

“THIRD PARTIES” AND DEMOCRACY 2.0

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Although the Supreme Court of Canada has described freedom of political, and especially electoral, debate as the most important aspect of the protection of freedom of expression in Canada, no debate in Canadian society is so regulated as that which takes place during an electoral campaign. Parliament has set up—and the Supreme Court has embraced—an “egalitarian model” of elections, under which the amount of money participants in that debate can spend to make their views heard is strictly limited. “Third parties”—those participants in pre-electoral debate who are neither political parties nor candidates for office—are subject to especially strict expense limits. In addition to limiting the role of money in politics, this regulatory approach was intended to put political parties front and centre at election time.

This article argues that changes since the development of the “egalitarian model” have undermined the assumptions behind it and necessitate its re-examination. On the one hand, since the 1970s, political parties have been increasingly abandoning their role as essential suppliers in the marketplace of ideas to the actors of civil society, such as NGOs, unions, and social movements. On the other hand, over the last few years, the development of new communication technologies and business models associated with “Web 2.0” has allowed those who wish to take part in pre-electoral debate to do so at minimal or no cost. This separation of spending and speech means that the current framework for regulating the pre-electoral participation of third parties is no longer sufficient to maintain political parties’ privileged position in pre-electoral debate. While the current regulatory framework may still have benefits in limiting (the appearance of) corruption that can result from the excessive influence of money on the political process, any attempts to expand it to limit the online participation of third parties must be resisted.

Bien que la Cour suprême du Canada ait décrit la liberté du débat politique, et surtout électoral, comme étant l’aspect le plus important de la protection de la liberté d’expression au Canada, aucun débat dans la société canadienne n’est aussi réglementé que celui qui accompagne une campagne électorale. Le Parlement a mis en place, et la Cour suprême a entériné, un « modèle électoral égalitaire » qui limite strictement les dépenses que peuvent encourir les participants à ce débat afin de faire entendre leur point de vue. Les « tiers » — les participants au débat pré-électoral qui ne sont ni des partis politiques ni des candidats — sont assujettis à des limites particulièrement sévères. En plus de limiter le rôle de l’argent en politique, cette approche réglementaire devait placer les partis politiques sur le devant de la scène pré-électorale.

Cet article soutient que les changements survenus depuis le développement du « modèle électoral égalitaire » ont miné les présuppositions qui le sous-tendent, et en rendent nécessaire le réexamen. D’une part, depuis les années 1970, les partis politiques délaissent de plus en plus leur rôle de fournisseurs essentiels dans le marché des idées au profit des participants de la société civile, tels les ONG, les syndicats et les mouvements sociaux. D’autre part, ces dernières années, le développement de nouvelles technologies de communication et modèles d’entreprises associés au « web 2.0 » a permis à ceux qui souhaitent participer au débat pré-électoral de le faire à coût minimale ou nul. Cette séparation des dépenses et du discours fait en sorte que le cadre actuel de réglementation de la participation électorale des « tiers » ne suffit plus pour préserver la position privilégiée des partis politiques dans le débat pré-électoral. Bien que le cadre réglementaire actuel puisse encore présenter des avantages pour la réduction de la corruption réelle ou apparente, qui peut résulter de l’influence excessive de l’argent sur le processus politique, il faudrait résister à toute tentative de l’étendre en vue de limiter la participation en ligne des tiers.

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Introduction

The electoral process, parliamentary institutions, and freedom of expression operate in a curiously complex relationship in Canadian constitutional law. Well before the entrenchment of the *Canadian Charter of Rights and Freedoms*,¹ F.R. Scott was able to claim that “[s]o long as the word ‘parliament’ remains in the text of the constitution, there is a bill of rights.”² What made such a claim possible, if perhaps optimistic, were the statements of some of the judges of the Supreme Court of Canada, to the effect that the existence of a national legislature meant that freedom of speech was also a national, and not a merely provincial matter.³ In a subsequent case, Justice Abbott would insist that the constitutional and legislative provisions instituting elections for Parliament necessarily imply “the right of candidates for Parliament or for a Legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members.”⁴ According to Justice Abbott, this right could not be abrogated—either by provincial legislatures or even by Parliament itself.⁵ Yet the free discussion so essential to the existence of democracy and of parliamentary institutions is at no point so constrained as during electoral campaigns. No debate in Canadian society is so regulated as the one at the heart of our parliamentary democracy and thus of the protection of the freedom of expression.

This regulation of pre-electoral⁶ debate has taken many forms. For example, Parliament restricts the amount of money candidates and parties can spend during election campaigns.⁷ Parliament requires broadcasters to provide candidates and parties with airtime, some of it free of charge.⁸

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

² Frank R Scott, “Political Nationalism and Confederation” in Frank R Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977) 3 at 28 [footnote omitted] (the essay was originally a lecture delivered in 1942).

³ *Reference Re Alberta Statutes*, [1938] SCR 100 at 134, 2 DLR 81, Duff CJ [*Re Alberta Statutes*].

⁴ *Switzman v Elbling*, [1957] SCR 285 at 327, 7 DLR (2d) 337 [*Switzman*].

⁵ See *Switzman*, *supra* note 4 at 328.

⁶ In this article, the terms “pre-election” and “pre-electoral” refer to the campaign period immediately preceding an election.

⁷ See *Canada Elections Act*, SC 2000, c 9, s 422 [CEA].

⁸ See *ibid*, ss 335(1), 345(1).

It prohibits the dissemination of election advertising on election day.⁹ It imposes detailed conditions on the publication of the results of opinion polls¹⁰—and attempted to prohibit their publication altogether in the three days preceding an election, before the Supreme Court declared this prohibition unconstitutional.¹¹ None of these restrictions on the ways in which political parties and candidates, as well as their records and platforms, can be discussed apply outside of the immediate pre-election period.

Yet another important restriction on political debate that only applies during electoral campaigns concerns “third parties”: individuals who are not candidates for office and groups or organizations that are not political parties.¹² Parliament limited their expenses to \$150,000 during an election campaign, of which no more than \$3,000 may be spent on supporting or opposing a candidate in a single electoral district.¹³ A permanent restriction on individuals or civil society groups wishing to speak out—and wishing to spend their money on speaking out—on political issues, parties, or candidates would surely be considered draconian and incompatible with our right “to ... debate and discuss in the freest possible manner” on these matters.¹⁴ But Parliament has thought it necessary to restrict third parties’ participation in the political debate during election campaigns

⁹ See *ibid*, s 323(1). But see *ibid*, ss 323(2), 324 (exceptions for certain Internet messages, leader-attended events, and distribution of certain printed materials).

¹⁰ See *ibid*, ss 326–28.

¹¹ See *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877, 159 DLR (4th) 385. But see *CEA*, *supra* note 7, s 328 (prohibiting the transmission of new opinion poll results on election day).

¹² See *ibid*, s 349.

¹³ See *ibid*, s 350(1)–(2) (these amounts are adjusted for inflation, s 350(5)). See also Elections Canada, “Limit on Election Advertising Expenses Incurred by Third Parties”, online: Elections Canada <www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limit_tp&lang=e> (the actual amounts applicable to the last general election were \$188,250 and \$3,765 respectively). See also *Fair Elections Act*, SC 2014, c 12, s 78.1 (recently enacted amendments to the *CEA* will provide that only Canadian citizens or residents, groups led by Canadian citizens or residents, or corporations carrying on business in Canada are allowed to spend these amounts; others are limited to the sum of \$500).

¹⁴ *Switzman*, *supra* note 4 at 327. Indeed, the British Columbia Court of Appeal has twice declared unconstitutional provincial legislation imposing such limits during “pre-campaign periods” (see *British Columbia Teachers’ Federation v British Columbia (AG)*, 2011 BCCA 408, 23 BCLR (5th) 65 [BCTF] (invalidating a sixty-day limit); *Reference re Election Act (BC)*, 2012 BCCA 394, 355 DLR (4th) 289 (invalidating a limit that could extend up to 40 days)).

since the 1970s.¹⁵ In addition, the Supreme Court initially upheld the principle of third-party spending restrictions¹⁶ and, subsequently, the specific scheme enacted by Parliament in the *CEA*.¹⁷

My purpose in this article is to explore the assumptions underlying these decisions and the ways in which (more or less) recent and ongoing changes are undermining these assumptions, thus potentially destabilizing the *CEA*'s framework for regulating third-party participation in pre-electoral debate. I begin, in Part I, by reviewing the Supreme Court's two major decisions on third-party participation, *Libman* and *Harper*. In Part II, I describe in more detail the “egalitarian model of elections ... premised on the notion that individuals should have an equal opportunity to participate in the electoral process”¹⁸ without regard to wealth, which the *CEA* and these decisions embrace. In Part III, I explore the assumptions that the *CEA* and the Supreme Court make about the nature of the political process and the central role that political parties play in it. Then, in Part IV, I describe the changes that have occurred in politics since the framework for regulating third-party participation embodied in the *CEA* was first conceived. I illustrate the effects of these changes by using the 2011 federal election as an example and show that the assumptions behind the *CEA*'s framework are no longer valid. This challenges the privileged position of political parties in pre-electoral debate. In Part V, I focus on another, more recent change that I describe as the separation of spending and speech: the emergence of new technologies and business models, in particular those associated with “Web 2.0”—social networks, blogs, video sharing services, and the like—which make it possible for third parties to communicate with large numbers of voters without spending much, if any, money. Finally, in Part VI, I explore the implications of these changes for regulating third-party participation in pre-electoral debates. I conclude that what might be called “electoral campaigning 2.0”¹⁹ does not, in itself, require radical changes to the current legal framework and only suggest two limited amendments to the *CEA*. Nevertheless, the changes in politics and technology that I describe are significant. Ignoring them is likely to

¹⁵ For a history of third-party spending restrictions in federal election law, see Andrew Geddis, “Liberté, Égalité, Argent: Third Party Election Spending and the *Charter*” (2004) 42:2 *Alta L Rev* 429 at 439–43.

¹⁶ See *Libman v Quebec (AG)*, [1997] 3 SCR 569, 151 DLR (4th) 385 [*Libman*].

¹⁷ See *Harper v Canada (AG)*, 2004 SCC 33, [2004] 1 SCR 827 [*Harper*].

¹⁸ *Ibid* at para 62. See also 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 [Feasby, “Egalitarian Model”].

¹⁹ See e.g. Vincent Marissal, “La première vraie campagne 2.0”, *La Presse* (29 June 2012), online: <www.lapresse.ca/debats/chroniques/vincent-marissal/201206/28/01-4539268-la-premiere-vraie-campagne-20.php>.

lead scholars, legislators, or judges to unrealistic, and possibly pernicious, conclusions about the law of Canadian democracy.

I. The Supreme Court and Electoral Debate

The pre-*Charter* “Implied Bill of Rights” cases, in which some of the Supreme Court’s judges found a protection for freedom of speech—especially political speech—implicit in the constitution’s establishment of parliamentary institutions,²⁰ did not concern pre-electoral debate. Indeed, it is only in the 1970s that Parliament engaged in extensive regulation of election campaigns and, for the first time, enacted rules governing the participation of third parties.²¹ Canadian courts then had to address the consistency of such regulation with the *Charter* following its entry into force in 1982.

A. Libman

In the face of early lower court decisions unfavourable to regulating third parties’ involvement in electoral campaigns,²² the Supreme Court first confronted the issue in *Libman*. The case was a challenge to provisions of Québec’s legislation governing referenda, which allowed for the constitution of official committees to campaign for either side of a referendum question and prevented persons or organizations who were not members of or affiliated with one of the committees from incurring almost any campaigning expenses.²³ The exceptions were largely limited to the cost of publishing an article, editorial, or opinion piece in a periodical not established for the purposes of the referendum campaign, the cost of a radio or television news or public affairs broadcast, as well as various personal expenses an individual might incur in volunteering on the campaign.²⁴

The Supreme Court had no difficulty in finding that this legislation infringed the *Charter*’s guarantee of freedom of expression.²⁵ The real issue

²⁰ See *supra* notes 2–5, and accompanying text.

²¹ See *Geddis*, *supra* note 15 at 439; Feasby, “Egalitarian Model”, *supra* note 18 at 18.

²² See e.g. *National Citizens’ Coalition Inc v Canada (AG)* (1984), 11 DLR (4th) 481, 32 Alta LR (2d) 249 (Alta QB); *Canada (AG) v Somerville*, 1996 ABCA 217, 136 DLR (4th) 205. See also *Geddis*, *supra* note 15 at 440–43; Feasby, “Egalitarian Model”, *supra* note 18 at 23–26.

²³ See *Referendum Act*, RSQ 1978, c C-64.1, s 23, amending *Election Act*, RSQ c E-3.3, s 413.

²⁴ *Ibid.*, s 404.

²⁵ See *Libman*, *supra* note 16 at 594.

was whether the infringement was saved by section 1 of the *Charter* as a “reasonable [limit] prescribed by law [that] can be demonstrably justified in a free and democratic society.”²⁶ The Court found that “[t]he basic objective of the Act at issue is to guarantee the democratic nature of referendums by promoting equality between the options submitted by the government and seeking to promote free and informed voting.”²⁷ More specifically, the purpose of spending limitations in the legislation, including the prohibition on third parties’ spending, was to ensure the fairness of the electoral process, which is a corollary of the political equality of citizens.²⁸

Spending limits achieve fairness in three related ways. First, they “prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources.”²⁹ Second, they help voters make an informed decision by preventing one voice from dominating the campaign. Third, they ensure that the campaign does not appear tainted by the influence of money.³⁰ Furthermore, spending by third parties, the purpose or effect of which may be to favour the position of one of the contending sides, must also be limited if the limits on spending by the participants in an election or the committees representing the options in a referendum are to be effective.³¹ Indeed, the limits on spending by each separate third party must be low, lest an imbalance in the number of third parties supporting one side over another undermine the fairness of the electoral debate.³² Thus the Supreme Court approved, in principle, substantial limitations on the ability of third parties to spend to intervene in a pre-referendum (or pre-electoral) campaign.

It held, however, that Québec’s legislation went too far in not only curtailing, but completely eliminating third parties’ ability to spend money in the campaign.³³ This prohibition was so severe as to silence not only the wealthy who might wield unfair influence, but even the least affluent.³⁴ The Court struck down the impugned provisions, but made it clear that a somewhat less draconian version would be constitutional. It concluded by asserting that “[f]reedom of political expression, so dear to our democratic

²⁶ *Charter*, *supra* note 1, s 1.

²⁷ *Libman*, *supra* note 16 at 596.

²⁸ See *ibid* at 598–99.

²⁹ *Ibid* at 596–97.

³⁰ *Ibid*.

³¹ See *ibid* at 603.

³² See *ibid*.

³³ See *ibid* at 617–618.

³⁴ See *ibid* at 617.

tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices.”³⁵ This was all the encouragement the Québec legislature—and Parliament—needed to reimpose strict limits on third-party spending.

B. Harper

Harper tested the constitutionality of Parliament’s response to *Libman*, which limited third-party spending during an election campaign to \$150,000 overall and \$3,000 in any given electoral district.³⁶ (A number of other *CEA* provisions were also at issue, but they are not germane to this discussion.) The government conceded that these limits infringed third parties’ freedom of expression.³⁷

The Supreme Court, however, rejected the claim that they also infringed the *Charter*’s guarantee of the right to vote,³⁸ which the Court had previously interpreted as a right to meaningful participation in the electoral process.³⁹ While the Court accepted that in order to be meaningful, participation must be informed,⁴⁰ it focused not on the third parties’ potential to inform voters, but on the danger that “[i]n the absence of spending limits ... the affluent or a number of persons or groups pooling their resources and acting in concert [would come] to dominate the political discourse” and to silence others.⁴¹ Unlimited spending thus threatens the right to meaningful participation. Spending limits, provided that they are not set so low as “to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented,”⁴² do not infringe section 3 of the *Charter*. The Court held that the limits set by the *CEA* passed this test.⁴³

The main issue for the Supreme Court was, as in *Libman*, whether the infringement on the third parties’ freedom of expression could be saved by section 1 of the *Charter*. The Court held that scientific evidence of the

³⁵ *Ibid* at 621.

³⁶ See *supra* notes 12–13, and accompanying text.

³⁷ See *Harper*, *supra* note 17 at para 66.

³⁸ *Charter*, *supra* note 1, s 3.

³⁹ See *Reference Re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158, 81 DLR (4th) 16; *Figueroa v Canada (Attorney General)*, 2003 SCC 37, [2003] 1 SCR 912.

⁴⁰ See *Harper*, *supra* note 17 at para 71.

⁴¹ *Ibid* at para 72.

⁴² *Ibid* at para 73.

⁴³ See *ibid* at para 74.

harm Parliament sought to prevent by enacting the restrictions at issue was not required: “logic, reason and some social science evidence”⁴⁴ could lead to “a reasoned apprehension of that harm,”⁴⁵ which in turn could suffice to find the restrictions justified.⁴⁶ The objective of the prohibition on third-party advertising was to protect both the voters and the political parties and their candidates⁴⁷ by fostering “electoral fairness”⁴⁸ and, more specifically, “to promote equality in the political discourse; ... to protect the integrity of the financing regime applicable to candidates and parties; and ... to ensure that voters have confidence in the electoral process.”⁴⁹ The Court found that these objectives were pressing and substantial,⁵⁰ and that restrictions on third-party spending were rational ways of attaining these objectives, even though such restrictions were not supported by solid evidence.⁵¹

The Court also held that the limits on third-party advertising imposed by Parliament passed the “minimal impairment” test. In the Court’s view, the participation of most citizens was, in any case, limited by their lack of means rather than by the *CEA*’s provisions;⁵² besides, the amount of the expenses allowed by the *CEA* leaves room for some expensive advertising or “a significant amount of low cost forms of advertising,” in addition to those forms of advocacy altogether exempted from the limits, such as advertising not related to specific candidates or certain types of publications in the news media.⁵³ The Court found that the positive effects of the restrictions on third-party advertising in achieving Parliament’s objectives outweighed the deleterious effects of curtailing third parties’ freedom of expression, and upheld the limitations.⁵⁴

Unlike in *Libman*, where the Supreme Court’s judgment was unanimous (and indeed *per curiam*), three judges dissented in *Harper*. Writing for themselves and Justice Binnie, Chief Justice McLachlin and Justice

⁴⁴ *Ibid* at para 78.

⁴⁵ *Ibid* at para 77.

⁴⁶ See *ibid* at para 88.

⁴⁷ See *ibid* at paras 80–81.

⁴⁸ *Ibid* at para 91.

⁴⁹ *Ibid* at para 92.

⁵⁰ See *ibid* at paras 101–103.

⁵¹ See *ibid* at paras 105–109.

⁵² See *ibid* at para 113.

⁵³ *Ibid* at para 115.

⁵⁴ The Court also upheld some related provisions of the *CEA*, notably those imposing disclosure and reporting requirements on third parties incurring expenses above certain thresholds (*ibid* at paras 136–46).

Major were of the view that “[t]he law at issue sets advertising spending limits for citizens — called third parties — at such low levels that they cannot effectively communicate with their fellow citizens on election issues during an election campaign.”⁵⁵ They noted that the limits on third-party advertising set by the *CEA*, which are much lower than the limits imposed on political parties, had the effect of putting political parties at the centre of electoral debate, despite the fact that the right to take part in this debate belongs to citizens as well as political parties.⁵⁶ While agreeing with the majority that the objectives invoked by the government were pressing and substantial, the dissenters would have held that the severity of the limitations on freedom of expression, combined with the “wholly hypothetical”⁵⁷ character of the risks invoked by the government, meant that the limits imposed by Parliament were not minimally impairing and were, in any case, a disproportionate means of achieving Parliament’s objectives.⁵⁸

II. The “Egalitarian Model” of Elections

Colin Feasby has described the approach to regulating electoral campaigning chosen by Parliament and approved by the Supreme Court in *Libman* as the “egalitarian model” of democracy,⁵⁹ a description endorsed by the Supreme Court in *Harper*. Reflecting, as Feasby points out,⁶⁰ the work of John Rawls, whose *Theory of Justice*⁶¹ is a near contemporary of Parliament’s first attempt at regulating electoral campaigning and spending, this approach seeks to translate the formal equality of voters into a substantive equality of citizens by insisting on the fairness of the electoral process.

According to Rawls, citizens must have “a fair opportunity to take part in and to influence the political process. ... [I]deally, those similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class.”⁶² Although the impact of differences in talents and motivation is

⁵⁵ *Ibid* at para 2.

⁵⁶ See *ibid* at paras 2, 13–14.

⁵⁷ *Ibid* at para 34.

⁵⁸ *Ibid* at paras 33–35, 41.

⁵⁹ Feasby, “Egalitarian Model”, *supra* note 18; *Harper*, *supra* note 17 at para 62 (endorsing this description).

⁶⁰ Feasby, “Egalitarian Model”, *supra* note 18 at 9–12.

⁶¹ John Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap, 1971) [Rawls, *Theory*].

⁶² *Ibid* at 224–25.

acceptable, economic differences must have as little effect as possible on the citizens’ political influence. “[W]ealth,” said the Supreme Court in *Harper*, “is the main obstacle to equal participation.”⁶³ This means, above all, that the power of money in politics must be tamed.

For the Supreme Court, the danger of money is that it allows those who have more of it to dominate pre-electoral debate, indeed to the point of silencing other voices, in violation of the principle of equality between the citizens. This echoes Rawls’s concern that democratic “participation lose[s] much of [its] value whenever those who have greater private means are permitted to use their advantages to control the course of public debate.”⁶⁴ But for Rawls the reason for this is that “eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation. In due time they are likely to acquire a preponderant weight in settling social questions, at least in regard to those matters upon which they normally agree, which is to say in regard to those things that support their favored circumstances.”⁶⁵ Rawls’s concern seems to be not so much abstract equality or fairness as the risk that the wealthy will act as a class in order to (successfully) resist the adoption of egalitarian, redistributive policies. The Supreme Court’s abstract egalitarianism might be less overtly results oriented, but its concern that the wealthy will “control ... the electoral process to the detriment of others with less economic power”⁶⁶ suggests that for it too, fairness is a matter of class competition, and not just abstract philosophy.

According to Rawls, in order to resist the threat of a capture of the political process by the wealthy, the state must ensure “that political parties [will] be autonomous with respect to private demands, that is, demands not expressed in the public forum and argued for openly by reference to a conception of the public good.”⁶⁷ It can do so, for example, by subsidizing political parties and providing support for public political discussion.⁶⁸ Even after direct subsidies to political parties are phased out, the *CEA* will continue to do this, notably by making donations to parties tax-deductible and by providing parties with free broadcasting time. But of course, if the aim is to prevent the wealthy from capturing the political process by dominating public debate, silencing them (or, at least, muffling their voices, so that they are not heard more loudly than those of others)

⁶³ *Harper*, *supra* note 17 at para 62.

⁶⁴ Rawls, *Theory*, *supra* note 61 at 225.

⁶⁵ *Ibid.*

⁶⁶ *Harper*, *supra* note 17 at para 62.

⁶⁷ Rawls, *Theory*, *supra* note 61 at 226.

⁶⁸ *Ibid* at 225–26.

is at least as effective a policy. Although Rawls did not discuss this possibility in *A Theory of Justice*, he did so in his later work, *Political Liberalism*.⁶⁹ As the Supreme Court recognized, the CEA's restrictions on the participation of third parties in pre-electoral debate serve this purpose⁷⁰ (as do the provisions limiting contributions to political parties and the parties' expenditures).

It is possible to formulate several criticisms of the egalitarian model of democracy, based as it is on a fear of the wealthy and a perceived need to check their influence by equalizing pre-electoral debate. One potential line of criticism could be empirical. It would consist in pointing out that, contrary to Rawls's belief, the wealthy do not "normally agree ... in regard to those things that support their favoured circumstances," at least not more than the vast majority of citizens in Western liberal democracies.⁷¹ They are not a united block, and could not capture the political process in their own interests because they disagree about what these interests are.

Another, more philosophical line of criticism is that developed by Ronald Dworkin in an article on the meaning of political equality.⁷² Dworkin pointed out that the Rawlsian egalitarian model lacks coherence in that it is not concerned, "even in an egalitarian society", with "differences in interest, commitment, training, and reputation [which] might be sources of differences in political influence."⁷³ Yet trying to eliminate these differences or the resulting disparity in political influence would conflict with our notions of equality and personal autonomy. Thus, while "[w]e should ... remedy the distributive injustices that account for a great deal of the inequality in political influence of our own time," we should not be concerned with equality of political influence for its own sake "beyond remedying those distinct injustices."⁷⁴ The most radical line of criticism

⁶⁹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 358.

⁷⁰ *Harper*, *supra* note 17 at para 62.

⁷¹ Rawls, *Theory*, *supra* note 61 at 225. To be sure, one would probably be hard-pressed to find billionaire communists. But communists are in short supply in any tax bracket. On the other hand, champagne socialists and, more broadly, members of *la gauche caviar*, are not so rare. Derision apart, one of the world's richest men has famously advocated raising taxes on wealthy Americans: see Warren E Buffett, "Stop Coddling the Super-Rich", *New York Times* (15 August 2011) A21.

⁷² Ronald Dworkin, "What is Equality? Part 4: Political Equality" (1987) 22:1 USF L Rev 1.

⁷³ *Ibid* at 15.

⁷⁴ *Ibid* at 18. In later writings, Dworkin changed his position at least somewhat, arguing—with specific reference to *Harper*—that a "level playing field" in electoral discourse is a pre-requisite for democracy, insofar as it is necessary to prevent the viewpoints of the well off from monopolizing the marketplace of ideas, while warning against excessive levelling down of the amounts people ought to be allowed to spend to propagate

rejects the very idea that equality (at least above the one-person one-vote threshold) is something that the regulation of the political process should be concerned with.

Last but not least, the “structuralist” critique of election law is a strong argument to the effect that, although purportedly egalitarian, restrictions on the role of money in politics “tend to benefit incumbents, thereby entrenching those already in power,” by making it more difficult for challengers to overcome the incumbents’ advantages such as notoriety and agenda-control.⁷⁵

In this article, however, I want to pursue two different critiques of the Rawlsian egalitarian model endorsed by Parliament and the Supreme Court, focusing on assumptions on which this model rests and which have lost force since its development in the early 1970s. One of these assumptions, to which I will return in Part V, consists in equating spending and speech. The other, to which I now turn, concerns the place of political parties in the egalitarian vision of democracy.

III. Egalitarian Elections and Party Democracy: Who Gets to Play on a Level Field?

Although its proponents do not emphasize the point, the egalitarian conception of democracy outlined by Rawls and adopted by both Parliament and the Supreme Court is inextricably linked with a certain model of the electoral process. It is based on the assumption that political parties *and their platforms* will be central to electoral politics. Thus, for Rawls, the ideal electoral process is “a form of fair rivalry for political office and authority. By presenting conceptions of the public good and policies designed to promote social ends, *rival parties* seek the citizen’s approval in accordance with just procedural rules against a background of freedom of thought and assembly.”⁷⁶ The Canadian approach to regulating pre-electoral debate reflects similar views.

The historian John English described Parliament’s choice to enact the *Election Expenses Act*⁷⁷ in 1974 as “reflecting [then-Prime Minister Pierre] Trudeau’s own belief ... that a broader political process was essential for

their views, which would create greater equality at the cost of silencing those holding new or unpopular ideas altogether (Ronald Dworkin, “The Decision that Threatens Democracy”, *The New York Review of Books* 57:8 (13 May 2010) 63).

⁷⁵ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62:4 UTLJ 499 at 547.

⁷⁶ Rawls, *Theory*, *supra* note 61 at 227 [emphasis added].

⁷⁷ *Election Expenses Act*, SC 1973-74, c 51.

Canadian democracy to flourish.”⁷⁸ Yet as English explains, this “broader political process,” even “the rhetoric of participatory democracy,”⁷⁹ was meant to happen within the structure of the political party. Speaking at a Liberal Party conference in 1969, Trudeau “compare[d] the party to ‘pilots of a supersonic airplane. By the time an airport comes into the pilot’s field of vision, it is too late to begin the landing procedure. Such planes must be navigated by radar. A political party, in formulating policy, can act as a society’s radar.’ The conference itself, he continued, should be a ‘super-market of ideas.’”⁸⁰

The Royal Commission on Electoral Reform and Party Financing (known as the “Lortie Commission”), whose 1991 report⁸¹ provided renewed support for the regulation of third-party electoral spending and in many ways formed the basis of the *CEA*’s provisions on the subject,⁸² similarly considered parties as central to the formulation of public policies and political ideals. Although, as I will further explain below, its authors were aware of the parties’ limitations in this regard, they argued that “[t]he parties need to recapture their position and reassert their role in the realm of political education, policy development and value articulation, including the creation of broader partisan networks.”⁸³ In their view, “the continued health of our democracy ... requires that people in Canada become more involved in political life through political parties”⁸⁴, in addition to—and even rather than—in other ways. Indeed, even as it acknowledged that the very low cap on third-party expenses it recommended would prevent third parties from making their views known to Canadians, the Lortie Report suggested that those who “wished to conduct broader campaigns ... do so by supporting existing parties and candidates ... or by forming a political party and fielding candidates.”⁸⁵

⁷⁸ John English, *Just Watch Me: The Life of Pierre Elliott Trudeau, 1968–2000* (Toronto: Alfred A Knopf Canada, 2009) at 151.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy* (Ottawa: Minister of Supply and Services Canada, 1991) vol 1 [*Lortie Report*].

⁸² Note, however, that the amount a third party is authorized to spend pursuant to s 350 of the *CEA* (\$150,000) is much higher than that recommended by the *Lortie Report*, *supra* note 81 at 352 (\$1,000), presumably reflecting Parliament’s consideration of the Supreme Court’s opinion in *Libman*.

⁸³ *Lortie Report*, *supra* note 81 at 292.

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at 353.

Likewise, the Supreme Court suggested in *Harper* that political parties are the primary vehicle for political participation in the Canadian political system. Although it recognized that “[s]till, some will participate outside the party affiliations,”⁸⁶ the Court’s tone suggests that it viewed such participation as anomalous. Already in *Libman*, the Supreme Court had accepted the principle that third party expenses can and indeed should be limited at much lower amounts than those of political parties.⁸⁷ As it observed in *Harper*, the limitation of third-party expenses served to protect candidates and political parties.⁸⁸

This has led Feasby to point out that “[t]hough it may seem paradoxical, under the rubric of fairness, *Libman* set out a *de facto* hierarchy of interests in the electoral system. Voters’ interests are foremost; candidate and party interests are secondary; non-participant interests are tertiary.”⁸⁹ In his opinion, this hierarchy is in keeping with “the structure of Canadian electoral democracy.”⁹⁰ But it would be more accurate to say that it is in keeping with a specific conception of elections, and one that increasingly reflects a sense of the electoral process as it ought, perhaps, to be rather than as it actually is.

A metaphor used by the Supreme Court in *Harper* helps illustrate what this conception of democracy is like. This metaphor is that of “a level playing field for those who wish to engage in the electoral discourse.”⁹¹ Although the Supreme Court probably invoked it mainly for its feel-good appeal to our sense of fair play,⁹² I would like to extend it a little, and ex-

⁸⁶ *Harper*, *supra* note 17 at para 113.

⁸⁷ *Libman*, *supra* note 16 at 603.

⁸⁸ *Harper*, *supra* note 17 at para 81 (the Court asserted, however, that “neither candidates nor political parties can be said to be vulnerable” *ibid*).

⁸⁹ Feasby, “Egalitarian Model”, *supra* note 18 at 34.

⁹⁰ *Ibid* at 35. It is also noteworthy that there is an additional hierarchy between political parties, with larger and well-established ones enjoying advantages over small and new ones: see Colin Feasby, “Continuing Questions in Canadian Political Finance Law: Third Parties and Small Political Parties” (2010) 47:4 *Alta L Rev* 993 at 994, 1001–1004 [Feasby, “Continuing Questions”] (observing that “[t]he right of third parties to participate in public discourse is now strictly limited during the period immediately before elections. Small political parties have fared better in the courts than third parties and have secured some constitutional protection, though not strict equality with major political parties” at 994).

⁹¹ *Harper*, *supra* note 17 at para 62.

⁹² The appeal is lost on some, however. See *Arizona Free Enterprise Club v Bennett*, 131 S Ct 2806, 180 L Ed 2d 664 (2011), Roberts CJ (claiming that “[l]eveling the playing field’ can sound like a good thing. But in a democracy, campaigning for office is not a game” at 2826 [cited to S Ct]).

plore the implications of describing electoral debate as a football game.⁹³ This metaphor reveals more than the Court probably intended about the roles of those involved in the political process under the egalitarian model.

If the electoral process, as envisioned by the Supreme Court, is a football game played on an “even playing field,” political parties are the teams playing on that field. According to the adherents of the egalitarian conception of democracy, political parties are the primary competitors for the prize of political power. They are like professional sports teams, with coaching and scouting staff of consultants and opposition researchers, their farm clubs of youth organizations, their practice rosters of backbenchers and, of course, their fans among the voters. These fans, along with less interested spectators, are seated in the stands around the playing field. A few of them might unfurl some home-made banners to make their opinion of the proceedings or the competitors known, but for the most part they will, at most, cheer their favourites and boo the opponents. There are even cheerleaders on the sidelines, although they generally wear suits, as befits members of editorial boards. Neither players nor mere spectators, they try to stir up the enthusiasm of the latter for the former.⁹⁴

This allegory highlights some salient features of the egalitarian model of elections implemented by Parliament in the *CEA* and endorsed by the Supreme Court, such as the special status of the media (which, although neither candidates nor political parties, are exempted from restrictions on third-party participation in pre-electoral debate⁹⁵) and, most importantly, the central role of political parties in electoral discourse and the relative passivity of the voters. The metaphor only breaks down on Election Day, when the voters are at last allowed to leave the stands, and to choose the winner of the game they have (or have not) been watching.

For a deeper description of the conception of democracy and political debate to which Rawls, Parliament, and the Supreme Court all subscribe,

⁹³ Or a chivalry tournament—or, perhaps less romantically, a duel—for those who read the French version of the judgment, which speaks of debate “à armes égales.” The imagery is somewhat different, but still amenable to the interpretation I am about to suggest.

⁹⁴ There is one further element to this analogy, although it is not directly relevant to my purposes here. It is that, as in a professional sports league, the teams are in full control of the rules of the game, and can set them to suit their own purposes, regardless of the interests and wishes of the non-participants (see Michael Pal, “Breakdowns in the Democratic Process and the Law of Canadian Democracy” (2011) 57:2 McGill LJ 299).

⁹⁵ *CEA*, *supra* note 7, s 319(a) (excluding “the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news” from the definition of “election advertising”).

I turn to the illuminating work of Bernard Manin on representative government.⁹⁶ Manin describes this conception of democracy as “party democracy”. His analysis of it is worth our attention, because it helps clarify the assumptions that may have seemed natural or self-evident to Rawls, Trudeau, the members of the Lortie Commission, and the Supreme Court’s judges, but which, as Manin shows, are neither natural nor self-evident.

Party democracy arose with the extension of the franchise in the nineteenth century. As Manin points out, “[m]odern representative government was established without organized political parties. ... From the second half of the nineteenth century, however, political parties organizing the expression of the electorate came to be viewed as a constitutive element of representative government.”⁹⁷ Personal communication between the (aspiring) representative and the voter having become impossible as a result of the extension of the franchise, “[p]olitical parties, with their bureaucracies and networks of party workers, were established in order to mobilize the enlarged electorate.”⁹⁸ The earlier age of the more or less independent representative, and its fear of “faction,” so prominent, for example, at the founding of the United States,⁹⁹ were apparently forgotten.

With the franchise extended to the middle and the working classes, “[i]n party democracy electoral cleavages reflect *class divisions*.”¹⁰⁰ A social class is also a political camp, and “representation becomes primarily a reflection of the social structure.”¹⁰¹ Hence Rawls’s worry about the wealthy acting as a group to have their group’s favoured policies implemented. Hence also the tendency for a voter to support, in every election, the same party which he or she supported in the past, and for which his or her parents voted too.¹⁰² Indeed, in some polities at least, it had been expected that political parties would not only represent the interests of middle and working classes, but also bring members of these classes into office. One can hear an echo of these hopes in Rawls’s admonition that talent and motivation, but not social class, should determine a person’s chances of attaining political office.¹⁰³ Yet this expectation, Manin writes,

⁹⁶ Bernard Manin, *The Principles of Representative Government* (Cambridge, UK: Cambridge University Press, 1997).

⁹⁷ *Ibid* at 194.

⁹⁸ *Ibid* at 206.

⁹⁹ See e.g. James Madison, “No. X,” in Alexander Hamilton, James Madison & John Jay, *The Federalist on the New Constitution* (District of Columbia: Hallowell, 1831) 45.

¹⁰⁰ Manin, *supra* note 96 at 209 [emphasis in original].

¹⁰¹ *Ibid* at 210.

¹⁰² See *ibid* at 208–209.

¹⁰³ Rawls, *Theory*, *supra* note 61 at 225.

was not fulfilled. Instead of ordinary people, it was party activists who came to power with party democracy.¹⁰⁴

That is because parties and their activists and structures dominated the political process. Instead of an individual representative, voters were now expected to support “someone who bears the colors of a party;”¹⁰⁵ the party which represented their social class and thus the political camp to which they belonged. Most importantly for my purposes here,

parties organize both the electoral competition and the expression of public opinion (demonstrations, petitions, press campaigns). All expressions of public opinion are structured along partisan cleavages. ... Since the parties dominate both the electoral scene and the articulation of political opinions outside the vote, cleavages of public opinion coincide with electoral cleavages.¹⁰⁶

This dominance of parties, not only in the contest for political power but also in political debate, had two important consequences.

One was to create the impression that electoral choice was driven by party platforms combining ideology and policy proposals. In reality, Manin observes, although political parties “certainly proposed detailed platforms and campaigned on them ... the greater part of the electorate had no detailed idea of the measures proposed. Even when voters knew of the existence of such platforms, what they retained was primarily vague and attention-grabbing slogans emphasized in the electoral campaign.”¹⁰⁷ The electoral choice was, for most voters, a matter of class identity and trust, rather than the result of a consideration of the parties’ policies.¹⁰⁸ Nonetheless, the impression was a powerful one, and there is little doubt that it influenced the defenders of the egalitarian model of democracy, such as Rawls and Trudeau, who saw political parties as vehicles for “conceptions of the public good and policies designed to promote social ends” or “supermarket[s] of ideas.”¹⁰⁹ (Needless to say these thinkers and leaders were among the minority of people who did in fact have detailed knowledge of, and cared for, party platforms.)

The second consequence of the parties’ centrality in this conception of democracy is that it makes it natural to see those participants in the electoral debate who are not associated with parties as either mistaken or in-

¹⁰⁴ See Manin, *supra* note 96 at 206–208.

¹⁰⁵ *Ibid* at 206.

¹⁰⁶ *Ibid* at 215.

¹⁰⁷ *Ibid* at 210.

¹⁰⁸ See *ibid* at 210–11.

¹⁰⁹ See *supra* notes 78–80 and accompanying text.

sincere in their claims of independence or, at best, anomalous. On this view of the electoral process, the real debate takes place between political parties and concerns their platforms. Self-proclaimed outsiders really are, wittingly or not, the parties’ auxiliaries. Thus, the Supreme Court held up the possibility that third parties’ participation in electoral campaigning would really amount to reinforcing one side of the debate taking place between the parties over the other (in contravention of the rules ensuring their equality) as a reason for imposing severe constraints on such participation.

The “egalitarian model” of the regulation of the democratic process is a reflection of “party democracy”. It is based on a vision of political parties as the appropriately dominant actors of the electoral process, representing certain class interests in society and bearing ideas and policies intended to secure the commonweal. While these roles might seem contradictory, the egalitarian model serves to resolve the contradiction by minimizing the danger, inherent in the parties’ role as class representatives, of a domination of one class over the other(s), and maximizing the benefits of the parties’ role as competing “supermarkets” in the marketplace of ideas. It achieves the former by imposing restrictions on the parties’ means to compete with each other, thus presumptively giving each (major) party and the social class it represents a fair shot at victory—if not in one election then at some future point. It achieves the latter by securing the parties’ central place in electoral debate, guaranteeing that their voices will be heard, and that they will be heard much louder and clearer than any competing ones.

The “egalitarian model” is a reasonable one given the assumptions it makes about the nature of electoral competition (and subject to the structuralist critique). But, unfortunately for its proponents, these assumptions are no longer warranted. Party democracy is decaying, and another model of representation is taking its place. In the next Part, I will describe that other model, in which the parties no longer represent social classes or present voters with detailed policy proposals, relying again on Manin’s work, and outline its implications for the egalitarian model of electoral regulation.

IV. Audience Democracy and the Egalitarian Model

A. From Party Democracy to Audience Democracy

Even as John Rawls was providing the theoretical foundation for the egalitarian model of electoral regulation and Parliament was enshrining this model in Canadian law, the system of representation for which it was designed was beginning to fray. Moreover, the same man, Pierre Trudeau, was deeply involved in both processes in Canada. As Manin explains, be-

ginning in the late 1960s and 1970s, “party democracy” has given way to “audience democracy,” in which the role of political parties, the relationship between the parties and the voters, and the nature of public debate are different from those considered normal before.

The shift away from party democracy was noticed when, beginning in the 1970s, it became apparent that the usual patterns of electoral results had broken down. In particular, the stability of these results over time and the correlation between electoral preferences and “the socio-economic and cultural backgrounds of the voters” no longer held.¹¹⁰ What had happened, Manin explains, was that “[v]oters tend increasingly to vote for a person and no longer for a party or a platform. This phenomenon marks a departure from what was considered normal voting behavior under representative democracy,”¹¹¹ and presented as the ideal of democracy, for example by Rawls. From representatives of social classes and supermarkets of ideas, political parties were transformed into “instruments in the service of a leader” for whom they provide fundraising and organizing machinery.¹¹²

This is not to say that political parties have lost their significance, much less that they are on their way to disappearing. For one thing, parties still play a crucial role in the formation of governments, especially in parliamentary systems, where the support of a stable plurality (or, ideally, a majority) of the members of a legislature is necessary for governments to remain in office. For another, even in electoral politics, parties in audience democracy do not entirely abandon their ideological orientations, and the party label might thus serve as a somewhat useful heuristic for voters (especially the uninformed or disengaged).¹¹³ Last but not least, political parties select the leaders who represent and lead them in the electoral competition. Even this role, however, may be undergoing a shift, with parties across the political spectrum and across the globe opening their leadership elections to non-members, so that the party becomes less the constituency than the organizer and rule maker for the leadership

¹¹⁰ Manin, *supra* note 96 at 218.

¹¹¹ *Ibid.* at 219. In Canadian history there is arguably one important exception to this trend: the 1988 federal election, which sharply opposed a pro- and an anti-free-trade platform. I am grateful to Simon Bessette for pointing this out to me. The electoral politics of some provinces, in particular Quebec with its long-standing polarization around the question of its constitutional future, may also have escaped the trend, at least for the time being.

¹¹² *Ibid.*

¹¹³ But see Jennifer L Merolla, Laura B Stephenson & Elizabeth J Zechmeister, “Can Canadians Take a Hint? The (In)Effectiveness of Party Labels as Information Shortcuts in Canada” (2008) 41:4 *Can J Poli Sci* 673 (arguing that in Canada, unlike in other countries, Canadian political parties are not especially useful information shortcuts).

contest.¹¹⁴ A general description of the nature and role of political parties in audience democracy and the extent to which they differ from those under party democracy would thus be very complex, and far beyond the scope of this essay. What I focus on here is the change in the role of parties in electoral politics (rather than in government or with respect to leadership contests) and, especially, in pre-electoral debate. This particular role has undergone a real transformation.

The Lortie Commission believed that what was being described as the lack of interest among political parties “in discussing and analysing political issues that are not connected directly to winning the next election, or in attempting to articulate the[ir] broader values”¹¹⁵ was due (at least in considerable part) to a lack of resources. The Commission recommended that parties be incentivized to create affiliated “foundations” that would receive public funding to engage in the development of policies and political education.¹¹⁶ These recommendations were not followed, but there is good reason to believe that they would have proven quixotic even if they had been implemented. Indeed, Manin observed the same process at work across all Western democracies, including the European countries from which the Lortie Commission borrowed the idea of “parties’ foundations”.

Manin found two causes for the shift from party and platform to leader as the centre of electoral politics. One was the impact of the electronic media, which allow candidates, and especially party leaders, to communi-

¹¹⁴ See e.g. Jean-Marc Salvat, “Le PQ examine officiellement l'idée de primaires ouvertes”, *Le Soleil* (3 June 2014), online: <www.lapresse.ca/le-soleil/actualites/politique/201406/02/01-4772266-le-pq-examine-officiellement-lidee-de-primaires-ouvertes.php> (reporting that the Parti Québécois was officially considering the idea of “primaries” open to sympathizers); “PQ : pas de primaires ouvertes et un chef en mai”, *Radio-Canada* (4 October 2014), online: <ici.radio-canada.ca/nouvelles/Politique/2014/10/04/002-parti-quebecois-regles-course-a-la-direction.shtml> (reporting that the Parti Québécois decided against holding an open primary, possibly due to lack of financial and organizational resources); Geoffroy Clavel, “La primaire UMP sera ouverte mais jusqu'à quel point? Le parti se penche sur les parrainages”, *Huffington Post* (20 January 2015), online: <www.huffingtonpost.fr/2015/01/20/primaire-ump-ouverte-parti-parrainages_n_6501290.html> (reporting on the discussions regarding the organization of an open primary to select the UMP's candidate for the 2017 French presidential election); “Sauce Hollandaise”, *The Economist* (22 October 2011), online: <www.economist.com/node/21533416> (reporting on the 2011 primary election held by the French Socialist Party, open to voters who “pledged allegiance to the ‘values of the left’”); “Chilly Welcome”, *The Economist* (28 February 2008), online: <www.economist.com/node/10766556> (mentioning the “system of open primaries” in South Korea's Grand National Party); “Left Upset”, *The Economist* (11 January 2014), online: <www.economist.com/news/europe/21593501-turbulent-time-italys-centre-left-left-upset> (mentioning “a primary election [for the leadership of the Italian Partito Democratico in 2013] that was open to all”).

¹¹⁵ *Lortie Report*, *supra* note 81 at 292.

¹¹⁶ See *ibid* at 293–301.

cate directly with voters. “Moreover, television confers particular salience and vividness to the individuality of the candidates.”¹¹⁷ In Canada, as John English explains, Pierre Trudeau’s rise to power epitomized this new model of politics, and especially “the transformation of politics caused by television.”¹¹⁸ Yet “[a]lthough Trudeau’s appearance and skills fitted TV especially well, the new importance of the medium meant that all political campaigns changed dramatically.”¹¹⁹ The change was lasting, rather than tied to the exceptional personality of a single leader.

The second cause of the change of the political paradigm was found in “the new conditions under which elected officials exercise their power.”¹²⁰ As government has taken on increased responsibilities, the task of governing has become ever more complex and unpredictable. And, since it is clear that, once in office, the government will need to make many difficult and unforeseen decisions, candidates “are not inclined to tie their hands by committing themselves to a detailed platform,” preferring “to put forth their personal qualities and aptitude for making good decisions rather than to tie their hands by specific promises.”¹²¹ Arguably, it is similarly reasonable for voters to judge candidates on their perceived decision-making abilities rather than their specific policies.

The developments since Manin wrote have only reinforced these twin trends. The rise of the Internet and especially the emergence of social media have increased political leaders’ ability to communicate directly with voters and thus to focus attention on their character and personality, rather than on the political party they represent. The effect of these developments is only beginning to be felt in Canada,¹²² but a look at the last presidential election campaign in the United States is instructive:

Republican Tim Pawlenty disclosed his 2012 presidential aspirations on Facebook. Rival Mitt Romney did it with a tweet. President Barack Obama kicked off his re-election bid with a digital video emailed to the 13 million online backers who helped power his historic campaign in 2008. ... The candidates and contenders have embraced the Internet to far greater degrees than previous White House campaigns, communicating directly with voters on platforms

¹¹⁷ Manin, *supra* note 96 at 220.

¹¹⁸ English, *supra* note 78 at 34.

¹¹⁹ *Ibid* at 35.

¹²⁰ Manin, *supra* note 96 at 220.

¹²¹ *Ibid* at 221.

¹²² See e.g. Nathalie Collard, “Une campagne 2.0? Vraiment?”, *La Presse* (26 August 2012), online: <techno.lapresse.ca/nouvelles/internet/201208/25/01-4568164-une-campagne-20-vraiment.php> (arguing that Quebec’s 2012 election campaign was not as “2.0” as that of Barack Obama in the United States in 2008).

where they work and play. ... [The 2012] race [would] be the first to reflect the broad cultural migration to the digital world.¹²³

Internet technologies such as email and blogs—and especially online platforms such as YouTube, Facebook, and Twitter—allow politicians to make announcements to voters, to take their questions and even engage them in discussion if they so choose, to react to their opponents’ actions or speeches, and so on.¹²⁴ In these ways, political leaders can attract and keep voters’ attention like never before.

As for the complexity and unpredictability of the governments’ tasks, it seems that they too have only increased in the past fifteen years. Admittedly, such things are difficult, perhaps impossible, to measure, and even a cursory overview of the relevant political developments would be a formidable task well beyond the scope of this article. Nonetheless, it stands to reason that globalization and international terrorism, to name but two of the forces shaping the policy of most developed nations, have contributed to rendering policy development even more uncertain than in the still-recent past. Thus, the impulse to remove detailed policy platforms from the centre of electoral debate is as strong as ever.

And yet, Manin cautions, electoral choice is not only about the leaders’ personalities. The parties’ platforms matter less, but their records matter more than they used to.¹²⁵ Furthermore, as the influence of social and economic background on electoral preferences has declined, “voting decisions are made on the basis of perceptions of what is at stake in a particular election ... [and] seem to be sensitive to issues raised in electoral campaigns.”¹²⁶ However, unlike in “party democracy,” these issues do not relate to any lasting and salient cleavage in society, because “[n]o socio-economic or cultural cleavage is evidently more important and stable than others.”¹²⁷ The issues are chosen by the politicians, who succeed or fail depending on whether the issues they choose to raise and the cleavages they choose to highlight resonate with the voters. “[T]he electorate appears, above all, as an *audience* which responds to the terms that have been pre-

¹²³ Beth Fouhy, “Elections 2012: The Social Network, Presidential Campaign Edition”, *Huffington Post* (17 April 2011) online: <www.huffingtonpost.com/2011/04/17/elections-2012-social-media_n_850172.html>. See also Pew Research Center’s Project for Excellence in Journalism, “How the Presidential Candidates Use the Web and Social Media” (15 August 2012), online: <www.journalism.org/2012/08/15/how-presidential-candidates-use-web-and-social-media/>.

¹²⁴ *Ibid.*

¹²⁵ See Manin, *supra* note 96 at 221.

¹²⁶ *Ibid* at 222.

¹²⁷ *Ibid* at 223.

sented on the political stage,”¹²⁸ while politicians are the agenda setters of public debate.

A further important feature of “audience democracy” is the importance, in the public debate, of actors not affiliated with political parties, such as interest groups, think tanks, and non-governmental organizations. In the early 1970s, the emerging tendency for citizens, especially young people, to involve themselves in public affairs through such organizations rather than political parties could still be regarded with some surprise and perhaps even distress.¹²⁹ And, as noted earlier, the majority in *Harper* seemed to regard individual political participation through the medium of parties as the norm and activism in civil society groups as an anomaly that only “some” would choose.¹³⁰

But, as English observes, this form of participation in political life (broadly understood) is now ubiquitous.¹³¹ Already in 1991, the Lortie Commission observed

a generational change in attitudes about politics and the most effective means of political participation. ... [Y]ounger generations in Canada and abroad were less enamoured with established political parties of all persuasions. They preferred to pursue their particular political interests ... through single-issue organizations with the sole purpose of promoting a specific cause.¹³²

It is, surely, not a mere coincidence that even as political parties were abandoning detailed platforms and leadership on policy matters, civil society groups were filling the void.

B. Canada as an Audience Democracy

A look at the most recent federal election campaign in 2011, confirms that Canada has become an audience democracy. Electoral campaigns are dominated by television and revolve around party leaders. The parties’ policy commitments, to the extent that they are discussed at all, are an afterthought. Voters’ choices are driven by perceptions of the party leaders’

¹²⁸ *Ibid* [emphasis in original].

¹²⁹ See English, *supra* note 78 (noting that, in 1970, the Liberal Party’s president, Senator Richard “Stanbury shrewdly observed that there was a tendency among the young and others ‘to refuse to believe that the Party was effective’ and a feeling that ‘they could be more effective outside parties.’ It was a perceptive comment: this trend marked the remainder of the century, and for young and old alike, nongovernmental organizations and ‘civil society’ became their preferred focus of commitment” at 151–52).

¹³⁰ *Harper*, *supra* note 17 at para 113.

¹³¹ English, *supra* note 78 at 152.

¹³² *Lortie Report*, *supra* note 81 at 222.

leadership qualities and by the cleavages created by the leaders and the parties, much more than by the leaders’ and parties’ actual commitments, especially substantive policy commitments. As a result, the parties’ and their leaders’ dominant position in pre-electoral debate results in substantive issues not being addressed.

The centrality of party leaders to electoral competition and the status of television as the dominant means¹³³ through which voters learn about an election campaign are inextricably linked and mutually reinforcing. Television coverage naturally centres on party leaders, who become the spokespersons who articulate their parties’ message to the voters. As Mary Francoli, Josh Greenberg, and Christopher Waddell note in a study of the role of the electronic media in the 2011 election, television coverage, mostly of each of the campaign tours of the main parties’ leaders, “hasn’t changed very much since the 1970s”¹³⁴—that is to say, since, as Manin and English suggest, television first became the dominant medium of political mass communication. Indeed, “[t]he parties and the television networks are linked in a mutually dependent relationship.”¹³⁵ The parties provide the images (as well as the access), which the networks need to produce their stories. In return, the networks disseminate the parties’ messaging as news—“regardless of whether the images match the story being told that night by the reporter”¹³⁶—providing parties with the exposure they need to keep the voters’ attention.

Unsurprisingly, Francoli and her co-authors find that “[c]ampaign events and coverage of those events are formulaic” and leave little or no room for an examination of the important issues and the parties’ positions on these issues.¹³⁷ Similarly, the leaders’ tours are designed to demonstrate enthusiasm for the party leaders, not to address the voters’ concerns. The “issues” that attract day-to-day coverage over the course of an election campaign are of limited importance if not altogether trivial,¹³⁸ with the arguable exception of the opinion polls—which, although certainly important, are not substantive policy issues either. In short, on television, “there was almost no talk of the challenges of financing health care into the future, the debate about climate change, the coming infrastruc-

¹³³ Mary Francoli, Josh Greenberg & Christopher Waddell, “The Campaign in the Digital Media” in Jon H Pammett & Christopher Dornan, eds, *The Canadian Federal Election of 2011* (Toronto: Dundurn, 2011) 219 at 220.

¹³⁴ *Ibid.*

¹³⁵ *Ibid* at 221.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ See *ibid* at 222–23 for a list of the issues that attracted coverage during the 2011 campaign.

ture crisis, or the fact that Canada for the first time in its history has troops fighting in two concurrent wars, among a host of other important public policy issues.”¹³⁹ To the extent that issues of significance to the voters came up in the television coverage, it was in “stories away from the leaders’ tours”.¹⁴⁰ The 2011 election campaign was by no means exceptional in this respect. As the study’s authors put it, their “review of how television covered the 2011 campaign could have been written in 2004, 2006, or 2008.”¹⁴¹ The near-absence of issues from election campaigns is the trend, the normal state of Canadian democracy.

As Manin’s description of audience democracy suggests, rather than substantive policies, what matters is the ability of party leaders to project certain personality traits and to frame the election campaign as a choice of which they represent the desirable side, and their opponents the repellent one. These twin skills explain the successes both of the Conservatives (in finally forming a majority government) and the NDP (in achieving its best-ever electoral results) at the 2011 election. These parties’ platforms were, by contrast, largely irrelevant to their success.

The stage for the Conservatives’ victory in 2011 was set at the start of the election campaign thanks to what Francoli and her co-authors describe as Stephen Harper’s “succe[ss], on the campaign’s opening day in framing the election as being a choice between a ‘power-hungry coalition’ of opposition parties and a ‘stable majority’ Conservative government.”¹⁴² He thus created “an electoral dynamic that pitted their party against all of the others.”¹⁴³ As Ellis and Woolstencroft explain in their study of the Conservative campaign, doing so allowed the party “to exploit the most negative elements of each [of its opponents], tarring the rest in the process.”¹⁴⁴ To be sure, some of this “tarring” involved accusations of economic incompetence—but a general accusation of incompetence is not a criticism of a policy. On the contrary, such rhetoric confirms Manin’s insight that in an audience democracy, politicians prefer to present themselves as generally capable of dealing with the tasks of government while making few if any substantive commitments.

¹³⁹ *Ibid* at 242.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid* at 231.

¹⁴² *Ibid* at 222. See also Faron Ellis & Peter Woolstencroft, “The Conservative Campaign: Becoming the New Natural Governing Party?” in Jon H Pammett & Christopher Dornan, eds, *The Canadian Federal Election of 2011* (Toronto: Dundurn, 2011) 15 at 16.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid* at 29.

Indeed, Ellis and Woolstencroft observe that “[a]s was the case [in] 2008, the 2011 Conservative platform was ... long on extolling the Prime Minister’s virtues and the government’s record of stable economic stewardship [and] short on new initiatives that were not already contained in the 2011 budget.”¹⁴⁵ In any case, they note that “[t]he platform was released in its entirety at the end of the second week of the campaign, just prior to the debates and too late to have any significant impact on the overall campaign dynamics.”¹⁴⁶ Presumably, this is because the party understood that—as Manin argues—to the extent that they consider policy at all, voters in audience democracies look more to the parties’ records than to their promises, and because not making new promises left an eventual Conservative government freer hands for the future.

Admittedly, the issue of government by a single-party majority or a coalition (especially a coalition dependent on the support of a separatist party) is not an insignificant one, whether or not it is so significant as to deserve to be *the* ballot question of an election. It is not, however, a *policy* question, but one about the nature and style of political leadership. Nor is it an issue related to some lasting and substantive problem of cleavage in society, but one that has to do with the circumstances of a single election, chosen by a politician for its promise of electoral success.

The other key ingredient of Conservative success was the party’s ability to project an image of competent and confident leadership. Its leader’s tour was set up so as to broadcast the appearance of enthusiasm and support for Stephen Harper.¹⁴⁷ Conversely, the Conservatives sought to discredit the other parties’ leaders more than their platforms (beyond general accusations of favouring high taxes). Their attack ads targeted Michael Ignatieff’s trustworthiness and personality, rather than his party’s policies.¹⁴⁸

Similarly, the unprecedented success of the NDP was built on a successful choice of a cleavage that allowed it to distinguish itself from its opponents and to focus on the appeal of Jack Layton. As with the Conservatives, these themes structured what passed for the party’s platform, as well as its advertisements and the organization of its campaign.

¹⁴⁵ *Ibid* at 29–30.

¹⁴⁶ *Ibid* at 30.

¹⁴⁷ See Francoli, Greenberg & Waddell, *supra* note 133 at 225.

¹⁴⁸ See Ellis & Woolstencroft, *supra* note 142, at 31–32. See also *ibid*, at 38 (describing the attacks on Jack Layton during the final stages of the 2011 campaign, when it had become clear that the NDP, rather than the Liberals, was the Conservatives’ main rival; these attacks were also aimed at Mr. Layton and emphasized “credentials” rather than specific policies).

The cleavage the NDP used to frame the election was the contrast between itself and the other, “old,” parties associated with “broken” politics—the Bloc Québécois in Québec, and the Conservatives and the Liberals elsewhere. This distinction allowed the NDP to occupy the attractive side of the question while lumping the other parties together on the unattractive one, much like the Conservatives’ choice of “stable government versus the coalition.” As David McGrane notes in his study of the NDP campaign, “[t]he theme of the NDP platform was simply that Ottawa is broken and Jack Layton”—the emphasis, again, is on the leader—“has a practical plan to fix it.”¹⁴⁹ To the extent the platform contained substantive commitments, they were vaguely worded and not translated into specific policies.¹⁵⁰ Dysfunction in politics was also an important theme of the NDP’s advertisements. While it was much less important than leadership—although still more important than policy—in English-language ads, it was the dominant theme in French-language ads.¹⁵¹

Leadership (and the contrast between Jack Layton and the other leaders) was—as it was for the Conservatives—the NDP’s other campaign theme. Variations on it (whether ads extolling Layton or those attacking Harper or Ignatieff) constituted about two thirds of the NDP’s English-language advertising.¹⁵² Indeed, the ads barely mentioned the party’s name: although it appeared on screen, it was less prominent than Layton’s.¹⁵³ The NDP’s campaign opened and closed with leadership. Policy, to the extent that it was discussed, was confined to the less prominent middle weeks of the campaign.¹⁵⁴ Although McGrane notes that the NDP did make a number of “detailed [policy] commitments” in its platform, they did not feature prominently in its messaging.¹⁵⁵

In short, success in Canadian politics today seems to come from skill in defining a cleavage that allows a party to present itself as being opposed to its competitors in a way that voters will find attractive, and from emphasis on leadership. Election campaigns are not, political parties have concluded, opportunities for policy discussions. On the contrary, parties

¹⁴⁹ David McGrane, “Political Marketing and the NDP’s Historic Breakthrough” in Jon H Pammatt & Christopher Dornan, eds, *The Canadian Federal Election of 2011* (Toronto: Dundurn, 2011)77 at 82.

¹⁵⁰ *Ibid* (“[h]ire more doctors and nurses, strengthen your pension, kick-start job creation, help out your family budget, and fix Ottawa for good” at 82).

¹⁵¹ *Ibid* at 84 (for data on the content of English-language ads) and 87 (for French-language ads).

¹⁵² *Ibid* at 84.

¹⁵³ *Ibid* at 85.

¹⁵⁴ *Ibid* at 91.

¹⁵⁵ *Ibid*.

find it best either to avoid policy commitments or at most to relegate them to the periphery of their electoral messaging. Although the 2011 election illustrated this lesson starkly, it was only the latest example of a trend that seems set to continue into the future.

C. The Egalitarian Model and Audience Democracy

This model of the political process differs in important respects from that which underlies the egalitarian model of elections embodied in the *CEA* and endorsed by Canadian courts. The law reflects increasingly outdated assumptions about what the political process is like and is becoming a poor instrument for regulating that process.

First, as we have seen, underlying the egalitarian model of electoral regulation is a concern, overt or tacit, that the political process will be captured by the wealthy, acting as a social class, at the expense of the less well off. Such a concern is understandable when political allegiances are largely congruous with social classes and political competition opposes one class to another. It makes less sense, however, when, as is the case in the audience democracy, political cleavages—such as opinions as to the desirability of a strong government or a coalition, or an impression of “broken politics”—do not track class differences. The risk of domination of one class by another recedes, as the political process is no longer a competition between them.

Indeed, there is good reason to believe that, in Canada at least, it is not the affluent who are most affected by restrictions on third-party spending during electoral campaigns. After reviewing the reports filed by registered third parties with Elections Canada following the 2000, 2004, 2006, and 2008 elections, Colin Feasby noted

a dearth of corporations registered as third parties. ... Instead, third parties appear to be four types of individuals or organizations: (1) labour unions and trade/professional associations; (2) student associations; (3) activist groups (for example, environmental); and (4) groups promoting or opposing local candidates.¹⁵⁶

¹⁵⁶ Feasby, “Continuing Questions”, *supra* note 90 at 998 (“trade/professional associations” do not seem to be associations of corporations or employers). See also Robert G Boatright, “Interest Group Adaptations to Campaign Finance Reform in Canada and the United States” (2009) 42:1 *Can J Poli Sci* 17 at 27 (noting that “[u]nions are more likely to push money into the political system than are business groups or advocacy organizations, and labour clearly has the money and the incentive to engage in third-party advertising as well.”) For an explanation of why this is not surprising, see Richard A Epstein, “*Citizens United v FEC*: The Constitutional Right That Big Corporations Should Have But Do Not Want” (2011) 34: 1 *Harv JL & Pub Pol’y* 639 (arguing that corporations are not, in practical terms, free openly to step into the political arena, even if they

This trend seems to have continued at the 2011 election.¹⁵⁷

Events in provincial politics confirm this trend. For instance, one important court case involving a third-party advertiser arose in Québec, after a political party, Action Démocratique du Québec, attacked a trade union federation, the Fédération des travailleurs et travailleuses du Québec (FTQ), during the provincial election campaign of 2003. The FTQ sought to respond to the criticism by publishing a pamphlet, which it distributed to its members.¹⁵⁸ As a result, it was fined for violating the provisions of Québec's *Election Act* restricting third-party electoral expenses. The FTQ challenged the constitutionality of this legislation, but to no avail.¹⁵⁹ Similarly, in British Columbia, trade unions were the first to challenge restrictions on third-party spending during "pre-campaign periods".¹⁶⁰ Conversely, the absence of restrictions on third-party spending might favour organized labour and allow it to play a very important role in electoral campaigns, as Tom Flanagan has argued.¹⁶¹ Yet another case in point is the situation of Québec's student movement. Once the provincial election campaign of 2012 began, the student unions were prevented from making expenditures in support of its campaign against the government of Prem-

have the legal right to do so, because they are vulnerable to backlash by regulators and consumers in retaliation for taking a controversial position, while unions are able publicly to take a political stance, not being subject to the same kinds of risk).

¹⁵⁷ See Elections Canada, Report, "Third Party Election Advertising Reports for the 41st General Election" online: Elections Canada <www.elections.ca/content.aspx?section=fin&document=index&dir=thi/advert/tp41&lang=e>.

¹⁵⁸ See *Métallurgistes unis d'Amérique (FTQ), section locale 7649 c Québec (Directeur général des élections)*, 2011 QCCA 1043 at para 9, [2011] RJQ 1206 [*Métallurgistes*]. See also Andrea Woo, "Union appeals \$3.2-million advertising fine from Elections BC" *The Globe and Mail* (21 August 2012), online: <www.theglobeandmail.com/news/british-columbia/union-appeals-32-million-advertising-fine-from-elections-bc/article4492635/> (discussion of another case involving a union).

¹⁵⁹ See *Métallurgistes*, *supra* note 158 (rejecting the constitutional challenge). But see *CEA*, *supra* note 7, s 319(c) (which exempts materials distributed "directly by a person or a group to their members" from its definition of restricted "election advertising" and would presumably have applied if the same facts had occurred during a federal election campaign—unless the pamphlets were also distributed to non-members).

¹⁶⁰ See *BCTF*, *supra* note 14 (plaintiffs included the British Columbia Teachers' Federation, the Federation of Post-Secondary Educators of British Columbia, the British Columbia Division of the Canadian Union of Public Employees, and the British Columbia Nurses' Union).

¹⁶¹ Tom Flanagan, "Organized Labour Is Now a Super PAC", *The Globe and Mail* (16 July 2012) A11, online: <www.theglobeandmail.com/globe-debate/organized-labour-is-now-a-super-pac/article4415926/>.

ier Jean Charest in response to that government’s policy of raising university tuition fees.¹⁶²

To be sure, one could argue that trade unions and student organizations represent privileged minorities working to entrench the benefits they enjoy at society’s expense, and thus are actually precisely the sort of moneyed interests that restrictions on third-party spending were designed to hold at bay.¹⁶³ Whether or not one agrees with that assessment, it is true that groups and organizations, even of people who are not especially well off individually, are able, if they are large enough, to wield considerable resources. Nonetheless, it seems implausible to say that such associations are in danger of dominating the political process so as to stifle opposition. They are vocal participants in the public debate, but by no means the only ones.

The second way in which the egalitarian model of elections embodied in Canadian legislation is a poor fit with the contemporary reality of the political process concerns the shift in the focus of political competition away from policy proposals contained in party platforms. This shift means that parties, having become vehicles for promoting and supporting the personality of their leaders, have relinquished their role as supermarkets of ideas. Instead of being dominated by a few supermarkets, the marketplace of ideas is now open to, and indeed mostly the preserve of, a variety of boutique suppliers, such as think tanks, NGOs, and social movements. As Colin Feasby pointed out, “[t]hird parties help to set the public agenda and to define the parameters of debate in ways that mainstream political parties are often unwilling or unable to do.”¹⁶⁴ Political parties may not only prefer “to avoid raising certain issues,”¹⁶⁵ but are indeed disinclined to campaign on issues altogether, favouring campaigns based squarely on the personalities of their leaders (and on those of their opponents’ leaders). By preventing these suppliers from promoting their products during the key period of election campaigns, restrictions on third-party spending may deprive voters of important information to a much greater extent than in the past.

¹⁶² See generally Léonid Sirota, “Élections: les étudiants bâillonnés?”, *La Presse* (April 13, 2012), online: <www.lapresse.ca/debats/votre-opinion/201204/13/01-4515063-elections-les-etudiants-baillonnes.php> (predicting the limitation of the student movement’s spending if the provincial election was called); “Financement électoral : le DGE invite les étudiants à respecter la loi”, *Radio-Canada* (May 24, 2012), online: <www.radio-canada.ca/nouvelles/societe/2012/05/24/001-dge-greve-loi.shtml> (the DGE warning the student movement that it must respect election spending laws).

¹⁶³ This seems to be, for example, the position taken by Flanagan, *supra* note 161.

¹⁶⁴ Colin Feasby, “Issue Advocacy and Third Parties in the United Kingdom and Canada” (2003) 48:1 McGill LJ 11 at 21.

¹⁶⁵ *Ibid.*

Admittedly, there are no guarantees that alternative suppliers in the marketplace of ideas would in fact enter the marketplace during election campaigns, even if legally free to do so. Robert Boatright, for instance, has come to the conclusion that Canadian advocacy groups are not interested in intervening in election campaigns, finding not only that they tend not to engage in the sorts of activities prohibited by the *CEA*'s rules on third-party advertising,¹⁶⁶ but that “[m]ost advocacy groups have, in fact, sought to further remove themselves from partisan politics in the past two election cycles.”¹⁶⁷ Yet these findings seem to be contradicted by the willingness of trade unions to intervene at least in provincial politics. More importantly, the dearth of suppliers in a market for what seems, after all, a desirable product (namely, policy ideas proposed for the voters’ consideration at election time) is, if anything, a reason to look for ways to encourage suppliers to enter the market rather than to prevent them from doing so if or when they choose to.

In short, the intellectual foundations on which the current approach to the regulation of third-party participation in electoral debate rests have been shaken by the changes in the political process over the last four decades—that is to say, roughly since the enactment of the current election laws or their direct predecessors. We need to think again about our regulations to make sure that they fit the politics of today rather than those of the 1970s. Even if we conclude that the regulations now in place are in fact well suited to contemporary society, it is important that we develop more relevant justifications for them than those that made sense to John Rawls and Pierre Trudeau. In doing so, however, it is important to take stock of another new development, more recent than the changes in the political process described by Bernard Manin: the emergence, thanks to the Internet, of new ways in which ideas can be shared. By making it virtually free to communicate ideas to vast numbers of people, the Internet is bound further to upset the rules surrounding third-party involvement in elections.

V. The Separation of Spending and Speech

Until quite recently, a person who wanted to share a message, political or otherwise, with any substantial number of people had to incur considerable expense to do so. For example, in *Harper*, the majority took the view that “a lack of means, not legislative restrictions,” is the reason “the vast majority of Canadian citizens”¹⁶⁸ cannot reach the spending amounts

¹⁶⁶ Boatright, *supra* note 156 at 34.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Harper*, *supra* note 17 at para 113.

which, as the dissent pointed out, were not even sufficient “to effectively communicate through the national media.”¹⁶⁹ Insofar as this statement is taken to describe only the position of individuals acting alone, rather than that of individuals pooling their resources together with those of others (by means, for example, of a trade union), it is no doubt correct—although this qualification is an extremely important one.¹⁷⁰

To be sure, there were always some exceptions to this rule. Perhaps most importantly, the *CEA* exempts from its definition of “election advertising” “the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news.”¹⁷¹ Accordingly, those endowed with enough notoriety, rhetorical talent, good luck, or some combination of the three, might count on having their views publicized, free of charge and thus of the *CEA*’s constraints, by the news media, whether as part of news stories (reporting a politician’s statement, for example) or as op-eds.

Not everyone will have this opportunity, however. The problem might be especially acute in local settings (such as small-town municipal elections—which, of course, would be regulated by provincial rather than federal legislation—or riding-level election campaigns), where there might not be enough media interest to give everyone a chance to express his or her views in this way.¹⁷² But more generally, it is much easier for already well-known persons and groups—and above all politicians and political parties—to have their views reported or published by the news media. For outsiders especially, to engage in effective political speech means spending their own money.¹⁷³

New technologies, notably social media, are changing this, by allowing anyone to reach potentially unlimited numbers of readers, listeners, or viewers without having to pay for the transmission of one’s message. Platforms such as Twitter, Facebook, and YouTube, as well as various podcasting and blogging services—what is often called Web 2.0—let users post

¹⁶⁹ *Ibid* at para 4.

¹⁷⁰ See *supra* notes 158–162 and accompanying text.

¹⁷¹ *CEA*, *supra* note 7, s 319(a).

¹⁷² See e.g. *Québec (Directeur général des élections) c Piché*, 2011 QCCA 477 (CanLII) (overturning the acquittal of a person whose letter to the editor of a regional weekly newspaper was rejected for publication in the letters section and who, desiring it to appear in print in time for a municipal election campaign, paid to have it published as an advertisement).

¹⁷³ Boatright, *supra* note 156 at 34. Boatright suggests that some advocacy groups may try to combine these two approaches, buying some advertisements in order to attract the attention of the media rather than to persuade the (relatively few) people who will actually see them.

and share content, giving others access to it, without charge. Such messages can potentially reach hundreds of thousands, even millions of people. And Canadians are among the most avid users of social media.¹⁷⁴ Of course, as with the traditional media, prior notoriety and a talent for communicating one's ideas will help. But there is no institutionalized gatekeeper between the person or group seeking to transmit a message and the intended audience, with a limited space to offer to third parties and an incentive to offer it to established interests, whose views are more likely than outsiders' to be of interest to the public. A tweet, Facebook post, or YouTube video posted by anyone can go viral, spreading by word of mouth or click of mouse, between family members, colleagues, friends, or followers. Even as these platforms allow for new forms of communication between political parties—and especially their leaders—and citizens, they open up political discourse to new voices that would formerly have remained on its margins.

Indeed, there is a difference, perhaps even a conflict, in the ways parties and other members of civil society see the potential of Web 2.0. As Francoli and her co-authors note, “established political parties” prefer to use social media “not to generate deliberative discourse, but as tools to command and control the conversations that affect and involve them.”¹⁷⁵ For others, however, the potential of Web 2.0 is to “enable individuals to be more than just passive recipients of content produced for a mass audience. [Social media platforms] also allow them to produce, share, and distribute their ideas with others.”¹⁷⁶ Whether, or to what extent, this potential will be realized remains to be seen. During the 2011 campaign, active participants in the online conversation may have been few, and many of them may have already been “committed partisans”.¹⁷⁷ Yet it seems safe to say that their number and diversity will grow. In Web 2.0 terms, the 2011 election belongs to an already distant past.

The *CEA* only provides for a limited recognition of the role the Internet can play in pre-electoral discussion by exempting “the transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views.”¹⁷⁸ This exemption is quite narrow. For instance, it only applies to “individuals,” not to groups or corporations, even though the *CEA*'s provisions on third-party advertising apply equally to individuals, corporations, and groups.

¹⁷⁴ See e.g. Francoli, Greenberg & Waddell, *supra* note 133 at 232–34 for some statistics.

¹⁷⁵ *Ibid* at 237.

¹⁷⁶ *Ibid* at 239.

¹⁷⁷ *Ibid* at 241.

¹⁷⁸ *CEA*, *supra* note 7, s 319(d).

Yet acknowledged or not, the possibility for third parties, individuals and groups, to take part in pre-electoral public debate on the Internet, especially on social media, at little or no cost is an important change relative to even the recent past. In a break with to the “spending-to-speak”¹⁷⁹ reality created by the business model of traditional media, in which the high cost of publication meant that the authors of most messages not produced by the media companies themselves had to pay to have their messages published, the Internet and social media allow for at least a partial separation of spending and speech. Lack of financial resources is no longer an insuperable obstacle to citizens, NGOs, or social movements seeking to inject their views in election campaigns. All they need is a free Facebook page or Twitter account—and a message that will catch on.

The separation of spending and speech upends the *CEA*’s scheme of regulation of pre-electoral speech, which is grounded in the spending-to-speak reality that existed at the time of its enactment. So long as the premise that one must spend in order to speak held, a limit on electoral spending was a limit on electoral speech. Limiting spending, and therefore speech, by third parties had two effects. On the one hand, it helped limit the influence of money on elections, and thus was a part of the “egalitarian model” of elections favoured by Parliament and the Supreme Court. On the other hand, it helped guarantee that political parties, which were allowed to spend substantially more than third parties, had pride of place in the electoral process; that they were the main, if not the only, players on the level field created by the limitation of the role of money in electoral campaigns. Both of these effects, I argued in previous parts of this article, were desired by the framers and defenders of the *CEA* and similar regulations. The separation of spending and speech means that the *CEA* can only achieve the first of the *CEA*’s proponents’ purposes, but not the second. Controlling money and levelling the field is no longer sufficient to exclude citizens and groups who wish to play on it, among but not along with the political parties and their candidates, because these citizens and groups can make their voices heard online.

VI. The Future of Third-Party Participation

The current framework of regulation of third-party participation in electoral debate in Canada is intellectually outdated. It rests on assumptions about the political process and about the business and technology of communications that no longer hold true. The “egalitarian model” which, although by no means incontestable, was at least a rational response to the conditions of politics of forty years ago, and of communications as re-

¹⁷⁹ *Geddis, supra* note 15 at 438.

cently perhaps as five, certainly ten years ago, is no longer adequate in 2015. How, then, should third-party participation be regulated in the future?

In order to answer this question, it is necessary to ask ourselves which, if any, of the current framework's objectives are still worth pursuing, keeping in mind that their pursuit entails, as the Supreme Court recognized in both *Libman* and *Harper*, limitations on citizens' freedom of expression. The *CEA*'s framework seeks to accomplish two things: first, it tries to guarantee that political parties will enjoy a dominant position in pre-electoral debate; second, it limits the role of money in that debate. In my view, it is no longer worthwhile to pursue the first of these purposes. The case of the second is more complicated.

In the "audience democracy" described in Part IV, privileging political parties' voices at the expense of those of citizens, organizations, groups, and social movements can no longer be justified, if it ever was. In comparison with the "party democracy" model of political process, in which these privileges originated, their deleterious effects are much worse, and salutary ones much smaller.

The cost of curtailing the pre-electoral expression of third parties is now higher than before because the political parties are retreating from the field of detailed policy proposals, and third parties are filling the void. Curtailing third parties' expression thus deprives voters of more—and more valuable—information than it might have in the past. In addition, because more people now choose to involve themselves in public affairs through third parties such as NGOs and social movements, and fewer through political parties, more citizens find their (collective) voices silenced in the crucial pre-electoral period.

Crucially, the development of new communications technologies and the resulting separation of spending and speech would make it necessary to suppress more speech than in the past in order to ensure the centrality of political parties in pre-election debates. Not only paid advertisements, but also the practically costless speech of social media users and bloggers would need to be regulated and curtailed in order to achieve this objective.

At the same time, due again to the changes in the political parties' role that result from the shift from "party" to "audience democracy," it is much less clear now what advantages this curtailment might have. Instead of allowing the voters to focus on the parties' platforms, it leaves them focusing on campaigns about the personalities of party leaders. Instead of pondering the advantages and disadvantages of policy proposals, it lets them divide on short-term issues that are manufactured by political parties for the purposes of a single general election and then discarded. There accordingly seems to be no reason for electoral law to attempt to maintain the political parties' privileged position in public debate.

On the other hand, these recent social and technological changes need not be seen as entirely undermining the case for limiting the impact of money on pre-electoral debate. To be sure, to the extent that political parties no longer reflect stable class divisions, there is less danger of an imbalance of resources leading to the permanent domination of the political process by the well off, which so worried Rawls. Furthermore, the argument that the limitation of third parties’ expenses is necessary to preserve the fairness of the electoral competition between political parties is weakened by the separation of spending and speech. As a result, it is increasingly possible for third parties to actively campaign for or against one side of that competition, possibly throwing into imbalance, without incurring any expenses.

There remains, however, at least one powerful argument in favour of curbing the role of money in politics—that based on the importance of avoiding improper links between moneyed interests and political parties. Indeed, this issue is arguably all the more pressing if it is indeed the case that moneyed interests, individual and collective, are to be found on all sides of the political competition. If this is true, all parties are vulnerable to improper influence and even capture by their individually or collectively wealthy supporters. Furthermore, so long as campaign spending by parties remains so constrained, limits—and fairly low limits at that—on the spending of third parties may be reasonably regarded as necessary to prevent third parties from acting as the political parties’ proxies, spreading their message without being subject to the parties’ spending limits.

Campaigning online, however, does not raise the same concerns. It is open to the well off as well as to others, of course, but insofar as online communication is (practically) free, financial resources will not assist those who possess them in spreading their message. Nor is circumvention of limitations on the political parties’ ability to campaign an issue in this context, since there are no such limitations online.

Of course, it can be argued that the importance of the freedom of expression outweighs both fairness and concerns over the propriety of relationships between politicians and those who expend money on political campaigns.¹⁸⁰ However, this objection does not gain strength in the “audience democracy” relative to the “party democracy,” so I will put it to one side. If we think that limiting money’s role in politics generally, and of third-party spending specifically, was a valid objective of electoral regulation under “party democracy,” we have reason to believe that it remains a

¹⁸⁰ This, in effect, is the view of a majority of the Supreme Court of the United States (see *Citizens United v Federal Election Commission*, 558 US 310, 130 S Ct 876 (2010)).

valid objective under “audience democracy,” though the case for it might not be quite as strong.

Thus, the regulation of third-party participation in electoral debate ought not to favour political parties at the expense of other participants in that debate, but can still aim at limiting the role of money in the political process. What then should it look like?

The answer, perhaps paradoxically, given the extent of the changes that have taken place since the “egalitarian model of elections” was conceived and even since the *CEA* was enacted, is that it may well look much like the *CEA*’s current framework. Ten, even five, years ago the answer would not have been the same, because the extent to which the *CEA* privileged political parties was unjustifiable in the “audience democracy.” However, the separation of spending and speech is now working to counteract this ill-effect by allowing voices other than those of the political parties to be heard in pre-electoral debate, despite the financial disadvantage at which they find themselves because of the *CEA*’s rules on third-party spending. The salutary effects of the separation of spending and speech being likely only to increase in the future, political parties are bound to lose their unwarranted privileges without the need for legislative intervention.

Indeed, the danger now consists precisely in intervention intended to restore political parties to the privileged position they are losing as a result of the separation of spending and speech. Parties’ control of the law-making machinery, and their interest in excluding competitors and critics from pre-electoral debate, a time at which they are the most vulnerable to criticism, mean that “likelihood of distortion of election laws by self-interested parties seeking to remain in office”¹⁸¹ which, as Michael Pal recently stressed, is a general feature of the Canadian law of democracy, is a real danger here. One hopes that the practical difficulty, or at least the cost, of policing Internet speech, especially on social media, will act as a deterrent to any attempt at such manipulation of the pre-electoral debate. However, should legislatures succumb to the temptation, courts ought, as Pal urges, to set aside the deferential approach they have tended to adopt in law of democracy cases, and step in so as to prevent the self-interest of political parties masquerading as a genuine concern of a time in fact long-gone from influencing the rules that define pre-electoral debate in the twenty-first century.

That said, two limited changes to the *CEA* rules on third-party participation are in order. First, the spending limits set out in section 350 of the

¹⁸¹ Pal, *supra* note 94 at 302.

CEA ought to be raised. As the dissenters in *Harper* pointed out, the national limit in subsection 350(1) is not even sufficient to pay “for a one-time full-page advertisement in major Canadian newspapers,”¹⁸² and “puts effective radio and television communication within constituencies or throughout the country beyond the reach of ‘third party’ citizens.”¹⁸³ Even without calling into question the principle of a limitation of third-party expenses to amounts considerably lower than those of political parties, these limits ought to be reviewed so as to allow third parties to make their position known throughout the country. As the Supreme Court recognized long ago, elections to Parliament are a national, not a local concern.¹⁸⁴ It must be possible for Canadians to debate the issues they raise on a national and not only a local scale, regardless of the willingness of political parties to do so.

Second, paragraph 319(*d*) of the *CEA*, which allows unlimited “transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views”¹⁸⁵ ought to be amended so as to apply to communications by groups and organizations. Its singling out of communications by individuals is the only such distinction in the third-party speech regulation scheme the *CEA* puts in place, and lacks an obvious justification. Subject to the financial limits which, as I have argued, can only be justified (if they can be at all) due to their potential to prevent the formation or appearance of improper links between politicians and third parties and by the necessity to prevent circumvention of spending limits applicable to political parties, individuals, groups, and organizations ought to be equally free to take part in pre-electoral debate. There is no reason why this principle would not be applicable online as well as to the more traditional forms of communication.

Conclusion

Parliament has put in place—and the Supreme Court of Canada has endorsed—stringent limits on the amount of money that so-called “third parties”—persons and groups other than political parties and candidates—can expend in order to take part in the pre-electoral debate. The Supreme Court and other proponents of these restrictions subscribe to an “egalitarian model” of elections, which seeks to ensure that electoral competition will take place on a level playing field. This means above all that

¹⁸² *Harper*, *supra* note 17, at para 4.

¹⁸³ *Ibid* at para 6.

¹⁸⁴ See *Re Alberta Statutes*, *supra* note 3 at 132–34, Duff CJ.

¹⁸⁵ *Supra* note 7.

electoral competition must not be influenced by money or be affected by disparities between the financial resources of the competing sides.

But this vision of electoral competition was grounded not only in timeless egalitarianism, if such a thing exists, but also in “party democracy”—a certain conception of electoral politics that regarded political parties as its central and appropriately dominant participants and “third parties” as marginal and insignificant. In fact, the limitation of third parties’ participation in pre-electoral debate served not only to further egalitarian objectives, but also to guarantee that political parties retained a privileged position in public debates during election campaigns. Yet in the decades since the egalitarian model of elections was conceived, “party democracy” has been replaced by a different form of politics, “audience democracy”, in which leaders and their personalities have taken the place of parties and their platforms as the focus of the electoral competition. The 2011 election provided a vivid illustration of this trend. From “supermarkets of ideas”, political parties have become vehicles used to deliver power to their leaders. Meanwhile, the role of suppliers of ideas has increasingly been taken on by “third parties”, such as think tanks, NGOs, and social movements.

In the last few years, another development has challenged the Canadian framework for the regulation of third parties’ participation in pre-electoral debate. The emergence of new technologies and business models enabled by the Internet has allowed a growing separation of spending and speech, meaning that it is no longer necessary to spend a significant amount of money in order to take one’s message to large audiences. Third parties (as well as political parties and candidates) are now able to use the Internet, and especially social media platforms, to communicate with voters at little or no cost.

The combined effect of these changes means that without changing the current rules on third-party spending a great deal, it is possible to achieve the objective of reducing the influence of money on the political process without conferring on political parties privileges which, although perhaps understandable under “party democracy”, are unwarranted in “audience democracy”.

Some readers will perhaps find the limited scope of the changes to Canadian electoral law I recommend disappointing, or question the interest of a paper that seems to conclude that the shift from “party” to “audience democracy” and the separation of spending and speech largely cancel each other out. Yet these phenomena are not insignificant. While their combined effect in the case of third party participation in electoral debate may be to make radical legislative reform unnecessary, it is important to understand how they interact to produce this effect. Without this understanding, the temptation to protect the dominance of political parties in electoral debate from being undermined by the advent of Web 2.0 may

lead to attempts to stifle online debates, which would be ill-advised in the era of audience democracy.

More broadly, these concurrent developments are among the factors that influence the incentives of politicians and parties that, in turn, help shape the law of Canadian democracy. An analysis of this law, whether scholarly, legislative, or judicial, which does not take these changes into account is likely to go astray and to yield conclusions disconnected from and inadequate to the reality of democracy in the Web 2.0 era. In other areas of the law of Canadian democracy, the impact of recent and ongoing social and technological changes on the assumptions underlying the regulatory schemes chosen by Parliament (and provincial legislatures) deserves careful study. The case of Parker Donham, accused of “showing” his marked ballot by photographing it and posting the picture on Twitter, is only the latest example.¹⁸⁶ This article could not explore this phenomenon beyond the realm of third-party participation in pre-electoral debate. It will have succeeded, however, if it starts the discussion.

¹⁸⁶ See Jane Taber, “Blogger threatens Charter challenge over ballot tweet controversy”, *The Globe and Mail* (17 January 2014), online <www.theglobeandmail.com/news/national/cape-breton-blogger-threatens-constitutional-challenge-over-ballot-tweet-controversy/article16385294/>. The law Mr. Donham is said to have contravened was Nova Scotia’s *Elections Act*, SNS 2011 c 5, para 301(b). The *CEA*’s paragraph 164(2)(b) is an equivalent provision.