ELECTION LAW AND DELIBERATIVE DEMOCRACY: AGAINST DEFLATION

Hoi L. Kong[*]

INTRODUCTION

In this article, I will argue that election law should incorporate ideals of deliberative democracy, but before addressing directly the relationship of deliberative democratic theory and election law, I will clarify the nature of the relationship between *deliberative democratic* and *legal* theory. I will argue that there are points of similarity between theories of deliberative democracy and a theory of the rule of law that have not (to my knowledge) been identified. Once I have specified the nature and significance of that relationship, I will turn to aspects of elections that attract the attention of the proponents and opponents of applications of deliberative democratic theory to election law and I will respond to the "deflationary account", which rejects a deliberative democratic conception of election law and favours an aggregative one.

This article will be divided into three Parts. In Part I, I will examine the relationship between a theory of deliberative democracy, on the one hand, and a theory of the rule of law, derived from Lon Fuller's writings, on the other. In Part II, I will argue that careful consideration of specific features of elections should lead to the conclusion that the law governing elections ought to admit of a certain number of departures from a stringent application of deliberative democratic theory. I will claim nonetheless that the arguments set out in Part I about the

[*]Associate Professor, Associate Dean Academic, Faculty of Law, McGill University. I acknowledge with gratitude the support of the Knowledge and Opportunity Fund from McGill University Faculty of Law and the Social Sciences and Humanities Research Council, which supported the research for this paper and funded the workshop "Electoral Law: The Virtuous or Vicious Circle of Theory and Practice" at which this article was first presented. The workshop was held at McGill's Faculty of Law on November 19, 2013. I would like to thank participants in that workshop, as well as those in workshops at the Faculties of Law of the University of Victoria, the University of British Columbia and the University of Hong Kong for helpful comments and stimulating conversations. I am grateful to Ron Levy for careful written comments and I am also grateful to Olga Redko and William Stephenson for their help with the editing of this text.

relationship between theories of deliberative democracy and the rule of law can provide (1) answers to criticisms advanced by the deflationary account and (2) arguments in favour of the incorporation of deliberative democratic principles into election law. In Part III, I will claim that the very nature of constitutional interpretation should lead one to incorporate deliberative democratic principles into the interpretation of constitutional provisions that bear on election law. I conclude the article with some thoughts about how legal scholars might engage the institutional design proposals of scholars from disciplines outside of law.

PART I: THE LAW OF DELIBERATIVE DEMOCRACY

The theory of deliberative democracy has diverse elements and strands, and any attempt to offer a complete picture of it in a space as short as this article will necessarily fail. My aim in this Part is therefore modest: I will offer a stylized version of deliberative democratic theory that, I hope, neither unduly simplifies nor exaggerates the significance of central aspects of that theory. I begin by identifying the core concern of deliberative democratic theory, as well as some articulations of its constitutive principles. The core claim has been articulated by Gutmann: "Personal freedom and political equality are valuable to the extent that they express or support individual autonomy — the willingness and ability of persons to shape their lives through rational deliberation."[1] Gutmann continues that "persuasion [is] . . . the most justifiable form of political power because it is the most consistent with respecting the autonomy of persons, their capacity for self-government."[2] The central challenge for deliberative democrats who address issues of governance and institutional design lies in identifying means of safeguarding the autonomy interests of citizens and ensuring that, when political power is exercised against citizens, it is guided by norms of persuasion and thus respects their rational agency. Joshua Cohen has developed this point in arguing that state action is legitimate when it *manifestly* results from the deliberation of citizens.[3]

---

[1]Amy Gutmann, "Democracy" in Robert E. Goodin, Philip Pettit & Thomas Pogge, eds. *A Companion to Contemporary Political Philosophy*, 2d ed (Oxford: Wiley-Blackwell, 2007) 521 at 527.

[2]*Ibid.*

[3]Cohen writes: "Because the members of a democratic association regard deliberative procedures as the source of *legitimacy*, it is important to them that the terms of their association not merely *be* the results of their deliberation but also be *manifest* to them as such" (Joshua Cohen, "Deliberation and Democratic Legitimacy" in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, Mass: Harvard University Press, 2009) 16 at 22).

For present purposes, two contrasts that Gutmann draws with other theories of democracy are significant. Unlike the populist, Gutmann argues, the democrat (and by extension the deliberative democrat), need not believe that there is a necessary and irreconcilable conflict between (1) valuing popular will in a democracy and (2) accepting institutions that temper or constrain exercises of popular will in order to safeguard the autonomy of citizens.[4] And unlike the Schumpeterian, the deliberative democrat need not accept that democracy has no substantive value and is merely a system of political competition over votes among those elites who would seek to acquire political power.[5] Rather, according to Gutmann, the value of autonomy in theories of deliberative democracy "requires a distinctive kind of democracy, a system of popular rule that encourages citizens to deliberate over political decisions."[6] Constraints on popular will are therefore justified for the deliberative democrat when they limit the capacity of majorities to constrain deliberation among citizens. Moreover, this concern for deliberation provides the normative background that enables the deliberative democrat to determine whether the conditions and outcomes of political competitions are just. We will see the significance of these two claims in Parts II and III of this article when we examine how scholarly analyses and judicial doctrines can give effect to deliberative democratic commitments in the domain of election law.

(a) Deliberative Democratic Pragmatism

Now that we have seen that a concern for citizens as reasoning agents is central to theories of deliberative democracy, we can turn to consider how deliberative democratic theorists reason about the principles that safeguard this autonomy interest and specify how these principles relate to one another. The task of identifying such principles has given rise to debates about (1) whether they are procedural or substantive in nature and (2) what the correct relationship among different principles is. The first debate can be addressed quickly and reveals a pragmatic tendency in the work of at least some theorists. David Estlund has argued that if one holds to a *proceduralist* conception of deliberative democracy, one will be committed to accepting the possibility of *outcomes* that are contrary to the underlying principles of deliberative democracy. As a consequence one will accept infringements of some sets of autonomy interests. By contrast, if one holds to a *substantive* conception of deliberative democracy, one diminishes the importance of deliberative processes and compromises the *epistemic value* of

---

[4]Gutmann, *supra* note 1 at 523.

[5]*Ibid* at 522.

[6]*Ibid* at 528.

deliberation.[7] The resolution of this apparent problem lies in a particular pragmatic conception of the relationship between procedures and substantive norms, or as the relationship is more typically labelled in the literature on pragmatism, between means and ends. According to the pragmatist, we can only identify whether procedures and their outcomes conform to substantive principles, and what the content of those principles is, by examining particular examples. Moreover, the pragmatist argues, we understand the content of principles and we can identify procedural and substantive departures from them only through a constant and iterative process of reflection and experimentation.[8]

This pragmatic exercise is evident in some authors' claims that the application of principles of deliberative democracy involves context-specific balancing. Authors have proposed a variety of principles as candidates for evaluating whether a given set of institutions or outcomes safeguards the value of autonomy that we identified above. Gutmann and Thompson for instance, identify the principles of reciprocity, publicity and accountability.[9] When these principles are applied in particular circumstances by the authors, conflicts arise, or priority is given to one principle in some circumstances, and another in other circumstances. The

---

[7]See David Estlund, "Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence" (1993) 71:7 Tex. L. Rev. 1437.

[8]For an explanation of the relationship between means and ends in pragmatic theory, generally, see Charles Sabel, "Dewey, Democracy and Democratic Experimentalism" in Brian E Butler, ed. *Democratic Experimentalism* (Amsterdam: Rodopi BV, 2012) 35. For applications of this pragmatic insight to various domains of law, including election law, see Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy*? (Princeton: Princeton University Press, 2004). Gutmann and Thompson write: "A critical claim in our defense of a deliberative democratic theory that is both procedural and substantive is that the principles are to be treated as morally and politically provisional. This provisionality gives deliberation part of its point. Both procedural and substantive principles are systematically open to revision in an ongoing process of moral and political deliberation" (*ibid.*, at 97).

[9]Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass: Belknap Press, 1996) at 12. According to the authors, "[t]he basic premise of reciprocity is that citizens owe one another justifications for the institutions, laws, and public policies that collectively bind them" (Gutmann & Thompson, *Why Deliberative Democracy*?, *supra* note 8, at 133). Further, "[t]he principle of publicity requires that reason-giving be public in order that it be mutually justifiable. The principle of accountability specifies that officials who make decisions on behalf of other people, whether or not they are electoral constituents, should be accountable to those people" (*ibid.*, at 135).

contours of the principles, their scope of application, and their relative weight are identified in the assessment of specific contexts of application.[10]

Contemporary theorists of deliberative democracy go further in this balancing exercise. They accept that under certain circumstances, modes of governance that are contrary to deliberative ideals may be necessary in order to give rise to a system of governance that on the whole safeguards the autonomy interests of citizens.[11] For instance, Jane Mansbridge and her collaborators argue that although partisan speech in House of Commons debates or elections does not comport with the principles of deliberative democracy, it may be justified in deliberative democratic terms and must ultimately support, and not undermine, a system that is itself deliberative and seeks to protect the autonomy interest of citizens.[12] It is worth noting that although policy makers may, in a given set of circumstances, engage in context-specific judgments and trade-offs among different deliberative principles, it is hard to imagine a political system that could adequately safeguard the fundamental autonomy interest of citizens as reasoning agents, yet comprehensively undermine any one of these principles. For example, it would be difficult for a system of governance to be characterized as deliberative, if a government kept the reasons for its policies and actions entirely private and beyond the scrutiny of citizens and thereby comprehensively violated the principle of publicity.

In Part II, I will argue that the deflationary view of elections does not adequately consider the potential extent of the threat to a system of deliberative governance that is posed by elections that completely eschew deliberative ends,[13] but for now, it is sufficient to restate the elements of deliberative democratic theory that are relevant to the current discussion: (1) that deliberative democracy has as its

---

[10]See e.g., Gutmann & Thompson, *Why Deliberative Democracy*? *supra* note 8 at Chapter 6. For similar, context-specific analyses of deliberative democratic principles in operation and the trade-offs involved, see John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford: Oxford University Press, 2006) at Chapter 1.

[11]Jane Mansbridge *et al.*, "A Systemic Approach to Deliberative Democracy" in John Parkinson & Jane Mansbridge, eds. *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge: Cambridge University Press, 2012) at 1.

[12]*Ibid.*, at 6-7.

[13]For this argument, see Amy Gutmann & Dennis Thompson, "The Mindsets of Political Compromise" (2010) 8:4 Perspectives on Politics 1125; Amy Gutmann & Dennis Thompson, *The Spirit of Compromise: Why Governing Demands It and Campaigning Undermines It* (Princeton: Princeton University Press, 2012) at 183-84 [Guttman & Thompson, *Compromise*].

underlying concern the autonomy interest of citizens, understood in terms of their capacity to reason; (2) that the content of the principles of deliberative democracy can be identified contextually; and (3) that the principles that give effect to the value of citizen autonomy can be balanced against one another, and that deliberative democratic norms can in specific instances be attenuated in a system that on the whole conforms to the ideals of deliberative democracy.

(b) Deliberative Democracy and Fuller's Jurisprudence

These three features of deliberative democracy resonate with the legal theory of Lon Fuller and his interpreters. Fuller has recently received extended theoretical attention, and in this article I will offer an account that aims to do justice to Fuller, as well as the broad outlines of this rediscovery of his work, and that highlights the points of similarity between the work of Fullerians and theories of deliberative democracy. I begin with a brief summary of some recent contributions to the Fullerian literature. Kristen Rundle and Colleen Murphy have argued that for Fuller, laws enacted in compliance with the rule of law create obligations (1) on the part of rulers to govern with respect for the agency of citizens and (2) on the part of citizens to respect laws evincing this kind of respect.[14] The authors further argue that such laws assume that citizens have the *capacity* to engage with the law as responsible agents.[15] In his interpretation of Fuller,

---

[14]According to Fuller, laws address themselves to citizens in ways that create a relationship of reciprocity between lawgiver and citizen. It is this relationship of reciprocity that constitutes the basis of legitimacy of a legal order, and if a lawgiver undermines this relationship, through for instance, acting like a tyrant, the resulting governance order is no longer one of law and the citizen has no obligations of fidelity towards it. See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Portland: Hart, 2012) Chapter 1 [Rundle, *Forms Liberate*]. Macdonald has argued, in a Fullerian framework, that laws offer hypotheses of interaction that citizens can construct and interpret. See e.g. Roderick A. Macdonald, "The Fridge Door Statute" (2001) 47:1 McGill L.J. 11 at 33. Jeremy Waldron calls this aspect of Fuller's conception of the rule of law "self-application" (*Dignity, Rank, and Rights* (New York: Oxford University Press, 2012) at 53).

[15]Rundle argues, "[t]o be a legal subject, Fuller insists, is not merely to be a member of a 'subservient populace ready to do what they are told to do', but rather to be a participant in a distinctly constituted social condition in which one is respected as an agent" (Kristen Rundle, "Form and Agency in Raz's Legal Positivism" (2013) 32:6 Law and Philosophy 767 at 771). According to Murphy, "[r]eciprocity plays a key role in Fuller's account of duty; according to him, the existence of duties depends partly on the behavior of others. . . . In the legal context, citizens have a duty to follow legal rules provided those rules outline a standard that citizens are knowledgeable of, capable of following, and that is

Nigel Simmonds puts the emphasis in a different place, as he both emphasizes the liberty interests of citizens, rather than the reciprocal obligations of citizens and rulers, and stresses the revisability of the concept of the rule of law. According to Simmonds, the central value of the rule of law, understood as a moral ideal, is personal liberty, which he defines as a condition in which one is not subject to the will of another.[16] Fuller's rule of law principles, argues Simmonds, seek to safeguard this liberty interest since they preserve a sphere in which citizens can act unthreatened by arbitrary interference from those who possess the authority to make and apply laws.[17] Moreover, in this account, legality as a moral ideal takes the form of an archetype: law is both a set of practices and an ideal form against which specific instances of law can be measured.[18] Whether an existing system counts as a legal order depends, in this view, on the extent to which it approximates the ideal, whose specific content is in turn revealed in the very act of assessing particular systems of law. This pragmatic relationship between particular examples and the general ideal is expressed by Simmonds when he writes: "our practices count as law insofar as they approximate to a certain ideal that they themselves suggest."[19] One implication of this conception of the rule of law has been drawn out by Rundle. According to her, the principles of the rule of law (non-retroactivity, non-contradiction, congruence, publicity etc.) are indicative but not exhaustive of this concern for the underlying moral ideal.[20] Consequently, close examination of legal systems may reveal additional principles or criteria of the rule of law.

---

actually used to judge their conduct" (Colleen Murphy, "Lon Fuller and the Moral Value of the Rule of Law" (2005) 24:3 Law and Philosophy 239 at 242).

[16]According to Simmonds, "The virtue of the rule of law consists in its embodiment of our independence of the power of others, not in its realization of mere predictability in governmental action: even when we are fully under the power of the unconstrained will of our governors, the exercise of that power may be highly predictable" (Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 90).

[17]*Ibid.*, at 101–104.

[18]*Ibid.*, at 11, 37.

[19]*Ibid.*, at 11.

[20]Rundle writes: "the message that Fuller sought to convey through his model of the internal morality of law is distorted if we regard it as a checklist of criteria that require exhaustive and inflexible application. Instead . . . the eight principles must be understood as larger than the sum of their parts, a representation of how governance through general rules works and is made possible and which includes respect for the legal subject as an agent as part of law's form" (Rundle, *Forms Liberate*, *supra* note 14, at 141).

With this summary of Fullerian scholarship in view, we are now in a position to identify two points of overlap between theories of deliberative democracy and Fuller's theory of the rule of law, and we can infer from these a third. Recall first that the core concern for theories of deliberative democracy is the rational agency of citizens and the chief normative principle is the requirement that the state address itself to citizens in ways that are respectful of that agency. As we have just seen, both this concern and this principle are shared by Fuller and his interpreters. Second, Simmonds' interpretation of Fuller echoes the pragmatic aspects of deliberative democratic theory when it emphasizes the contingency and revisability of the content of the rule of law. As do theorists of deliberative democracy, Simmonds stresses that an assessment of whether the ideal of citizen agency is protected in a particular governance regime requires a context-specific assessment. From these points of overlap we can derive a third.

We have seen above that some theorists of deliberative democracy lay much emphasis on the fact that laws must not only aim to achieve deliberative democratic ends, but must be *seen* to do so by those who are subject to legal authority.[21] One reason for this flows from the ideal of public argument, which Cohen formulates in this way: "The notion of a deliberative democracy is rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among equal citizens."[22] It follows that in a system committed to this ideal, the terms of public debate, including those which have been enshrined in law, should be easily accessible and comprehensible to citizens. We can understand Fuller's requirements that laws be public and clear in light of this requirement. These requirements do not only enable citizens to reason with the law (as Rundle and Murphy would have it), or to conduct their affairs free from the threat of arbitrary interference (as Simmonds has argued): when viewed in light of the deliberative democratic ideal of public argument, the requirements of publicity and clarity can be seen to enable citizens to contest the contents of laws and therefore engage in deliberation about their value. Such an understanding of law's deliberative potential represents an advance over conceptions advanced by deliberative democratic theorists themselves. For instance, Habermas claims that laws are legitimate when they are the *result* of deliberative processes;[23] I extend this claim by noting that the fact of publicity enables citizens to deliberate about

---

[21]Cohen, *supra* note 3, at 22.

[22]Cohen, *supra* note 3, at 21.

[23]Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, Mass: MIT Press, 1996) at 287.

laws, to contest them, and therefore, to contribute to deliberative processes that may result in the revision of existing laws and the formulation of new ones.[24] Under my interpretation of the relationship between Fuller's theory of the rule law and deliberative democracy, then, laws are not only the outputs of appropriately deliberative processes. Instead, when laws conform to the Fullerian rule of law principles, they are themselves an important means by which citizens in a democracy deliberate about state action and, potentially, influence its future iterations.

I turn now to address an overlap between Fuller's arguments about rule of law principles in a system of law, and deliberative democrats' claims that specific instances of non-compliance with the requirements of deliberative democratic theory can be justified in a system of governance that overall seeks to give effect to the theory's ends. We saw above that deliberative democrats are willing to make trade-offs among specific principles of deliberative democracy and to accept that in certain instances, regulation may not conform to deliberative democracy's core value, even though the overall system should so conform. Fuller and his interpreters make similar claims. In *The Morality of Law*, Fuller argues that in certain cases, abrogating some of the principles of the rule of law is acceptable. For instance, in order to cure an injustice, a legislature may be justified in exceptionally allowing retroactive applications of the law.[25] It does not follow, however, that laws evidencing such departures necessarily undermine a system that itself complies with the rule of law. It is only, Fuller says, when there is a "total failure" to respect one or more principles of the rule of law that we can question whether a set of rules amounts to a system of laws.[26] One point of overlap between the significance of systemic failures in Fuller's jurisprudence and similar failures in deliberative democratic theory, then, is the following: only when there is a catastrophic failure to abide by a rule of law principle (e.g., publicity) that is directly related to the deliberative democratic ideal of public reasoning, will there be a significant threat to the rule of law *and* the ideals of deliberative democracy.

---

[24]I leave to one side whether institutional measure for protecting and facilitating deliberation should be located exclusively in the state, or also in the broader public sphere. For a discussion of that debate, see Thomas Christiano, "Rational Deliberation Among Citizens and Experts" in John Parkinson & Jane Mansbridge, eds, *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge: Cambridge University Press, 2012) at 27.

[25]Lon L. Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 53-54.

[26]*Ibid.*, at 39.

Such a failure would properly be characterized as *formal* in nature, since what would threaten rule of law values in this instance is a violation of a formal or procedural norm, rather than a substantive one. In the next Part, we will see how the *substance* of a particular legal regime may threaten an entire system of deliberative governance, and in Part III, we will see how the substance of constitutional doctrine can be understood to advance the general ideals of deliberative democracy. In order to introduce this discussion, I conclude this Part by arguing how *in general* the substance of law may have a deleterious effect on both deliberative democratic and rule of law ideals. I introduce that discussion by outlining and answering one of Joseph Raz's challenges to Fuller's arguments about the moral value of the rule of law.

(c) Deliberative Democracy, the Rule of Law, and the Substance of Law

Joseph Raz has argued that the rule of law cannot be considered to have moral value because complete observance of Fuller's requirements of the rule of law is compatible with great iniquity. As an example, Raz offers a system of laws that imposed conditions of slavery but complied with the rule of law.[27] Indeed, the argument might go further: because laws allow for a high degree of policy coordination, a system of wicked law *amplifies* evil effects, in comparison to attempts to do evil through less efficient governance mechanisms, such as purely case-by-case decisions.[28]

In order to answer this challenge it is helpful to recall two claims of Fuller's interpreters: (1) that the principles of the rule of law are indicative and not exhaustive of the core value served by observance of the rule of law, and (2) that we can identify additional principles or criteria by examining specific systems that purport to be law. An analysis of a particular system of rules that took into consideration these claims would require express analysis of whether that system protected human agency, which as we have seen, Fuller understood to be the overarching objective of the rule of law. Under such an analysis, a system of rules that observed Fuller's principles but created a system of slavery would fail to respect this objective and could not be considered to be a system of law be-

---

[27]Joseph Raz, "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 210 at 220-21. Raz writes: "The law can violate people's dignity in many ways. Observing the rule of law by no means guarantees that such violations do not occur. . . . The law may, for example, institute slavery without violating the rule of law" (*ibid.*, at 221).

[28]This extension of the argument may be understood to follow from Raz's claim that the virtue of the rule of law is "efficiency" (*ibid.*, at 226).

cause in its reduction of those subject to its authority to the status of property, it would manifest a flagrant and total disregard for the agency interests of those individuals.[29] The substantive content of the system of rules would therefore violate the rule of law, even if none of Fuller's formal principles were transgressed.[30] Moreover, such a system would not permit the objects of its commands to contest its terms and would therefore fail to respond to the deliberative democratic demands that we have seen the rule of law places on a system of governance.

In the above, we saw that state action which violated the rule of law principle of publicity would at the same time infringe the cognate deliberative democratic principle. We suggested that such a violation could be characterized as formal. Here we see a different kind of overlap. The slavery example shows that the underlying interest protected by deliberative democratic theory and the rule of law — the rational agency of citizens — can be infringed by the *substance* of laws. It is important to note that the harm done by the substance of a given law is particularly objectionable when it does damage to a *system's* ability to safeguard the autonomy interest of citizens. This kind of damage arises when the effects of such a law are widespread and undermine the faith of citizens in a system of democratic governance. In the next Part we will assess how such a systemic threat might come into being, and we will explore in detail an important implication that flows from this substantive overlap between Fuller's view of the rule of law and deliberative democratic theory. For now, I shall only show

---

[29]This is how Rundle interprets Fuller's "conception of the person implicit in the internal morality of law" (Rundle, *Forms Liberate supra* note 14, at 113). According to Rundle, Fuller claims that when a person is reduced to being an object of property, "what was formerly a person in possession of a capacity to direct her agency towards the lawgiver's regime of general rules is now an object merely to be acted upon" (*ibid.*, at 114). A regime of slavery, therefore, would violate the concern for human agency that underlies Fuller's conception of the rule of law, and as a consequence, Rundle argues, Fuller would be committed to supporting "a claim about respect for the internal morality of law being incompatible with certain ways of pursuing iniquity, as well as the kinds of iniquity so pursued" (*ibid.*, at 113).

[30]Simmonds has offered an alternative argument that addresses the possibility that a regime could comply with Fuller's formal rule of law requirements, yet pursue evil ends that would undermine the moral purposes of those requirements. According to Simmonds: "a government's compliance with the requirements of the rule of law is not best explained by considerations of instrumental efficacy. Rather, it must be explained by reference to a concern to maintain an intrinsically valuable form of moral association that is embodied in the rule of law, or by a desire hypocritically to assume the appearance of such a concern" (Simmonds, *supra* note 16, at 66.

that the implication can be drawn from some theorists' treatment of the relative priority of aggregative and deliberative values in democratic polities.

Theorists of deliberative democracy sometimes charge rivals who view the goal of politics to be the aggregation of citizen preferences with failing to account for the essentially deliberative nature of political life. Jon Elster has argued that such aggregative accounts confuse the logic of the market with that of the public forum. In the marketplace, the only question to be answered is: how are individual preferences to be satisfied? But political life is driven by an entirely different set of questions.[31] There, citizens are properly concerned not only with their own wants, but with questions of justice and it is not enough for those who govern simply to aggregate private preferences. Rather, in political life, properly understood, citizens and their representatives deliberate together about what the public good is and about what it requires of the state and of citizens.[32] In this deliberative democratic argument against aggregative theories of democracy, the rational agency of citizens is given priority over other interests, and in particular, the interests of citizens in preference satisfaction.

A similar argument can be made about the relative priority of values as they are expressed in the substance of law. If the citizen interest in rational agency that a democracy, properly understood, aims to safeguard is identical to that which a system of law aims to protect, it has a significance that is presumptively greater than other kinds of interests.[33] Included among such lesser interests would be those relating to the market values of competition and efficiency.[34] We will see below how this presumption manifests itself in an analysis of a specific legal regime.

These observations suggest a final point about the significance of ideals of deliberative democracy to constitutional questions. We have seen that some theorists argue that in order for state action to be legitimate, it must be justified in terms

---

[31]Jon Elster, "The Market and the Forum: Three Varieties of Political Theory" in James Bohman & William Rehg, eds. *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass: MIT Press, 1997) 3 at 10-11. This paragraph draws from Hoi Kong, "Towards a Civic Republican Theory of Canadian Constitutional Law" (2011) 15:2 Rev. of Const. Stud. 249 at 278.

[32]*Ibid.*, at 24-25.

[33]For an examination of the different kinds of values that a system of law may aim to advance, and the significance of the relative weight given to these values, see Liam Murphy, "Better to See Law This Way" (2008) 83:4 N.Y.U.L. Rev. 1088; Dan Priel, "Reconstructing Fuller's Arguments Against Legal Positivism" (2013) 26:2 Can. J.L. & Jur. 399.

[34]For a criticism of the importation of such values into analyses of state action, see Elster, *supra* note 31, at 25-26.

of public reason — terms that a citizen could reasonably be expected to accept.[35] For some theorists, a constitution is the authoritative source of public reason[36] and courts engaged in judicial review are in the best institutional position to ensure that state action is justified according to its terms.[37] This is the import of Rawls' claim that "in a constitutional regime . . . public reason is the reason of its supreme court."[38] By contrast, claims or arguments that appeal only to the self-interest or preferences of individuals or groups in a society cannot provide the public quality of reasoning that is demanded by a deliberative democratic constitutional order. In Canadian constitutional law, this distinctive feature of public reason is evident in the textual and judicially developed requirement that state action be reasonable when it infringes citizens' exercise of rights.

According to s. 1 of the *Charter of Rights and Freedoms* limits on rights must be reasonably and demonstrably justified. The Supreme Court of Canada has held that two categories of reasons should not be considered to be reasonable and demonstrably justified: (1) reasons that express an intention to violate the rights in question[39] and (2) routine budgetary concerns.[40] The rationale for the first category of rights seems self-evident: a citizen whose rights have been infringed would not reasonably accept as a justification that the state's very purpose was to engage in that violation. The rationale underlying the second category is less obvious. According to the Court, if appeal to ordinary budgetary concerns were sufficient to justify infringements of rights, then such justifications would become routine.[41] Yet appeal to frequency in itself does not seem sufficient to

---

[35]See Gutmann and Thompson's articulation of the principle of reciprocity, in *Why Deliberative Democracy*? S*upra* note 8, at 37-38.

[36]According to Rawls' concept of liberal legitimacy, "our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational" (John Rawls, "The Idea of Public Reason" in Bohman & Rehg, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass.: MIT Press, 1997) 93 at 96.

[37]Rawls writes that the judiciary is "the only branch of government that is visibly on its face the creature of that reason [public reason] and of that reason alone" (*ibid.*, at 111).

[38]*Ibid.*, at 108.

[39]See e.g. *Vriend v. Alberta* (1998), 156 D.L.R. (4th) 385, [1998] 1 S.C.R. 493.

[40]*Newfoundland (Treasury Board) v. NAPE* (2004), 244 D.L.R. (4th) 294, [2004] 3 S.C.R. 381.

[41]*Ibid.*, at para. 72. According to the Court, "courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary

claim that these concerns are not reasonable or demonstrably justified.[42] In Part III, I will revisit this question and argue that at least in cases where a constitutional freedom of citizens to engage in democratic deliberation is at issue, only reasons that are comparable in normative weight to this freedom would qualify as justificatory and public. The Court's s. 1 jurisprudence will aid us in that exercise and the specific domain of constitutional analysis will be the freedom of expression jurisprudence relating to elections. It is to an overview of the debates about the relevance of deliberative democracy to election law that I now turn.

PART II: DELIBERATIVE DEMOCRACY AND THE LAW OF ELECTIONS

Elections attract the attention of theorists of deliberative democracy at least in part because much of the public rhetoric about elections is framed in terms that resonate with the principles of deliberative democracy. Jim Gardner, for instance, points out that since the Progressive Era in the United States, commentators have routinely lamented the absence of meaningful deliberation in campaigns[43] and the rhetoric of courts in the United States similarly expresses deliberative ideals.[44] Theorists have, in addition, identified specific deliberative democratic principles that should govern elections. Gutmann and Thompson, for instance, have argued that the principle of publicity obliges candidates to offer reasons for the positions they take in order to clarify them and to enable opponents to engage with those reasons.[45] The latter objective of providing opponents with the means to engage one's arguments is consistent with the principle

---

constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities" (*ibid.*).

[42]It is at least possible to imagine that a government could regularly appeal to some governmental interest that is nonetheless weighty. Imagine, for instance, that sexism was pervasive in Canadian society and it was necessary for legislation to routinely infringe some rights in order to combat that problem. In that case, routine government appeal to combatting sexism would not be a sufficient reason for ruling out such justifications, since preventing sexism would be a manifestly important governmental objective.

[43]James A. Gardner, "Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns" (2007) 54:5 Buff. L. Rev. 1413 at 1420–22 [Gardner, "Deliberation or Tabulation"].

[44]*Ibid.*, at 1426, citing *Buckley v. Valeo*, 424 US 1 (1976) ("[t]he primary goal of all candidates is to carry on a successful campaign by communicating to voters persuasive reasons for electing them" at 101).

[45]Gutmann & Thompson, *Democracy and Disagreement*, *supra* note 9, at 100-01.

of reciprocity.[46] Finally, the principle of accountability requires candidates to give reasons that are acceptable to those subject to or disadvantaged by the policies proposed.[47]

(a) Against Deliberation in Election Law

The argument in favour of applying deliberative democratic principles to the laws governing elections would seem to be relatively straightforward. Yet this position has been subject to vigorous challenge. For example, Gardner argues that there are several reasons why application of the norms of deliberative democracy to elections is incompatible with the conditions under which elections are held. He notes that voters are subject to a variety of biases and as a result, their beliefs are resistant to attempts at persuasion during the short intense period of a political campaign. Voters labor under a selection bias, according to which they select information that is consistent with their existing beliefs and they ignore information that challenges those beliefs. They systematically misinterpret information to render it consistent with what they already believe. And they select information from their immediate social environments, which tend to reflect their existing beliefs.[48] It is important to note that although Gardner argues that attempts to make campaigns deliberative are futile, he does not suggest that we should abandon the project of democratic deliberation in society more broadly.[49] According to Gardner, since the goal of campaigns is to aggregate existing preferences, we should not be concerned about majorities dominating electoral processes. Instead, we should direct our attention to whether political competition *outside of* election periods represents a fair marketplace in which different viewpoints can contend with one another.[50]

Dennis Thompson offers similar arguments and characterizes his views as deflationary, since they reflect a view of elections that is less elevated (or inflated) than the one held by deliberative democratic theorists. His arguments go further in some respects than Gardner's. He does not only claim that attempts to make elections deliberative are futile; he argues that any such attempts would under-

---

[46]*Ibid.*, at 79.

[47]*Ibid.*, at 129.

[48]Gardner, "Deliberation or Tabulation", *supra* note 43, at 1473-74.

[49]*Ibid.*, at 1480–1482.

[50]*Ibid.*

mine the core purposes of campaigns. It is worth quoting him at length on this point:

> Campaigns function best as strategic interactions with zero-sum outcomes, not as deliberative exchanges with joint gains. . . . If candidates were to seek agreement with their opponents, as the deliberative requirement of reciprocity suggests, they would serve less well not only their own cause but also the democratic value of the campaign. They would deprive voters of a clear and distinct choice — subverting a basic purpose of campaigns in a democracy.[51]

In order to illustrate his point, Thompson offers the example of Laurie Bower who in 1996 fought an election campaign for the state senate in Colorado. Days before the election, Bower announced that she had concluded that her opponent would best represent the district and she withdrew her candidacy, in the spirit of non-partisanship. This example, Thompson claims, illustrates the absurdity of adopting a deliberative approach to electoral campaigns. If candidates are open to altering their views in light of the better reasons of their opponents, rather than sticking to their partisan views, Thompson argues, they deprive the voting public of a choice.[52] In addition, Thompson claims that if voters are given to expect that elections are deliberative exercises, they will become cynical, since campaigns are not deliberative exercises and candidates have no incentives to engage in meaningful deliberation, because doing so will weaken their competitive edge.[53] Yet, it is important to note that Thompson does not extend his rejection of the project of deliberative democratic governance outside of elections. Like Gardner, he claims that deliberative exercises that can change minds require sustained commitment outside of elections, and he proposes that one potentially worthwhile object of such deliberation is the structure of election law itself.[54]

(b) For Deliberation in Election Law

A response to these challenges to a deliberative democratic view of election law might begin by conceding some ground. If election laws govern an area of activity that, for reasons relating to facts about voters, is aggregative in nature, then under the systemic conception of deliberative democracy that we have canvassed above, we might accept that the law governing elections should depart

---

[51]Dennis F. Thompson, "Deliberate About, Not In, Elections" (2013) 12:4 Election L.J. 372, at 374 [Thompson, "About, Not In"].

[52]*Ibid.*, at 374–76.

[53]*Ibid.*, at 376-77.

[54]*Ibid.*, 381.

from a general systemic commitment to deliberative democratic ideals. Yet in light of our discussion in Part I, we should be careful about how we frame such an argument. First, we should be careful to ensure that any departures in law from the principles of deliberative democracy do not undermine the capacity of a system of governance to safeguard the ideal of citizen autonomy. Second, because the ideal of respect for citizens as reasoning agents is a defining characteristic of the rule of law and constitutions, we should prioritize that ideal when engaged in analyses of particular legal and constitutional regimes. One consequence of such a prioritization would be that when there is a direct conflict between that ideal and other interests that may be at issue in a given legal or constitutional debate, it should trump. A second consequence relates to the perspective that scholars should adopt when analyzing legal and constitutional issues under conditions of factual and normative uncertainty. When characterizing contested facts, the relative weight that scholars give to values that frame their analyses may significantly influence their conclusions, and so it is important that they be cognizant of that influence and reflective about the rationales for adopting a particular weighting.

Scholars writing in the "decision rules" literature, have made a similar point about the importance of structuring judicial analyses, under conditions of uncertainty, when they distinguish the processes of interpretation and implementation in courts' construction of constitutional doctrine. Mitchell Berman, for instance, examines judicial doctrine in respect of the Fourteenth Amendment of the U.S. Constitution in light of this distinction. He writes: "Suppose the federal judiciary interprets the provision to mean that government may not classify individuals in ways not reasonably designed to promote a legitimate state interest."[55] This interpretation, which might draw on materials such as "text, history, precedent, structure, moral judgment, and the like,"[56] would not end the analysis. A court would still need some decision-making rule for determining when a government has classified individuals in this objectionable way, "when, as will always be the case, the court lacks unmediated access to the true fact of the matter."[57] This procedure is what Berman calls a "decision rule" and it can take many forms. For instance, a court may introduce a "preponderance of the evidence standard of review."[58] In deciding which decision rule to select, a court would consider

---

[55]Mitchell N Berman, "Constitutional Decision Rules" (2004) 90:1 Va L Rev 1 at 9.

[56]*Ibid.*

[57]*Ibid*., at 10.

[58]*Ibid*.

the relevant constitutional values, as well as considerations of institutional competence.[59]

For the purposes of this article, I argue by analogy that when scholars characterize a contested set of facts or principles they will sometimes need to adopt some rule or presumption about which of several potentially applicable values or theoretical perspectives should be given primary importance for the purpose of the characterization. We have seen above that the ideal of respect for citizens as reasoning agents is a defining characteristic of the rule of law and constitutions, and should be given primary importance in legal and constitutional analyses. By contrast, the interest of citizens in satisfying preferences is of lesser importance to legal and constitutional analysis, as are the aggregative theories that prioritize this interest. One consequence of the relative weighing is that when scholars have a choice between giving primacy to deliberative and aggregative values when selecting the appropriate perspective to adopt when framing a set of facts or principles, they should presumptively favour a deliberative perspective. I turn now to a discussion of the pertinence of this presumption in a debate about the nature and purposes of election law.

(c) A Deliberative Perspective

Many of the criticisms of deliberative democratic conceptions of election law rest on empirical claims that have been contested. For example, Gardner's claims about voter dispositions and tendencies would seem to apply primarily to voters who have fixed views. But scholars have noted that elections are often decided by voters who do not hold such views, and campaigns devote considerable attention to them.[60] Other scholars argue that voters' views often come in packages that "do not perfectly map onto ideological or partisan labels."[61] Thompson's empirical claims are also contestable and contingent. When he argues that voters will become cynical about the possibilities of deliberation in political society if they are led to believe that elections are deliberative exercises, he seems to assume that existing practices and the already prevalent view

---

[59]*Ibid*., at 22-23.

[60]See e.g. Keena Lipsitz, "Democratic Theory and Political Campaigns" (2004) 12:2 Journal of Political Philosophy 163 at 175-76.

[61]Graeme Orr, "Deliberation and Electoral Law" (2013) 12:4 Election LJ 421 at 425. Orr further writes: "Even if 80% of electors were party loyalists, any close election contest depends on the campaign's effect on the deliberation of the remaining 20% whose positions are more malleable. . . . An election can thus be a site for political deliberation, where even staunch partisans are open to deliberation on some issues, even if the election outcome is a foregone conclusion" (*ibid*).

that elections are failed deliberative exercises have not already given rise to such cynicism. One can at least imagine that a complete abandonment of the commonly and persistently held view that elections *should be* deliberative exercises would exacerbate this cynicism more than any attempt to make elections deliberative. There is, in short, uncertainty about the accuracy and import of the empirical claims that the critics of deliberative democratic election law advance. This level of uncertainty is not unusual in debates about legal reform. Legal proposals are often advanced under conditions of doubt, but they should respond appropriately to these conditions and not purport to rest on firm empirical foundations when none exist. In the present case, we will need to select a presumption that favours one of the contending theoretical perspectives, and we have seen above that there are good reasons for a presumption in favour of the deliberative democratic view of election law. In what follows, I will aim to demonstrate what such a presumption entails in a specific set of circumstances.

It is helpful to first expressly formulate the reasoning behind arguments in favour of an aggregative approach to election law. Gardner seems to suggest that attempting to shape election law in light of deliberative democratic concerns would be a futile exercise, because elections are inherently aggregative in nature. However, if deliberative democratic innovations were introduced to *supplement* the aggregative features of election law, it is difficult to see where the harm would lie. At worst, such supplements would be irrelevant to the processes or outcomes of elections.

Moreover, some deliberative democratic innovations that are consistent with an aggregative view of elections would potentially *strengthen* the aggregative function of elections. For example, if election law were to increase the quality of information that voters had about candidates, this would both enable voters to express better (because more informed) preferences, *and* provide voters with more accurate data about which they could deliberate. In instances where deliberative democratic reforms were introduced that attempted to challenge voters to reflect upon their preferences, some additional good may result, if the studies described above about the significance of the unfixed preferences of many voters and the non-ideological elements of voters' sets of preferences are accurate.

The above rendering of Gardner's position does not assume that there is a necessary incompatibility between deliberative democratic ideals and the aggregative function of elections. A stronger reading of Gardner's aggregative critique might state that the introduction of deliberative democratic reforms will frustrate the achievement of aggregative ends if they *replaced* essential elements of an aggregative regime or were *necessarily incompatible* with them. It is important to note that, as Gardner himself claims, deliberative democrats do not deny that elections have an aggregative function nor do they intend to supplant that function. For instance, deliberative democrats would not argue that it follows from

the simple fact that votes sometimes reflect unconsidered preferences that these votes should be disallowed.[62] Theorists of deliberative democracy argue rather, that the aggregative functions of elections can serve deliberative ends and they offer prescriptions for making elections more deliberative.[63] How, then, should we assess claims that specific facts or deliberative democratic principles would be incompatible with the aggregative functions of elections? We saw above that such an analysis would presume the relevance of deliberative democratic norms that are identical to those which are internal to law's own morality.

An analysis that adopted such a presumptive weighting in favour of deliberative democratic values and against values of aggregation that reflect the aims of the market-place, applies to two specific aspects of the aggregative critics' analysis: (1) their assessment of the *consequences* of adopting a deliberative democratic approach to election law, and (2) their *characterizations* of facts and deliberative democratic principles. Recall that Thompson argues that the case of a Colorado Democratic candidate withdrawing her candidacy for reasons that were putatively deliberative democratic in nature undermined election law's essential function of providing voters with meaningful choice. I will shortly address the question of whether Thompson's characterization of the facts was convincing; for now, I address what I take to be his claim that this result presents a strong reason against adopting a deliberative democratic conception of election law. For this claim to be convincing, one would need to have an idea about the likelihood of such an outcome and its importance relative to harms inflicted by an aggregative view of elections. More precisely, one would need to show that this kind of consequence would be more likely under an election law regime that better reflected deliberative democratic assumptions than the one at issue in the Colorado example. That is doubtful, since there are many electoral regimes that are closer in spirit to the ideals of deliberative democracy than the regime that is operative in the United States,[64] yet we do not see outbreaks of candidates abandoning elections in favour of the opponents in those jurisdictions.

Even if the likelihood of such an outcome were significant, we would need to weigh its gravity against the potential harms resulting from an exclusively ag-

---

[62]See James A Gardner, *What Are Campaigns For? The Role of Persuasion in Electoral Law and Politics* (New York: Oxford University Press, 2009) ch 4.

[63]For a survey of such reforms, see Gutmann & Thompson, *Compromise*, *supra* note 13 ch 5. The authors write: "While governing does not preclude campaigning, it does require some room to operate. . . . We should try to find some reforms that could protect the capacity to govern, making democracy safer for governing, without completely supressing the impulse to campaign while in office" (*ibid* at 167-68).

[64]For a survey, see Orr, *supra* note 62.

gregative approach to election law. Recall that Thompson, like Gardner, does not abandon deliberative democratic ideals in governance contexts outside of elections. Indeed, Thompson with Gutmann wrote one of the seminal works applying these ideals to a wide range of governance contexts[65] and Thompson and Gutmann have also pointed to the dangers of the "permanent campaign."[66] The danger to deliberative democratic governance is systemic: if the aggregative ethos of campaigning incentivizes legislators and executives to govern in order to mobilize the preferences of their supporters, rather than in ways that are justifiable to those who are subject to regulation, then the capacity of governments to function in a deliberative way would be undermined. Such a harm would properly be characterized as undermining the very system of democratic governance.

I should be clear that I am not claiming that there is clear empirical support for the existence of such harms, but I do not need there to be such support in order to advance my argument for a presumption in favour of a deliberative democratic conception of election law. I need only note that the risks to the aggregative functions of elections posed by deliberative democratic reforms do not enjoy any more empirical support, and may indeed enjoy less support. Given this and the gravity of the systemic harms that attend the introduction of a permanent campaign into governance systems, I believe that there is a strong case for presuming that governments should introduce deliberative elements into election law. Such reforms may reduce the likelihood of the permanent campaign's arising or temper any harms that would result from its arising. It follows from this analysis that, at the very least, governments should not aggressively introduce aggregative elements into election law, without considering the potential attendant harms to a system of governance that protects interest that are fundamental and common to deliberative democratic theory and the rule of law.

I conclude this section by discussing how adopting a perspective that is properly informed by deliberative democratic ideals would affect how scholars characterize the facts and principles at issue in debates about election law. Consider first the question of facts. Recall that according to Thompson, the case of the Colorado candidate who withdrew her candidacy in favour of her opponent was an example of a deliberative democratic view of elections in action. This characterization is damaging, because if accurate, it would imply that adherence to a deliberative democratic conception of election law leads to an absurd result. But the fact that the example would lead to this result should cause one to pause, if one were committed to an interpretive posture that presumed the relevance of

---

[65]See Gutmann & Thompson, *Democracy and Disagreement*, *supra* note 9.

[66]For a list of the causes of the permanent campaign and its negative effects, see Gutmann & Thompson, *Compromise*, *supra* note 13 at 165-66.

deliberative democratic ideals to questions of democratic governance generally, and elections more specifically. An interpretation that read these in light of such a presumption would, in the first instance note that (as we have seen) contemporary versions of deliberative democratic theory (1) do not require that all institutions maximize their deliberative democratic potential and (2) accept that some relaxing of the demands of the theory in specific circumstances may be necessary in order to advance the overall deliberative democratic potential of a system. Therefore, even if the Colorado case were an example of maximizing a deliberative democratic principle (in this case, a corollary of the principle of reciprocity, namely, provisionality, according to which participants engaged in a deliberative exercise should be willing to change their views),[67] it would not follow that doing so would advance the overall deliberative qualities of the system. Indeed, insofar as maximizing in this context would frustrate this systemic end, it would not be advised.

A deliberative perspective properly informed by contemporary writing would choose a starting point different from the one Thompson selected. It would note that a key deliberative function of elections is to provide voters with a range of views in order to ensure that they come into contact with views different from their own.[68] In the deliberative view, such exposure is designed to dislodge some of the biases that Gardner identifies, and to promote reflection and deliberation. The responsibility of political parties, in this view, is to formulate platforms that are distinctive, are defensible against opposing viewpoints, and are in fact to be so defended.[69] Over the course of an election campaign, parties may adjust their positions in light of the criticisms they receive, but in order for them to fulfill their deliberative function in an election, they cannot concede central points of their platforms and they cannot renounce their role in the competitive process. Therefore, a generous rendering would lead to the conclusion that the conduct of the candidate in the Colorado case *frustrated* the achievement of deliberative democratic ends. It is worth noting that I do not claim that this is the *only* characterization of the facts available, but I do insist that it represents the kind of generous interpretation that one would offer if one presumed (for the reasons set out above) that a deliberative democratic view of elections is appropriate.

This presumption would also affect how one would interpret specific principles of deliberative democracy, as they apply to a given set of facts. Gardner has

---

[67]Thompson, "About, Not In", *supra* note 51 at 375.

[68]Orr, *supra* note 62 at 424.

[69]Joshua Cohen & Joel Rogers, *On Democracy* (New York: Penguin, 1983) at 154–57.

argued that consensus is an indispensable element of deliberative democratic theory.[70] Consensus is moreover, an expressly articulated goal of some authors' versions of deliberative democratic theory.[71] But, once again, if we adopt the systemic view of deliberative democracy described above, we might ascribe less significance to consensus in the particular case of elections because of the function that contrasts play in promoting deliberative reflection amongst citizens. Such an interpretive move would not be unusual, as theorists have offered relaxed versions of other elements of deliberative democratic theory. For example, an exigent requirement of reason-giving would set limits on the contents of reasons offered by candidates in an election campaign that would seem to be unworkable. A more relaxed version, which would only require that *some* reasons be offered in support of positions would be more appropriate to that context. Such a view has been articulated by Fishkin, among others,[72] and is consistent with an approach that presumed that deliberative democratic ideals were pertinent to elections. By contrast, insistence on a more stringent view of the requirement of consensus or the nature of reason-giving would be either contrary to the logic of elections or unworkable. Adopting such views would reflect an attempt to disprove the relevance of deliberative democratic theory to elections. It would not flow from an analysis that presumed this relevance or that emphasized the role that elections play in a system of legitimate democratic governance.

(d) Conclusions: Pragmatism and Election Law

I close this Part on a general methodological point. In Part I, I argued for a pragmatic approach to interpreting the principles of deliberative democracy and the rule of law. According to such an approach, one comes to understand the content of these principles and how they should apply (or not) to specific circumstances by engaging in close analyses of institutional contexts. I have attempted in this Part to provide an example of this mode of pragmatic reasoning and to work out the implications of adopting a default interpretive stance in favour of a deliberative democratic theory of election law. This position flows, I have claimed, from the structural similarities between principles of deliberative democracy and the rule of law. In the next Part, I will work through a remaining claim about the significance of deliberative democracy to election law: that a

---

[70]James A Gardner, "The Incompatible Treatment of Majorities in Election Law and Deliberative Democracy" (2013) 12:4 Election LJ 468 at 472.

[71]See e.g. Joshua Cohen, "Deliberation and Democratic Legitimacy" in James Bohman & William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass: MIT Press, 1997) 67 at 75.

[72]See the summary in Lipsitz, *supra* note 61 at 174.

constitution's status as a foundational source of public reasons has particular implications for how one should interpret constitutional provisions that bear on the law governing elections.

PART III: THE DELIBERATIVE DEMOCRATIC CONSTITUTIONAL LAW OF ELECTIONS

Before I address a specific example of constitutional law doctrine respecting elections law in Canada, I will address a threshold question about the deliberative democratic value of judicial review. It is important to note that scholars writing in the deliberative democratic tradition have raised general objections to judicial review.[73] These objections are part of a complex debate that I cannot address here. However, it is perhaps helpful to situate them in the spectrum of kinds of democratic theory that I referred to in Part I. The deliberative position against judicial review reflects elements of a populist theory of democracy, according to which institutions that check expressions of popular will are illegitimate. Although populism can take a merely aggregative form, deliberative versions are also possible. A deliberative populist would argue that filtering the considered views of the people through deliberation and debate in reliable institutions such as parliaments, best respects the reason-giving capacity of citizens.[74] By contrast, these authors argue that judicial review shortcuts popular deliberation and debate, and in so doing denigrates and degrades this capacity. In this article, I bracket this debate and instead take constitutional orders with written constitutions that authorize judicial review as given. My task is not to contest the legitimacy of judicial review but rather to offer deliberative democratic arguments that would justify exercises of such review, in the context of election law. I will examine a Canadian case, *Harper v. Canada (Attorney General)*,[75] which applies s. 2(b) of the *Charter* to legislation that limited the capacity of third parties to engage in political speech during election periods. In what follows, I will not contest the democratic legitimacy of constitutional rights provisions or their interpretation by courts. I will instead assess how courts can engage in interpretation that is legitimate, from the standpoint of deliberative democratic theory.

Two features of the judicial decision under consideration are worth noting at the outset. First, the majority and the dissenting justices of the Supreme Court use

---

[73]See e.g. Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, UK: Cambridge University Press, 2007).

[74]See e.g. Jeremy Waldron, *The Dignity of Legislation* (Cambridge, UK: Cambridge University Press, 1999).

[75](2004), 239 D.L.R. (4th) 193, [2004] 1 S.C.R. 827 [*Harper*].

language that is consistent with a deliberative democratic conception of election law. They reason that the constitutional regime governing election law in Canada reflects an egalitarian model that creates a level playing field and enables voters to be better informed.[76] Moreover, they note that the regime aims to ensure that citizens are confident that they can participate in elections in a meaningful way. In their focus on the deliberative capacities of citizens during elections, these statements amount to an express rejection of an aggregative view that sees elections as merely tabulative in nature. Second, the justices' treatment of the specific issues before them is controversial within the literature on deliberative democracy and election law. For example, the justices might be challenged when they reason that limits on third party spending are justified because they facilitate deliberative processes in elections. A critic of the justices might argue that these limits have the effect of entrenching views that have sufficient aggregated support for mainstream political parties to accept them.[77] These two features of the Court's reasoning in *Harper* give rise to questions relating to (1) the appropriateness of a deliberative, as compared to an aggregative, view of the constitutional law relating to elections and (2) how courts should interpret the relevant provisions of the Canadian Constitution in light of the debate in the literature about the impacts of third party spending.

(a) Against Aggregation in Constitutional Law

Consider first the question of the appropriateness of a deliberative interpretation of constitutional provisions as they bear on election law. A critic may argue that the Court, by evincing a deliberative interpretation and rejecting the aggregative

---

[76]This is most evident in the majority reasons in *Harper*. Writing for the majority, Bastarache J. states: "Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters. Advertising expense limits may restrict free expression to ensure that participants are able to meaningfully participate in the electoral process. For candidates, political parties and third parties, meaningful participation means the ability to inform voters of their positions. For voters, meaningful participation means the ability to hear and weigh many points of view" (*ibid.*, at para. 87). This position is echoed in the dissenting reasons when they cite to *Libman v. Quebec (A.G.)* (1997), 151 D.L.R. (4th) 385, [1997] 3 S.C.R. 569 (articulating the egalitarian model) and make specific reference to the role of spending limits in permitting "citizens to conduct effective and persuasive communication with their fellow citizens" during election periods (*Harper*, *supra* note 76, at para. 39)

[77]See e.g. Lipsitz, *supra* note 61, at 181. For the various means by which entrenching through constitutional law dominant party advantages reflects an aggregative conception of election law, see Gardner "Deliberation or Tabulation", *supra* note 43.

model, has misunderstood the very nature of elections. In order to assess such a criticism, it is important to understand the structure of the Court's reasoning. The majority and the dissent accepted that limits on third party spending amount to infringements of the right of third parties to express themselves. The only constitutional question was whether such limits could be reasonably and demonstrably justified in a free and democratic society. In order to address that question it is helpful to recall that according to the deliberative view, a written constitution is an expression of the public reason of its polity.[78] Courts in this view are to act as exemplars of public reason by giving "due and continuing effect to pubic reason" and are to justify their interpretations "in terms of the public conception of justice or a reasonable variant thereof."[79] By contrast, Rawls writes:

> Citizens and legislators may properly vote their more comprehensive views when constitutional essentials and basic justice are not at stake; they need not justify by public reason why they vote as they do or make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions.[80]

This contrast between the roles of legislatures and citizens on the one hand, and courts on the other, allows us to formulate the question before us more precisely. If citizens are not obliged to justify their votes by reference to a deliberative democratic ideal of public reason, should courts interpret constitutional provisions that bear on elections as requiring conformity with this ideal? The defender of an aggregative conception of elections might argue that a supreme court should interpret the relevant provisions in a way that reflects the non-deliberative and aggregative nature of elections. Such an interpretation would appeal to the deliberative democrat, the critic may continue, because according to this interpretation, a third party subject to spending limits could reasonably accept constitutional justifications for limits that reflect a purely aggregative conception of elections, at least in part because such justifications rest on an accurate view of elections and the role of voters in them.

In order to understand why this aggregative view of constitutional justification in the election context is implausible, we need to know a little bit more about the structure of the Court's reasoning in *Harper*. The Court reasoned that the federal limits on election spending affected a kind of speech — political speech — that reflects core interests that a constitutionally-enshrined freedom of expression

---

[78]Rawls, *supra* note 36, at 109.

[79]*Ibid.*, 111.

[80]*Ibid.*

aims to safeguard.[81] Typically, when regulation limits this kind of speech, it is given little deference.[82] In *Harper*, however, the majority reasoned that the limits in question sought to improve the expressive quality of political speech and to advance a set of core interests underlying the constitutional protection of such speech.[83] As a result, the Court accorded the government's regulatory choice greater deference than would normally be the case when governments limit political speech.[84] In this instance, the reasons for according greater deference to the impugned state action needed to be weighty enough to counterbalance the reasons for subjecting limits on political speech to close scrutiny.[85] These latter kinds of reasons reflect deliberative democratic concerns related to listeners' ability to exercise their decisional autonomy in the political sphere: they reflect a deliberative conception of election law.

At this stage in the argument it is perhaps helpful to recall that in Part I, we raised the question of why the Court has reasoned that budgetary justifications are typically not sufficient under s. 1. Although the present analysis does not address the question of why *in general* such justifications would not succeed, it does provide an explanation for why in the specific circumstances of government regulation of campaign speech, they would fail. Normal budgetary reasons, like reasons that appeal to a governmental interest in simply aggregating preferences, would not provide reasons sufficiently important to offset the normative harm done by limiting political speech, and its deliberative potential, in the balancing analysis under s. 1. By contrast, in the majority's decision, reasons that advance deliberative democratic ends could offset that normative weight.

(b) Accounting for Academic Debates About Third Party Limits

I conclude this Part by considering an argument that would urge us to take seriously academic debates about the effects of third party spending limits. As we have seen above, some authors claim that such limits have the effect of privileging only those points of view that have been taken up by mainstream political parties seeking to aggregate the preferences of large numbers of citizens. In light of this consequence of limits on third party spending, one might argue, courts should abandon the pretense that they are protecting a deliberative democratic

---

[81]For the claim that political speech is at the very core of the values protected by freedom of expression, see *Libman v. Quebec (A.G.)*, *supra* note 77.

[82]*Ibid.*

[83]See especially *Harper*, *supra* note 76, at paras 84–86.

[84]*Ibid.*, at para 88.

[85]*Ibid.*, at para 86.

conception of election law and concede that they are defending an essentially aggregative conception of elections. The proponents of such a posture would argue that it has the advantage of being intellectually honest about the tabulative architecture of electoral regimes.

The deliberative democratic response to this position flows from the analysis above. The aggregative account of third party spending limits is contested, and under circumstances of factual uncertainty, courts should adopt a presumption in favour of a deliberative democratic perspective because it coheres with an appropriate understanding of the functions of constitutions. For the reasons given above, this view is more plausible than alternatives which appeal to values that have their source in domains of activity, such as the marketplace, that are external to law, in general, and to constitutional law, in particular. Yet, even if the factual controversy were resolved in favour of the aggregative picture of third party spending limits, and courts concluded that constitutionally imposed limits advance aggregative ends, courts would not need to abandon a deliberative conception of election law. Instead, courts would accept these facts but hold to a deliberative interpretation of the relevant constitutional provisions and reject third party spending limits as inconsistent with the relevant deliberative ends. In contrast to the aggregative interpretation, this would not require courts to abandon important normative commitments that inhere in the very idea of constitutional law.

CONCLUSION

This article has argued for a deliberative democratic conception of election law and against deflationary critiques of this conception. The argument has been advanced on the typical terrain of legal scholarship. I have engaged with theorists and the positive law in order to argue for what, I hope, is a plausible view of election law in general and in Canada in particular. I have not, however, focused on hard questions of institutional design. I conclude this article by suggesting that a shift in focus toward these questions is appropriate for legal scholarship in this area. Such a shift is warranted in part by the logic of the sources upon which this article has relied. Those who have sought to reclaim Fuller have argued that he addresses questions of institutional form that his opponents have neglected. Yet Fuller himself relies primarily on stylized versions of institutions that are similar to Rawls's descriptions of legislatures and courts, which we surveyed above. If we are to adequately undertake the pragmatic approach proposed in Part I, we will need to go beyond these abstract descriptions and engage with concrete institutions in all of their complexity. In this way, we will be able to refine our theories, by testing them against experience.

Such a project is necessarily interdisciplinary in ambition and scope. This article has attempted to develop the Fullerian project in the legal academy by drawing

on the theoretical resources of deliberative democracy. For that project to make significant progress, however, we in the legal academy should explore innovations in institutional design in collaboration with colleagues in other disciplines. The work of Ackerman and Fishkin provides a model of such collaboration.[86] One can imagine projects that take seriously the design questions that Fishkin lays out including those related to random sampling, selecting sample size, examining attitudinal as well as demographic representativeness, and designing institutions in a way that avoids the distortions of small-group psychology and that creates good conditions for examining pressing political issues.[87] By engaging in projects that raise these kinds of questions we will be able to attempt design interventions that push contemporary systemic theories of deliberative democracy beyond armchair speculation and toward on-the-ground experimentation, which will allow us to verify — and not merely stipulate — our claims about how our theories work in the world.

[86]Bruce Ackerman & James S. Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004).

[87]James Fishkin, "Deliberation by the People Themselves: Entry Points for the Public Voice" (2013) 12:4 Election L.J. 490, at 496–98.