minimal deliberation.<sup>41</sup> In Ontario, Lauren Stephenson and Brian Tanguay found a relatively low level of engagement by voters on the issue of electoral reform.<sup>42</sup> These authors suggest that MMP was too abstract to meet the on-the-ground concerns of voters. Ontarians felt the government was

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38. See Jürgen Habermas, “Three Normative Models of Democracy” (1994) 1 Constellations 1 (using the term “decentered society” at 7, 9).

39. “Open Versus Closed Constitutional Negotiation” in David Kahane et al, eds, *Deliberative Democracy in Practice* (Vancouver: UBC Press, 2010) 77 at 86.

40. Amy Gutmann & Dennis Thompson, “Democracy and Disagreement” in Robert A Dahl, Ian Shapiro & José Antonio Cheibub, eds, *The Democracy Sourcebook* (Cambridge: Massachusetts Institute of Technology Press, 2003) 18 at 20. There is another potential failing, namely, that the staff of the Assemblies had inordinate influence in setting the parameters of the debate. See Amy Lang, “Agenda-Setting in Deliberative Forums: Expert Influence and Citizen Autonomy in the British Columbia Citizens’ Assembly” in Warren & Pearse, *supra* note 4 at 87–95 [Lang, “Agenda-Setting”]. Lang points out that Ontario had the opportunity to learn from criticisms of the BC process (*ibid* at 105). In response, the staff in Ontario created working groups for Assembly members so as to prevent concerns that staff members were unfairly limiting the agenda or discussion on certain issues. See Fournier et al, *supra* note 5 (finding “no indication” of undue influence by research staff at 104).

41. See Stephenson & Tanguay, *supra* note 5. *Contra* Fred Cutler et al, “Deliberation, Information and Trust: The British Columbia Citizens’ Assembly as Agenda Setter” in Warren & Pearse, *supra* note 4 at 186. Cutler et al suggest that the more voters knew about STV and the Citizens’ Assembly, the more likely they were to vote for STV. They also found that different sets of voters liked the Assembly process for conflicting reasons—populists liked the ordinariness of the members while non-populists supported STV because of the Assembly members’ expertise.

42. *Supra* note 5 at 20.

“not in touch” and not worthy of their trust.<sup>43</sup> On the other hand, most of those surveyed were satisfied with the province’s democracy. Holding contradictory beliefs of this nature can be seen as an indicator of low levels of information and deliberation. Data on the experience in BC paints a similar picture, though the numbers on the first referendum are more encouraging than in the second.<sup>44</sup>

## II. The Problem of Incumbent Self-Interest and Electoral Reform

If the first intended function of the Assemblies was to enhance deliberation on electoral reform, the second was to minimize partisan manipulation in the choice of electoral system. This section investigates how well the Assemblies insulated the process from partisan interference. The problem of self-interested behaviour in the process of electoral reform stems from the traditional power of legislatures to devise electoral rules.<sup>45</sup> Incumbent politicians, who have the greatest personal stake in the design of an electoral system, are normally given a “monopoly over electoral rulemaking”.<sup>46</sup> Incumbents may therefore have incentives to manipulate electoral rules to augment their likelihood of success in future elections. Dennis F Thompson aptly summarizes this reality as “historically understandable, but ethically odd”.<sup>47</sup> In both BC and Ontario, incumbents benefited from the existing electoral system as the legislative majorities were selected by virtue of the SMP system. The Assemblies were designed to find a route to electoral reform that was not blocked by self-dealing representatives with direct interests in the outcome.

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43. *Ibid.*

44. See Cutler et al, *supra* note 41 at 187. In the first referendum in BC when a majority of the electorate opted for the Assembly’s proposal, voters seemed to rely on the legitimacy of the procedures of the Assembly to guide their thinking.

45. I have argued elsewhere that there are three main types of breakdowns in the democratic process: partisan, incumbent and interest entrenchment. Michael Pal, “Breakdowns in the Democratic Process and the Law of Canadian Democracy” (2011) 57:2 McGill LJ 299 at 330–44.

46. Carles Boix, “Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies” (1999) 93:3 Am Pol Sci Rev 609 at 609.

47. *Supra* note 4 at 23.

Political science scholarship on the choice of electoral system has tried to come to terms with the issue of incumbent self-interest. This body of scholarship supports the claim that when choice of electoral system is within the hands of elected representatives, there is likely to be partisan manipulation of the democratic process. The existing literature has not yet adequately considered whether Citizens' Assemblies can insulate decisions on electoral reform from political interference. To address these issues, I consider the political science scholarship and then evaluate to what extent the BC and Ontario Assemblies insulated electoral reform from partisan interests.

#### A. Choice of Electoral System in the Political Science Literature

Political science scholarship on the choice of electoral system supports the proposition that we should evaluate the Citizens' Assembly model on its ability to insulate against political interference. Electoral systems shape how social choices are expressed through voting, but are themselves shaped by the results of voting.<sup>48</sup> Each type of electoral system carries institutional biases that reward certain groups above others. For example, it is well established that SMP favours larger political parties by exaggerating their proportion of seats in relation to their share of the vote. Similarly, proportional representation (PR) provides advantages to smaller parties or parties with declining support.<sup>49</sup> Given that the type of electoral system can influence election outcomes, self-interested political actors may seek to modify institutions to their own advantage.<sup>50</sup>

Substantial empirical evidence indicates that self-interest is the guiding preoccupation of political actors in deciding among electoral systems or choosing whether to initiate electoral reform.<sup>51</sup> When a governing party

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48. See Olga Shvetsova, "Endogenous Selection of Institutions and Their Exogenous Effects" (2003) 14 Const Pol Econ 191 at 191.

49. See *supra* notes 25–26 (providing definitions); Rein Taagepera & Matthew Soberg Shugart, *Seats and Votes: The Effects and Determinants of Electoral Systems* (New Haven: Yale University Press, 1989).

50. See William H Riker, "Implications from the Disequilibrium of Majority Rule for the Study of Institutions" (1980) 74:2 Am Pol Sci Rev 432 at 445.

51. See Boix, *supra* note 46; Kenneth Benoit, "Models of electoral system change" (2004) 23:3 Electoral Stud 363; Josephine T Andrews & Robert W Jackman, "Strategic Fools: Electoral Rule Choice Under Extreme Uncertainty" (2005) 24:1 Electoral Stud 65.

undertakes electoral reform, it tends to select and advocate for the model that best serves its own interests. Uncertainty regarding future events may hinder the government's ability to devise a system that will benefit it,<sup>52</sup> but maximizing its electoral chances still guides its choice.

Carles Boix's 1999 study is the leading article advocating a self-interest model to explain choice of electoral systems.<sup>53</sup> Boix considers instances of electoral change in 23 advanced democracies, including Canada, from 1875 to 1990. He lists four circumstances in which change will occur: the extension of the franchise to include universal suffrage; the introduction of competitive elections in newly democratizing countries; transformative shifts in voter preferences among parties or social movements; and massive fluctuations in party organizations.<sup>54</sup> Boix concludes, however, that the primary cause of electoral reform is the rational calculation by political parties of how to maximize partisan advantage in the face of change.<sup>55</sup> On his view, electoral equilibria are relatively established and difficult to displace,<sup>56</sup> but ruling parties are willing to forego the benefits of competing under stable rules when they believe that a change in electoral system will work to their advantage. For example, Boix suggests that conservative governing parties in Europe adopted PR systems as a response to an expansion of the electorate to encompass the working class, and the resulting rise of trade union-based political parties.<sup>57</sup> As those parties grew in strength, conservative parties opted for PR to minimize their losses.<sup>58</sup>

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52. See *ibid* at 68–70, 80–83 (providing the strongest recent argument for this point). See also David M Olson, "Party Formation and Party System Consolidation in the New Democracies of Central Europe" (1998) 46:3 Pol Stud 432; Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991); Shvetsova, *supra* note 48.

53. *Supra* note 46 at 621–23.

54. *Ibid* at 621.

55. *Ibid*.

56. See also Ferejohn, *supra* note 18 at 197.

57. *Supra* note 46 at 621–22. *Contra* Stein Rokkan, *Citizens, Elections, Parties* (Oslo: Universitetsforlaget, 1970).

58. For instances of self-interested electoral reform or manipulation in other democracies, see Kenneth Mori McElwain, "Manipulating Electoral Rules to Manufacture Single-Party Dominance" (2008) 52:1 Am J Pol Sc 32 at 33 (arguing that political science undercounts instances of partisan manipulation); David Brady & Jongryn Mo, "Electoral Systems and Institutional Choice: A Case Study of the 1988 Korean Elections" (1992) 24:4 Comp Pol Stud 405 (Asia); Kathleen Bawn, "The Logic of Institutional Preferences: German

Canadian examples also support Boix's theory of strategic manipulation of electoral reform. On several occasions, political elites across the spectrum have adopted or altered their positions on the electoral system based on their current interests. In Quebec, the Parti Québécois moved from favouring PR to preferring SMP as its fortunes improved relative to those of the provincial Liberal Party.<sup>59</sup> The federal New Democratic Party's enthusiasm for PR has waxed and waned with its electoral fortunes under SMP, while its provincial counterparts have resisted electoral reform where they have succeeded in forming governments.<sup>60</sup> In keeping with the Boix narrative, established parties at the federal and provincial levels considered electoral reform to hinder the growth of the newly formed, socialist Co-operative Commonwealth Federation (CCF).<sup>61</sup> In BC, the provincial Liberals and Conservatives together introduced the alternative vote to successfully decrease the CCF's electoral fortunes.<sup>62</sup> Overall, parties with a chance at forming single-party majority governments have frequently supported SMP over PR.<sup>63</sup>

Recent scholarship has attempted to move the theoretical debate away from Boix's rational choice model.<sup>64</sup> Historical institutionalists, for example, have argued that the rational choice approach ignores history and context, and therefore reaches mistaken conclusions about why particular

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Electoral Law as a Social Choice Outcome" (1993) 37:4 Am J Pol Sc 965; Arend Lijphart, "Democratization and Constitutional Choices in Czecho-Slovakia, Hungary and Poland 1989-91" (1992) 4:2 J Theoretical Pol 207 (Europe); Alberto Diaz-Cayeros & Beatriz Magaloni, "Party Dominance and the Logic of Electoral Design in Mexico's Transition to Democracy" (2001) 13:3 J Theoretical Pol 271 (Mexico).

59. See Massicotte, *supra* note 16 at 119.

60. See *ibid* at 117, 136-37 (citing Manitoba and Saskatchewan as key examples).

61. See Dennis Pilon, "Explaining Voting System Reform in Canada: 1874 to 1960," (2006) 40:3 J Can Stud 135 at 152-53.

62. See *Ibid*; Massicotte, *supra* note 16 at 114.

63. See *Ibid* at 131, 135.

64. Benoit, *supra* note 51 at 365-66. He critiques Boix for making "broad empirical generalizations". He also considers an exhaustive laundry list of potential causes of electoral reform (*ibid* at 367-73). Yet he ultimately reaches the same conclusion as Boix that the self-interested behaviour of parties is the best explanation for electoral reform after a comparative evaluation of democracies worldwide (*ibid* at 373-74).

electoral systems are chosen at specific times.<sup>65</sup> Cultural modernization theorist Matthew Søberg Shugart argues that the rational choice model ignores the role of norms, namely democratic values, in evaluating the performance of electoral systems,<sup>66</sup> and fails to apply the necessary detailed contextual analysis.<sup>67</sup> Nevertheless, while these competing schools of thought challenge the idea that partisan manipulation is the sole factor at play, they accept that it remains a key ingredient in electoral system change.<sup>68</sup>

### B. Citizens' Assemblies and the Democratic Process

In this section, I consider how well the Citizens' Assemblies insulated the process of electoral reform from self-interested political interference. For several reasons, it can be plausibly argued that the problem of incumbent self-interest is eliminated by the use of Citizens' Assemblies.<sup>69</sup> First, the governments in BC and Ontario did not know whether the Assemblies in those provinces would recommend change or what alternative system they would propose. Second, voters, not elected representatives, decided the fate of the Assemblies' proposals in referenda. Third, there was no political interference by the provincial governments in the internal workings of the Assemblies once they were constituted.

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65. See Alan Renwick, *The Politics of Electoral Reform: Changing the Rules of Democracy* (Cambridge: Cambridge University Press, 2010) at 7-10; Amel Ahmed, "Reading History Forward: The Origins of Electoral Systems in European Democracies" (2010) 43:8/9 Comp Pol Stud 1059 at 1066-68; Marcus Kreuzer, "Historical Knowledge and Quantitative Analysis: The Case of the Origins of Proportional Representation" (2010) 104:2 Am Pol Sci Rev 369; Gideon Rahat & Reuven Y Hazan, "The Barriers to Electoral System Reform: A Synthesis of Alternative Approaches" (2011) 34:3 W Eur Pol 478 at 478-79.

66. "Inherent and Contingent Factors", *supra* note 16 at 10.

67. *Ibid* at 9. See also Matthew Søberg Shugart, "Extreme" Electoral Systems and the Appeal of the Mixed-Member Alternative" in Matthew Søberg Shugart & Martin P Wattenberg, eds, *Mixed-Member Electoral Systems: The Best of Both Worlds?* (Oxford: Oxford University Press, 2001) at 26-27.

68. Shugart, "Inherent and Contingent Factors", *supra* note 16 at 10; Ahmed, *supra* note 65 at 1066; Rahat & Hazan, *supra* note 65 at 483-85, 488-90; Renwick, *supra* note 65 at 10.

69. See e.g. Thompson, *supra* note 4 at 23-25; Flinders & Curry, *supra* note 5 (calling the BC Assembly a "significant and quite radical transfer of power from the executive to the [Assembly]" where "the executive severed its control capacity by instituting a direct relationship between the Citizens' Assembly and the public" at 383); Fournier et al, *supra* note 5 at 108-11 (concluding that political interference was negligible).



Finally, the governments voluntarily gave up their monopoly on determining the rules of the electoral game, implying they were open to reform.

Despite these indicators, Citizens' Assemblies were, in my view, only partially successful in dealing with the problem of self-interest. The argument that Assemblies fix the problem entirely does not take adequate account of the actual details of the Assembly and referendum processes in the two provinces. It overlooks the fact that governments retained significant levers of control and had opportunities for agenda-setting and embedding path dependencies in the Assemblies. In particular, there were two opportunities for the self-interest of elected representatives to manifest itself: in the composition of the Assemblies and during the post-Assembly/referendum stage.

#### (i) Composing the Citizens' Assemblies

In this section I consider how a government can pursue its own self-interest by defining the mandate and the procedures of a Citizens' Assembly. While there was no evidence of direct political interference with the Citizens' Assemblies in BC and Ontario,<sup>70</sup> there were still opportunities for significant, if subtle, partisan involvement—particularly in setting the mandates for the Assemblies and in the selection process for their members.

The government has significant agenda-setting power in determining what work an Assembly will do.<sup>71</sup> In particular, whether the government asks the Assembly to address a narrow question or an open-ended one is likely to affect how the Assembly approaches the issue of electoral reform. Consider the contrast between the Australian Citizens' Parliament and the Canadian experience. In Australia, the Citizens' Parliament was asked

70. See *ibid.*

71. See Lang, "Agenda-Setting", *supra* note 40 at 88–89 and 95–96 (discussing both formal and informal agenda-setting power and making a convincing case that both are relevant in understanding the workings of the Assemblies); Fournier et al, *supra* note 5 at 94–112, (considering the role of staff and experts, the chairs, the public, elected representatives, and the members themselves in shaping the outcome). Fournier et al also directly address whether there was political interference with the inner workings of the Assemblies or the choice of STV in BC and MMP in Ontario and conclude that there was not (*ibid* at 108–11).

an entirely open-ended question: "How can Australia's political system be strengthened to serve us better?"<sup>72</sup> In BC and Ontario, the Assemblies were told to consider very narrow questions. In BC, the Terms of Reference stated that the Assembly's work was "limited to the manner by which voters' ballots are translated into seats in the legislative Assembly".<sup>73</sup> The Ontario Assembly, created by a regulation after a study by an all-party committee of the legislature, also set a narrow question: whether to retain SMP or adopt a new electoral system.<sup>74</sup>

The narrow mandate in BC stemmed from a report by Gordon Gibson to the government on the process of setting up a Citizens' Assembly.<sup>75</sup> Gibson stated that issues such as campaign finance, mandatory voting, redistricting and reserved seats should not be considered. His rationale was that the work of an Assembly would suffer if faced with numerous topics and that any referendum would be hopelessly complicated if too many reforms were on the table.<sup>76</sup>

I believe this is arguable. The Australian Citizens' Parliament, with its very open-ended mandate, came up with a range of useful recommendations.<sup>77</sup> Evidence from BC and Ontario on the significant expertise built up by the Assembly members over the course of the process indicates that they could have deliberated effectively on a wider range of reforms.<sup>78</sup> Complexity can be managed in ways other than by

72. Dryzek, *supra* note 5.

73. British Columbia Citizens' Assembly on Electoral Reform, *Making Every Vote Count: The Case for Electoral Reform in British Columbia: Technical Report* (Vancouver: British Columbia Citizens' Assembly on Electoral Reform, 2004) at 107 (Chair: Jack Blaney). See also Thompson, *supra* note 4 at 32.

74. See Rose, *supra* note 5 at 9. Section 3(1) of the Citizens' Assembly On Electoral Reform, O Reg 82/06, as repealed by O Reg 293/10, ss 1–2, ordered the Assembly to consider SMP and alternatives, and to recommend either keeping SMP or adopting some new electoral system. Section 3(2) directed the decision to be made with reference to the principles listed in Table 1 of the regulation: legitimacy, fairness of representation, voter choice, effective parties, stable and effective government, effective parliament, stronger voter participation and accountability.

75. *Report on the Constitution of the Citizens' Assembly on Electoral Reform* by Gordon F Gibson (Victoria: Ministry of the Attorney General, 2002).

76. See Thompson, *supra* note 4 at 32 (arguing that Gibson was correct to say that the referendum must be on a single question).

77. See Dryzek, *supra* note 5.

78. See Blais, Carty & Fournier, *supra* note 30 at 128, 143–44.

posing very narrow questions. For example, a series of referenda would be organized to dispel concerns that “multiple options not only create the potential for voter confusion but also for strategic manipulation”.<sup>79</sup> A narrowly defined question means interrelated issues cannot be addressed. Altering the electoral system from SMP to STV, for example, might require a fundamental change in how electoral boundaries are drawn, and campaign finance laws might need to be amended. Citizens’ Assemblies are capable of deliberating on these issues, which are essential to how any new system recommended by an Assembly would function. Whether one prefers the efficiency-gains of a narrow mandate or the ability to consider interrelated problems offered by a broader question, it is the government that makes this decision when setting the Assembly’s mandate.

Another opportunity for government interference lies in the selection process for Assembly members, which can create distortions favouring some outcomes over others. Underlying this concern is the idea of path dependency: that past decisions will limit or guide future options. Although the selection of Assembly members in BC and Ontario was largely random, it was not completely so. The BC Assembly controlled for geography, gender and age on the idea that it would create “descriptive similarity to the provincial population”.<sup>80</sup> Two members were selected from each existing electoral district, one man and one woman, with a representative range of ages. There were no controls, however, for factors such as race, ethnicity, religion or language.<sup>81</sup> As a result, the Assembly had a far smaller proportion of visible minorities than the general population.<sup>82</sup> This is not to say that age, gender or geography are irrelevant characteristics, but simply to point out that other factors are potentially just as salient.

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79. Thompson, *supra* note 4 at 32 (referencing private correspondence with Gordon Gibson).

80. Michael Rabinder James, “Descriptive Representation in the British Columbia Citizens’ Assembly” in Warren & Pearse, *supra* note 4 at 109–10. James points out that the lack of minority representation in the Assembly (at least in descriptive terms) was perhaps striking given the well-recorded differential impact that types of electoral systems have on minority voters and candidates (*ibid* at 113, 119).

81. Two additional Aboriginal members were selected to remedy the lack of representation after the initial selection process.

82. See James, *supra* note 80 at 111. The Assemblies were more representative with respect to country of origin. See Fournier et al, *supra* note 5 at 56.

Detailed study of the deliberations in the BC Assembly raises questions as to whether these choices had a significant impact on the Assembly’s deliberations and final proposal. Some members began to see themselves as representatives of their geographic constituencies, even though the merit of retaining geographic ridings was a live issue given the disproportional electoral results in the province. A “northern caucus” emerged, and championed the idea of local representation and other accommodations to meet the needs of the rural northern part of the province.<sup>83</sup> The northern caucus was a minority in the broader Assembly, but utilized persuasion and bargaining to achieve their goal of varying district magnitudes.<sup>84</sup> This emphasis on geographic constituencies in the deliberations found its way into the STV model that was eventually chosen. It seems less likely that such a group would have formed had members been chosen without regard to geography. Their push to protect the interests of those they viewed as their constituents led to a recommendation that modified district size to ensure that rural overrepresentation under SMP would continue under STV.<sup>85</sup>

The story was similar in Ontario, where one Assembly member was elected from each existing electoral district. MMP, the system eventually selected as an alternative to SMP, gave priority to local representation and preserved geographic constituencies. Ninety seats would be contested in geographic ridings, with 39 added in a proportional top-up.<sup>86</sup> While the Assembly could have rejected geographic districting, this was less likely because the members were selected on the basis of local representation. The examples from BC and Ontario indicate that the geographic selection criteria for the Citizens’ Assemblies influenced their deliberations.

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83. See Lang, “Agenda-Setting”, *supra* note 40 at 96–98.

84. See *ibid*.

85. See Michael Pal & Sujit Choudhry, “Is Every Ballot Equal? Visible-Minority Vote Dilution in Canada” (2007) 13:1 IRPP Choices (for details on the level of rural overrepresentation under SMP)

86. See Ontario Citizens’ Assembly on Electoral Reform, *supra* note 36 at 2.

(ii) The Referendum Phase

Incumbents may exercise self-interest at the referendum stage when the option selected by the Citizens' Assembly is put to a province-wide vote. In both the BC and Ontario referenda, the status quo (SMP) was pitted against the reform proposal put forward by the Assembly.<sup>87</sup> Despite giving up substantial control over the implementation of electoral reform, the provincial governments retained various levers of power. They decided to set super-majority thresholds for electoral reform to pass; they were free to choose to campaign for or against the Assembly's recommendations, or to remain silent; and they could also decide whether or not to provide funds for organized "Yes" and "No" campaigns to promote awareness of the referendum and electoral reform.

Both the BC and Ontario governments set similar super-majority thresholds for the referenda. The governments required approval by 60% of total votes and majority support in at least 60% of the ridings for the proposal to pass.<sup>88</sup> BC's first referendum in 2005 recorded 58% support for the proposed reform.<sup>89</sup> A majority of BC voters supported the reform, but the super-majority requirement proved determinative. The second BC referendum in 2009 resulted in a remarkably decisive rejection of the same proposal, with only 39% of voters supporting STV.<sup>90</sup> The MMP proposal in Ontario received a mere 37% of the vote and had majority support in only 5 of 107 ridings, all of them in Toronto.<sup>91</sup> Thus, in Ontario, the super-majority requirement did not determine the outcome.

The second way in which governments retained power during the referenda phase was by exercising their discretion on how to present the proposed reform to the public. A government has the luxury of deciding whether to campaign in favour of a proposal it likes, against a proposal it does not like, or to be silent on the issue.<sup>92</sup> These are all significant

87. This infusion of direct democracy through referenda is a marked departure from past practice in Ontario and BC

88. See Stephenson & Tanguay, *supra* note 5 at 10.

89. See Leduc, *supra* note 5 at 553.

90. See *ibid.*

91. See *ibid.*; Stephenson & Tanguay, *supra* note 5 at 10.

92. Leduc, *supra* note 5 (making this point as well and arguing that the Ontario government "abandoned and isolated" the Assembly after it had been created at 564).

levers of power that may be used to further a government's self-interest. Both the Campbell government in BC and the McGuinty government in Ontario were able to wait to see what proposal the Assemblies came up with before deciding how to act.

Neither of the provincial governments chose to campaign outright against the reform proposals. In Ontario, while key cabinet ministers spoke out in favour of reform, the McGuinty government took no official position. If a government abstains from advocating for the Assembly's proposal, it is very difficult for citizen groups to mobilize the public to cross a super-majority threshold given the low levels of information that voters possess on the proposed alternative.<sup>93</sup> The experience of multiple countries with referenda on electoral reform indicates that there is a systemic bias toward defeating reform proposals, given the lack of information possessed by voters, the complexity of the issues, and the short time period of a referendum or election campaign.<sup>94</sup>

Caucus dynamics can be seen as significant factors in shaping the context for Citizens' Assemblies. As Flinders and Curry point out, governments could simply use their legislative majorities (which both BC and Ontario had) to pass electoral reform.<sup>95</sup> One possible motivation behind the creation of a Citizens' Assembly is the desire by a reform-minded executive to get around likely caucus disapproval of electoral system change.<sup>96</sup> The governments in BC and Ontario appeased pro-reform caucus members when they constituted the Assemblies and benefitted from the approval of interest groups advocating change,<sup>97</sup> but retained discretion to undermine electoral reform at the referendum stage if it was in their interests. The Liberal Party in Ontario, for example, supported reform in opposition, but its elected representatives were less convinced of the flaws of SMP once they were elected to a majority under that system.<sup>98</sup> In BC, Dennis Pilon argues that the Liberal Party gained

93. See Cutler et al, *supra* note 41 at 182-88; Stephenson & Tanguay, *supra* note 5 at 10-14, 16-19. *C.f.* Leduc, *supra* note 5 at 556-57.

94. See *ibid.* at 563.

95. *Supra* note 5 at 386.

96. See *ibid.* McElwain, *supra* note 58 at 34-35 (discussing the role of diverging interests causing intra-party conflict); Ruff, *supra* note 5 at 239-40 (making this point in relation to the BC Assembly).

97. See Stephenson and Tanguay, *supra* note 5 at 9-10.

98. See Leduc, *supra* note 5 at 553.

office with a promise of electoral reform, after receiving fewer seats than their vote share warranted in 1996 and 2001. After forming government, however, their partisan outlook under SMP improved. They responded by manipulating the referendum process in 2009 to forestall the partisan disadvantages that they feared would accompany a new electoral system.<sup>99</sup>

A third lever of control for governments is power over how to fund and organize the referendum campaign. They could choose to fund “Yes” and “No” camps, to offer no funding at all, or to offer trivial amounts that would preclude adequate information from being passed on to voters. In BC’s first referendum, there was no government funding for “Yes” and “No” campaigns and little support to publicize the Assembly’s deliberations beyond a mail-out of the Assembly’s proposal to each household six months before the voting date. The 58% vote in favour of that proposal was a miracle in those circumstances. For the second BC referendum, the government chose to fund both the “Yes” and “No” sides, and gave each \$500 000.<sup>100</sup> A Referendum Information Office was also set up to provide objective information about electoral systems and the referendum process. However, public interest in reform had already waned. Whatever trust voters had in the deliberations of the Assembly in 2004 was gone by 2009.

In Ontario, a fund of \$6.8 million was provided for a public education initiative, but there were no organized “Yes” and “No” campaigns.<sup>101</sup> Even the key interest groups operated with minimal funding.<sup>102</sup> The education initiative did not overcome voters’ contradictory feelings about government and electoral reform; they seemed to want reform while also being satisfied with the current system.<sup>103</sup> Media coverage of the Assembly’s deliberations was scant, and treatment in the press of MMP

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99. Pilon, “The 2005 and 2009 Referenda”, *supra* note 5 at 74 (claiming in the BC case that elites manipulated the process to minimize the chances of reform without creating the appearance of interference). But see Flinders and Curry, *supra* note 5 (whose understanding is that intra-party conflict caused lukewarm Liberal support for reform). In my opinion, both strategic calculations and intra-party conflict appear to have been at play.

100. See British Columbia, Ministry of the Attorney General, *Second Referendum Planned on Electoral Reform* (Victoria: Ministry of Attorney General, 2008).

101. See Stephenson and Tanguay, *supra* note 5 at 9.

102. See *ibid.*

103. See *ibid.*

before the referendum was overwhelmingly negative and failed to inform voters of the substance of the reform proposal.<sup>104</sup>

### III. Citizens’ Assemblies and Judicial Oversight of the Law of Democracy

In this section, I address the implications of the Citizens’ Assemblies on what is arguably the major debate in the law of democracy scholarship today. The disagreement is between structural theorists, who emphasize the need for courts to ensure a fair democratic process, and rights theorists, who are skeptical of judicial oversight of the law of democracy. The structural versus rights debate is extensive and I cannot do justice to it here.<sup>105</sup> I argue that both scholarly camps should support the use of Citizens’ Assemblies. Despite the limits of the Assembly model identified above, the institution also holds great promise. Assemblies have the potential to address concerns about the legitimacy of legislative decision-making on election law, which troubles structuralists. Their use also reduces the necessity of judicial oversight of election laws, which responds to the doubts expressed by rights theorists on the legitimacy of judicial review. To make this argument, I first outline structural and rights theory. I then consider what can be extracted from the Supreme Court of Canada’s indirect statements on the constitutionality of the existing electoral system. Finally, I demonstrate how Citizens’ Assemblies can respond to the particular concerns of both structural and rights theorists given the Court’s jurisprudence under section 3 of the *Charter*.

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104. See Leduc, *supra* note 5 at 558–60; Dennis Pilon, “Investigating Media as a Deliberative Space: Newspaper Opinions about Voting Systems in the 2007 Ontario Provincial Referendum” (2009) 3:3 Can Pol Sci Rev 1; George Hoff, “Covering Democracy: The Coverage of FPTP vs. MMP in the Ontario Referendum on Electoral Reform” 5:1 Can J Media Stud 24 at 45.

105. For greater detail on the structure versus rights debate, see Pal, *supra* note 45 at 304–10, 319–28.

A. *Theories of the Law of Democracy*

Structural theory is the leading theory of the law of democracy, and has been widely applied in the United States<sup>106</sup> and Canada.<sup>107</sup> Structural theorists argue that the paramount concern on issues of election law and electoral reform is the potential divergence between the interests of incumbents and those of the electorate. Insulating these decisions from partisan interference is therefore necessary. Structural scholarship has identified and is concerned with “lockups” of the democratic process, whereby incumbents manipulate seemingly unimportant aspects of election law to distort outcomes to their benefit. Lockups diminish political competition and harm the ability of the electorate to hold elected representatives accountable.<sup>108</sup> Examples of lockups are common. Partisan gerrymandering in the United States is one instance of election law manipulation that clearly serves incumbents. The adoption of campaign finance or party funding rules that favour large, established political

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106. The leading proponents are Samuel Issacharoff and Richard Pildes. They have written a large body of scholarship. See especially Samuel Issacharoff & Richard H Pildes, “Politics as Markets: Partisan Lockups of the Democratic Process” (1998) 50:3 *Stan L Rev* 643; Richard H Pildes, “The Theory of Political Competition” (1999) 85:8 *Va L Rev* 1605; Richard H Pildes, “The Constitutionalization of Democratic Politics”, *Supreme Court Foreword* (2004) 118:1 *Harv L Rev* 29; Samuel Issacharoff, “Gerrymandering and Political Cartels” (2002) 116:2 *Harv L Rev* 593.

107. See Pal, *supra* note 45. See generally, Colin Feasby, “Freedom of Expression and the Law of the Democratic Process” (2005) 29 *Sup Ct L Rev* (2d) 237; Colin Feasby, “Constitutional Questions About Canada’s New Political Finance Regime” (2007) 45:3 *Osgoode Hall LJ* 513; Colin Feasby, “*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy Under the *Charter*: The Emerging Egalitarian Model” (1999) 44:1 *McGill LJ* 5. In a reply to Feasby, Bredt and Pottie raise structural concerns with manipulation of the democratic process by incumbents. Christopher D Bredt & Laura Pottie, “Liberty, Equality and Deference: A Comment on Colin Feasby’s “Freedom of Expression and the Law of the Democratic Process” (2005) 29 *Sup Ct L Rev* (2d) 291 at 301–02.

108. See Issacharoff & Pildes, *supra* note 106.

parties over new or smaller parties is another,<sup>109</sup> as is the failure to adhere to representation by population.<sup>110</sup>

Structural theory does not treat self-interested behaviour by elected representatives as a problem in and of itself. Self-interest can motivate politicians in socially productive ways. The democratic system of representative government depends on candidates being motivated by the goal of getting elected to modify their views in order to secure the electorate’s support. Self-interest is also not determinative of all outcomes. Elected representatives may behave altruistically and may be guided by political principles. Structural theory views self-interested behaviour as problematic where it leads to distortions in the democratic process. Structural theorists therefore assert that courts, or other institutions such as electoral boundary commissions, must intervene in order to ensure a fair democratic process.

The leading alternative to structural theory is “rights theory”. Rights theorists are a disparate group of thinkers who are united by their critique of structural theory. They generally emphasize with the need for individual rights protection to ensure a fair democratic process. Rights theorists in the United States and Canada argue that structural theory places too much emphasis on ensuring political competition and too little on other democratic values.<sup>111</sup> Rights theorists also assert that structural theory invites unnecessary court interference in election law to uphold values like fair competition, which is democratically illegitimate as it violates the separation of powers between the judiciary and elected representatives.<sup>112</sup>

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109. See Bredt & Pottie, *supra* note 107 at 301–02, detail the concern with campaign finance.

110. Rural groups and voters in all provinces other than BC, Alberta and Ontario are over-represented in Parliament. MPs representing groups that benefit from overrepresentation have long used their political power to block representation by population. See Pal & Choudhry, *supra* note 85.

111. See e.g. Richard Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (New York: New York University Press, 2003). Hasen critiques structural theory throughout, but primarily in the chapter “Equality, Not Structure: The End of Individual Rights?” (*ibid* at 138–56).

112. See e.g. *ibid* at 143–46, 153–55.

Richard Hasen argues that courts should refrain from overseeing anything in the law of democracy except “core equality” rights.<sup>113</sup> In Hasen’s view, unresolved, contentious public issues should be the exclusive province of legislatures and executives.<sup>114</sup> Nathaniel Persily claims that despite evidence of gerrymandering by self-interested incumbents, and despite diminished political competition in American congressional and state elections due to safe districts, courts should still defer to politicians on matters of redistricting.<sup>115</sup> In their recent book on election law jurisprudence in the United States and Canada, Christopher Manfredi and Mark Rush outline major critiques of structural theory, including that it provides no limit to judicial power over the law of democracy.<sup>116</sup>

Both structural and rights theorists have reason to be dissatisfied with the Supreme Court’s section 3 jurisprudence. From a structural viewpoint, the Court has not come to terms with the need to prevent distortions of the democratic process through self-dealing. It has not developed a coherent doctrine to regulate self-dealing in redistricting, party funding, campaign finance and restrictions on political speech. From the other side, rights theorists skeptical of judicial review can point to specific interventions by the Court that have altered the rules governing politics in Canada as evidence of judicial overreach.

### B. The Supreme Court of Canada Section 3 Jurisprudence

Section 3 of the *Charter* states that “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein”.<sup>117</sup> The Supreme Court has not directly considered the constitutionality of our

113. *Ibid* at 73–137 (accepting, however, that there should be robust scrutiny of means and ends to police self-interest).

114. *Ibid* at 85 (arguing that contested non-core equality rights should be left to the political branches to decide. For example, he includes prisoner and felon disenfranchisement laws, age limits, and issues of non-citizen or non-resident voting as non-core rights).

115. “In Defence of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders” (2002) 116:2 Harv L Rev 649.

116. *Judging Democracy* (Peterborough, Ont: Broadview Press, 2008) at 125. See also Christopher Manfredi & Mark Rush, “Electoral Jurisprudence in the Canadian and U.S. Supreme Courts: Evolution and Convergence” 52:3 McGill LJ 457.

117. *Supra* note 7, s 3.

existing SMP electoral system.<sup>118</sup> A challenge to SMP by the Green Party of Canada was abandoned before trial.<sup>119</sup> More recently, a challenge to the Quebec electoral system was rejected by the Quebec Court of Appeal.<sup>120</sup>

The constitutionality of SMP was raised indirectly, however, in *Figueroa v Canada (AG)*.<sup>121</sup> In *Figueroa*, the Supreme Court considered the constitutionality of certain provisions in the *Elections Act* that required small political parties to nominate candidates in at least 50 ridings to be registered as political parties.<sup>122</sup> Registration as a party brought with it several advantages: the right to have candidates’ party affiliations listed on the ballot, generous tax benefits for donors and permission for unspent funds to be transferred from individual candidates to the party after an election.

Both Iacobucci J (for the majority of the court) and LeBel J (concurring) found that the treatment of small political parties under the *Elections Act* violated the right to meaningful participation in the electoral process guaranteed in section 3 of the *Charter*.<sup>123</sup> Justice Iacobucci held that the regulatory regime discouraged democratic participation of individual supporters and candidates of small political parties. In his concurring opinion, LeBel J reasoned that the right to meaningful participation

118. See Katz, *supra* note 5 at 588, 599, 603–04. Katz argues that while Canadian courts have not ordered a change in electoral system, the accumulation of doctrine under section 3 embodies democratic principles that may eventually compel large scale reform.

119. *Russov v Canada (AG)* [Notice of Application], (1 May 2001) (Ont Sup Ct J) online: <<http://www.law-lib.utoronto.ca/testcase/2.pdf>>.

120. *Daoust c Québec (Directeur général de élections)*, 2011 QCCA 1634 (available on CanLII).

121. 2003 SCC 37, [2003] 1 SCR 912. See also Heather MacIvor, “The Charter of Rights and Party Politics: The Impact of the Supreme Court Ruling in *Figueroa v. Canada (Attorney General)*” (2004) 10:4 IRPP Choices 1. MacIvor discusses the role of self-interested behaviour by elected representatives and the role of courts (*ibid* at 3–4) and considers other rules that may run afoul of *Figueroa*’s requirement of fair treatment of small political parties (*ibid* at 18). For further discussion of *Figueroa*, see Heather MacIvor, “Judicial Review and Electoral Democracy: The Contested Status of Political Parties Under the *Charter*” (2002) 21 Windsor YB Access Just 479 (considering cartel-like behaviour by large parties); Colin Feasby, “The Supreme Court of Canada’s Political Theory and the Constitutionality of the Political Finance Regime” in K D Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Finance in International Perspective* (Oxford: Hart Publishing, 2006) 243 at 251–53.

122. SC 2000, c 9, ss 24, 28.

123. *Figueroa*, *supra* note 121 at paras 45–46, Iacobucci J, 176–77, LeBel J, Concurring..

should be interpreted not only as furthering *individual* participation, but also as furthering *collective* interests through the doctrine of “effective representation”.<sup>124</sup> He emphasized the legitimate democratic value of aggregating individual political preferences to favour the formation of majority governments.<sup>125</sup>

Justice LeBel’s concurrence can be read as a pre-emptive defence of the constitutionality of SMP. He appears to have been concerned that the reasoning of the majority preventing discrimination against small political parties could be used in the future to find that SMP violates section 3. Justice LeBel correctly recognized that SMP is biased in favour of mainstream political parties, in contrast to PR.<sup>126</sup> By holding that it is within Parliament’s purview to channel voters’ preferences toward majority governments, LeBel J implied that PR is not mandated by section 3. Justice LeBel carefully insisted that he was neither prejudging the merits of a challenge to the constitutionality of SMP under section 3, nor asserting that laws promoting majority government are constitutionally permissible.<sup>127</sup> The consequence of his reasoning, however, is to carve out a wide discretionary range within which elected representatives can decide among competing electoral systems and values.

As the Supreme Court has only indirectly considered the constitutionality of SMP, legislatures in Canada are relatively unconstrained on choice of electoral system. This is in contrast to other areas of election law where legislative discretion has been truncated. The Supreme Court has ruled on the constitutionality of electoral boundaries, campaign finance rules and restrictions on political speech,<sup>128</sup> which has constrained legislatures. Other aspects of the law of democracy have been taken from legislatures and given to impartial and independent

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124. *Ibid* at paras 96–98, 100–01, 117.

125. *Ibid* at para 155.

126. *Ibid* at para 154.

127. *Ibid* at para 158.

128. Katz, *supra* note 5 at 588, 603–04.

bodies, such as Elections Canada, Elections Ontario and redistricting commissions on electoral boundaries.<sup>129</sup>

Although the Supreme Court has yet to face a constitutional challenge to SMP, it is conceivable that one could arise in the future. The routes to contesting the electoral system would be through section 3 or section 15 of the *Charter*, the equality guarantee. The jurisprudence indicates that there are two hooks for a section 3 claim: the fact that SMP diminishes the ability of specific aggregations of voters to meaningfully participate in the electoral system, and the requirement of effective representation by elected officials. For section 15, the claim would be that SMP discriminates against particular minorities. Potentially relevant to a section 3 or section 15 claim is that it is harder under SMP than under PR for women, aboriginals and geographically dispersed minorities to translate their political preferences into political power.<sup>130</sup> Also, under SMP, regional political parties are favoured, while national political parties often see their dispersed support fail to translate into seats.<sup>131</sup> There is evidence that SMP wastes votes, exaggerates majorities while weakening oppositions, and allows minor parties to accumulate votes with very little corresponding growth in seats.<sup>132</sup> These facts could ground a section 3 claim under the guarantees of meaningful participation and effective representation, or a section 15 challenge on the basis of discrimination.

David Beatty has argued that any constitutional challenge would be “simple and straightforward”,<sup>133</sup> due to the legion of flaws identified in

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129. Federal electoral boundary commissions provide a role for MPs in consultation, but the independent, non-partisan commissions have the final word on the electoral map. For provincial electoral boundaries, either legislatures or commissions may have the last say. See John Courtney, *Commissioned Ridings: Designing Canada’s Electoral Districts* (Montreal: McGill-Queen’s University Press, 2001) at 107–10.

130. See Trevor Knight, “Unconstitutional Democracy? A *Charter* Challenge to Canada’s Electoral System” (1999) 57:1 UT Fac L Rev 1 at 12–15.

131. See *ibid* at 15–16.

132. See *ibid* at 4–7.

133. “Making Democracy Constitutional” in Paul Howe, Richard Johnston & André Blais, *Strengthening Canadian Democracy* (Montreal: Institute for Research on Public Policy, 2005) 129 at 131, 136. See also Knight, *supra* note 130 (arguing that it is “clear” that SMP violates section 3 at 30).

SMP.<sup>134</sup> In my opinion, Beatty's characterization that courts will dismiss the existing system is overly optimistic. The ongoing debate about the competing merits of SMP versus PR, and LeBel J's discussion of the wide discretion that governments have in deciding among these alternative systems, suggest that the constitutionality of SMP is far from settled. While the Court has been willing to police the democratic process—for example, by expanding the franchise in *Sauvé v Canada (Chief Electoral Officer)*<sup>135</sup> and in supporting small parties in *Figueroa*<sup>136</sup>—it has been more deferential regarding electoral maps,<sup>137</sup> campaign finance rules<sup>138</sup> and restrictions on election-day communications.<sup>139</sup> Ruling that the entire electoral system is unconstitutional is another matter entirely from striking down rules that restrict the franchise or harm small political parties. There are much deeper issues of democratic legitimacy at stake in judging the electoral system.

### C. Structural Theory, Rights Theory and Citizens' Assemblies

In this section, I argue that Citizens' Assemblies are responsive to the concerns of both major approaches to the law of democracy—structural theory and rights theory—and should therefore be supported by adherents to each scholarly framework. The recent debate in the Supreme Court on the relationship between section 3 and section 33 (the notwithstanding clause) of the *Charter*<sup>140</sup> illustrates the divide between structural theory and rights theory. Section 33 permits governments to pass laws notwithstanding the fact that they contravene rights guaranteed

134. See *ibid* at 4–20 (summarizing these arguments in the context of a constitutional challenge to SMP in Canada). See generally, Howe, Johnston & Blais, *supra* note 133; Milner, *Steps Toward*, *supra* note 5; Henry Milner, ed, *Making Every Vote Count: Reassessing Canada's Electoral System* (Peterborough, ON: Broadview Press, 1999).

135. 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé II*].

136. *Supra* note 121.

137. See *Reference Re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158, 81 DLR (4th) 16 [*Boundary Reference*].

138. See *Harper v Canada (AG)*, 2004 SCC 33, [2004] 1 SCR 827.

139. See *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527.

140. *Supra* note 7, ss 3, 33.

by the *Charter*. Yet the right to vote in section 3 is one of the subset of rights in the *Charter* to which section 33 does not apply.<sup>141</sup>

The two *Sauvé* cases gave the Supreme Court occasion to consider the significance of exempting the right to vote from the notwithstanding clause. In *Sauvé v Canada (AG)*,<sup>142</sup> the Court held that blanket rules disenfranchising prison inmates were unconstitutional. Parliament responded with more narrowly tailored legislation, which the Court found to contravene section 3 in *Sauvé II*.<sup>143</sup> The Court's reasoning in the two *Sauvé* cases reflects the importance of democratic rights in the text of the *Charter*. Chief Justice McLachlin (for the majority) found that section 33's inapplicability to section 3 was designed to prevent governments from restricting democratic rights.<sup>144</sup> On this view, democratic rights are too "fundamental" to be overridden,<sup>145</sup> as they are the "cornerstone of democracy".<sup>146</sup> Chief Justice McLachlin's view of the relationship between section 3 and section 33 reflects a structural approach that emphasizes the need to prevent elected representatives from manipulating the franchise.

In his dissent in *Sauvé II*, Gonthier J rejected McLachlin CJ's structural approach.<sup>147</sup> In his view, the drafters of the *Charter* did not indicate any particular attempt to strengthen section 3 in the fashion suggested by the Chief Justice,<sup>148</sup> and her approach was without precedent. Justice Gonthier insisted that deference to the objectives of Parliament in condemning the actions of prisoners was necessary, as it was up to elected representatives to send signals regarding acceptable communal behaviour and to define the consequences.

Christopher P Manfredi has written in support of the approach taken by the dissent of Gonthier J.<sup>149</sup> He argues from a rights theory perspective

141. *Ibid* ("[p]arliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter", s 33(1)). Sections 3–6 and 15-onward are exempt from the override clause.

142. [1993] 2 SCR 438, 15 CRR (2d) [*Sauvé I*].

143. *Sauvé II*, *supra* note 135.

144. *Ibid* at para 11.

145. *Ibid* at paras 9, 13.

146. *Ibid* at para 14.

147. *Ibid* at para 89.

148. *Ibid*.

149. "The Day the Dialogue Died: A Comment on *Sauvé v. Canada*" (2007) 45:1 Osgoode Hall LJ 105 at 116–17.



that section 33's inapplicability to section 3 should lead to the conclusion that deference, not robust oversight by courts, is warranted. Section 33 presumptively allows for Parliament to respond to judicial decisions interpreting rights in the *Charter* by substituting its own judgment for that of the courts. The lack of applicability of the override to section 3 is an exception, not the rule, in his writing. Manfredi infers from the structure of the *Charter* that the possibility of Parliamentary override is the default state of affairs over constitutional adjudication, so the courts should tread lightly and show deference to Parliament when interpreting any section as not subject to section 33. While McLachlin CJC's interpretation of the relationship between section 3 and section 33 calls for more judicial oversight of political behaviour, Manfredi views the text as mandating less. This is the classic divide between structural and rights theory.

Despite their victory in *Sauvé II*, structuralists have ample reason to believe that the Supreme Court's jurisprudence on section 3 is lacking overall, and hence that Citizens' Assemblies would be a viable alternative to pursue reform of election law. Structuralists believe that the Supreme Court's doctrine on section 3 has failed to articulate a way to prevent self-dealing by elected representatives.<sup>150</sup> Although the results in *Figueroa* and *Sauvé II* were in accordance with the structural approach, neither majority framed its rationale in terms of preventing self-dealing. This was unsurprising, as the Court failed to police partisan self-dealing in the first case heard under section 3, *Reference re Provincial Electoral Boundaries*.<sup>151</sup>

In the *Boundary Reference*, the Supreme Court reviewed the provincial electoral map in Saskatchewan, which had resulted from what Mark Carter has called "as good an example of gerrymandering as Canadian history can provide".<sup>152</sup> The Supreme Court held that the map was constitutional. From a structural perspective, the decision set the section 3 jurisprudence on the wrong track. The majority's failure to address the partisan motivations and the consequences of the legislation flew in the face of overwhelming evidence that the government directly interfered with what had been an impartial and independent process.<sup>153</sup> The

150. See e.g. Pal, *supra* note 45 at 310–15.

151. *Boundary Reference*, *supra* note 137.

152. "Ambiguous Constitutional Standards and the Right to Vote" (2011) 5:2 J Parl & Pol L 309 at 320.

153. See *ibid* at 320–21; Pal, *supra* note 45 at 301.

legislation led to an unprecedented allocation of urban and rural seats in a manner designed to benefit the government.

Structuralists have reason to remain dissatisfied with section 3 jurisprudence, and therefore, to explore other institutional solutions. From a structural perspective, Citizens' Assemblies have the potential to provide impartial, independent deliberation on the law of democracy, including the rules for redistricting, campaign finance, political party funding or future consideration of electoral reform. The major concern of structural theorists with Citizens' Assemblies should be how to improve them to minimize partisan interference even further.<sup>154</sup>

Citizens' Assemblies answer many of the concerns raised by rights theorists regarding which institution should be tasked with overseeing the law of democracy. For rights scholars who believe the Supreme Court has intervened excessively and illegitimately in politics under the auspices of section 3 in decisions like *Figueroa* and *Sauvé II*, Citizens' Assemblies provide an attractive alternative to courts. Courts still have a role in reviewing an Assembly proposal adopted in a referendum for constitutionality and in monitoring the Assembly's compliance with its statutory or executive mandate. Yet Citizens' Assemblies provide a different institutional venue in which deliberation on the law of democracy and resolution of disagreement regarding election laws can take place.

Rights theorists are focused on the democratic legitimacy of the institution engaged in electoral reform. There are good reasons to think that Assemblies are democratically legitimate bodies in which to consider electoral reform. Assembly members are not elected and are therefore not directly accountable to the electorate. Yet a model similar to that employed in BC and Ontario is a democratically legitimate enterprise, even if it differs from standard representative democracy. Random selection and the one-off nature of the Assemblies mitigate concerns that Assembly members will have incentives to advance individual agendas or subvert elected representatives. The electorate possesses the final say on whatever referendum proposal is made by an Assembly, which diminishes concerns about a lack of democratic accountability. While Citizens' Assemblies carve out some of the responsibilities previously given to elected representatives, ultimate power still resides

154. I consider this issue in the Conclusion, below.

with voters. Assemblies sidestep many of the concerns regarding the democratic legitimacy of judicial review raised by rights theorists who fear overstepping the bounds of the separation of powers.

Despite the differences that exist between the two major approaches to the law of democracy, some common ground can be found in the institution of Citizens' Assemblies. Citizens' Assemblies largely address both the concern with self-dealing expressed by structural theorists and that of the proper role for judicial review focused on by rights theorists. On either perspective, Citizens' Assemblies should be seen as a legitimate option for future deliberation on the law of democracy.

## Conclusion

This article has investigated the promise and limits of the Citizens' Assembly model as a new deliberative democratic institution capable of overseeing the law of democracy. Citizens' Assemblies respond to the problem of a divergence of interests between elected representatives and voters, and to the lack of deliberation in legislatures. As I have argued, the Citizens' Assemblies in BC and Ontario were only partially successful at insulating the decision-making process from incumbent self-interest. The Citizens' Assembly model responds to the concerns of both structural theorists and rights theorists, and advocates of both approaches should be open to their use. By reducing the ability of elected representatives to manipulate the choice of electoral process for partisan ends or incumbent protection, it addresses the concerns of structural theorists. By providing a democratically legitimate institution for resolving disagreement on the fundamental rules of the electoral game without recourse to the courts, it limits the need for judicial oversight of democratic politics, which replies to rights theorists.

If Citizens' Assemblies are to be features of Canadian democracy, it is worth considering how the existing model can decrease partisan interference even further and enhance deliberation among voters. First, future Assemblies could track the Australian Citizens' Parliament and allow for open-ended consideration of democratic reform within a longer timeframe. Such an Assembly would not be bound to a narrow topic set by the government and would be able to recommend a series of changes in interrelated areas. The risk is that Assembly members would have to

dedicate more time and there is perhaps less chance of tightly-reasoned recommendations. The benefit is that governments would have less control over the deliberations of the Assembly.

Second, the selection criteria for members should ensure that an Assembly is truly representative. The requirement of an equal number of members from each electoral district resulted in Assemblies that did not reflect the actual population and may have skewed the outcome toward proposals that prioritized geographic representation. Attention should be paid to other factors beyond geography. The selection process should be designed to have as minimal an impact as possible on the deliberations of the Assembly.

Third, the referendum process should be rethought. The referenda in BC and Ontario failed to generate public deliberation or to result in electoral reform. Yet given the failure of the Dutch Assembly to achieve reform through recommendations made directly to government, and the need to gain popular legitimacy, a referendum in a revised form appears to remain the best option. Having organized "Yes" and "No" campaigns, with adequate funding to inform a public that has little pre-existing technical knowledge of electoral systems, is better than interest groups campaigning with relatively limited budgets. BC of course had organized campaigns in the second referendum, but these were not adequately funded. Funding through Elections Ontario was noticeably better in that province, but it had no set "Yes" and "No" camps. Political parties are self-interested on electoral reform, so their absence is generally preferable; however it must be acknowledged that their ability to inform and mobilize voters is lost when they are on the sidelines. Organized "Yes" and "No" campaigns may galvanize voters and provide some additional information to the electorate, which is key given the low levels of the media coverage during the BC and Ontario referenda.

Finally, thought should be given to the timing of the referendum on the recommendations of the Citizens' Assemblies. The referenda in BC and Ontario were held in conjunction with provincial elections. This ensured a reasonable turnout, but it also meant that debate on the issues at stake was drowned out by the noise of the provincial election campaign. Having a stand-alone referendum would likely result in decreased voter turnout, but could also allow for greater focus on the issues by the media and by voters. The tradeoff between the legitimacy conferred by

higher turnouts and the added attention that would go to the referendum question if disaggregated from the election should be carefully considered in setting up future Assemblies.

Citizens' Assemblies can be of tremendous benefit to Canadian democracy if we act to improve upon the model used in BC and Ontario. There are a number of contemporary problems in the law of democracy where it would be preferable for a representative body other than the legislature to have authority. The institutional strengths of the Assemblies lend themselves to considering issues in the law of democracy wherever incumbent self-interest is a serious problem and deliberation is unlikely to occur at a high-level within legislatures. Campaign finance, party funding, electoral boundary distribution and other recurring dilemmas could be the subject matter of future Assemblies.<sup>155</sup>

For example, a Citizens' Assembly could be used fruitfully for redistricting. Non-partisan, independent commissions set federal electoral boundaries in order to prevent the partisan gerrymandering that had been endemic before their introduction.<sup>156</sup> Though commissions have eliminated gerrymandering for federal electoral districts, Parliament still sets the principles under which commission-led redistricting occurs in the *Electoral Boundaries Readjustment Act*.<sup>157</sup> The *Act* seeks to balance competing districting principles, such as representation by population, community of interests (including minority representation), and geographic considerations.<sup>158</sup> The current balance struck by the *Act* results in vote dilution,<sup>159</sup> and amendments made since 1964 have decreased adherence to representation by population.<sup>160</sup>

Members of Parliament are directly interested in the particular boundaries of their own ridings. Rather than trusting elected representatives to set the principles that should govern redistricting, a Citizens' Assembly could propose amendments to the *Act*, which

could then be put to referendum. A Citizens' Assembly would foster deliberation on redistricting principles and decrease the chance of partisan interests holding sway in amendments to the *Act*.

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155. See Pal, *supra* note 45 at 317–19 (providing examples of self-dealing by Parliament).

156. See Courtney, *supra* note 129.

157. RSC 1985, c E-3, s 15.

158. *Ibid*, s 15(1).

159. See Pal & Choudhry, *supra* note 85 at 11–13.

160. These amendments include a clause that permits even greater population deviations in extraordinary circumstances and which eliminates the relative rate of population growth as a factor. Both of these move away from representation by population. See Courtney, *supra* note 129 at 107–10.

