
Regulating Impartiality: Electoral-Boundary Politics in the Administrative Arena

Ron Levy*

The author examines impartiality in cases of politically contentious decision making. Many jurisdictions delegate decisions over matters such as the establishment of fair election ground rules to independent bodies. Some of these bodies, including Canada's Federal Electoral Boundaries Commissions (FEBCs), attract widespread trust and are by most accounts substantially impartial. In contrast, commissions empanelled to draw electoral boundaries in the United States, and to a lesser extent in certain Canadian provinces, are often plagued by partisanship.

The author canvasses approaches to controlling partisanship, relying on a series of interviews conducted with boundaries commissioners and on interdisciplinary literature on trust and trustworthiness in governance. Commentators often favour bolstering formal constraints on FEBC discretion. However, the author concludes that traditional administrative-law models favouring such constraints are often inadequate. In politically sensitive cases these methods frequently catalyze partisanship. Proposals for more nuanced design—design sensitive to the complex interactions between law and administrative culture in cases where the potential for partisanship is high—are better but rarer. The author focuses in particular on the use of ambiguity in legal and institutional design. Although this approach is counterintuitive in light of rule-of-law assumptions favouring clarity, it has nevertheless gained traction in commentary and has long been at work in practice. The author argues that extensively ambiguous design, as displayed by the complex federal readjustment processes in Canada, has helped to develop the widely admired impartial decision-making cultures of the FEBCs.

L'auteur étudie l'impartialité dans le contexte de la réglementation démocratique, qui définit les règles de base de la gouvernance démocratique, et s'attarde spécifiquement à la redéfinition des frontières électorales. Certaines institutions, telles les commissions canadiennes de délimitation des circonscriptions électorales fédérales, bénéficient d'une confiance considérable du public et sont pour la plupart substantiellement impartiales. Au contraire, plusieurs modes de redéfinition des frontières électorales aux États-Unis, et dans une moindre mesure dans certaines provinces canadiennes, sont entachés de partisanerie.

S'appuyant sur une littérature interdisciplinaire traitant de la confiance et du mérite de la confiance dans la gouvernance, de même que sur des entrevues avec des commissaires canadiens à la délimitation des circonscriptions électorales fédérales, l'auteur étudie diverses approches visant à contrôler la partisanerie. Plusieurs commentateurs ont récemment insisté sur la nécessité de réformer les commissions canadiennes de délimitation des circonscriptions électorales fédérales en renforçant les contraintes formelles entourant leur pouvoir de discrétion. L'auteur leur répond en concluant que les modèles traditionnels de droit administratif permettant d'instaurer de telles contraintes formelles se révèlent souvent inadéquats.

En situation politiquement délicate, ces modèles catalysent fréquemment la partisanerie. Des propositions pour une approche plus nuancée—une approche sensible aux complexités des interactions entre le droit et les cultures de service civil, où le potentiel de partisanerie est élevé—s'avèrent supérieures, mais plus rares. L'auteur se penche en particulier sur le recours à l'ambiguïté dans la planification juridique et institutionnelle.

Bien que cette méthode soit surprenante et contre-intuitive à la lumière des assomptions de primauté du droit favorisant la clarté, elle a néanmoins gagné en importance dans la littérature et existe depuis longtemps en pratique. L'auteur avance que cette méthode fortement ambiguë a contribué à développer la culture décisionnelle impartiale et renommée des commissions canadiennes de délimitation des circonscriptions électorales fédérales.

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Introduction

May 2003 saw a bizarre political development out of Texas as Democratic state lawmakers boarded a plane to escape the jurisdiction. With a bill to redraw the state's federal congressional districts up for a vote in the Texas Legislature, Governor Rick Perry had ordered police to bring Democrats in to fill a quorum.¹ Partisan motivation behind the new Republican-sponsored electoral map was evident. The proposed boundaries concentrated Democratic voters inside relatively few districts. One revised congressional district, the Texas 25th, extended over a thin and ragged column from the city of Austin to the Mexican border five hundred kilometres south. The district united two regions with high concentrations of African Americans, who are known as dependable Democratic supporters.² In addition, coming only two years after the last boundary readjustment,³ the Texas gerrymander departed from the normal ten-year revision cycle, which is timed to follow the release of census data.⁴ In a final remarkable development, the readjustment plan's mastermind, the Republican leader of the United States House of Representatives, Tom DeLay, called on the Department of Homeland Security and other federal offices to track the progress of the Democratic jet as it passed into neighbouring Oklahoma.⁵ With the Texas plan's eventual passage, Republicans took five additional House seats in the 2004 election.⁶

A coherent historical narrative of American political partisanship is difficult to trace. But the situation appears to date to the Republic's origins, with periods of relative quiescence and resurgence thereafter.⁷ The past two decades in particular have, according to most accounts, been characterized by personal attacks and polemical discourse.⁸ Commentators now often picture U.S. electoral politics as a

¹ Jeffrey Smith, "In Texas Feud, a Plane Tale of Intrigue: U.S. Role in GOP Hunt for Democratic Lawmakers Is Still Murky" *Washington Post* (7 June 2003) A1.

² See James T. Campbell, "Second Black Seat Tests Uneasy Coalition" *Houston Chronicle* (15 March 2004) A18.

³ The process of redrawing electoral boundaries goes by "readjustment" in Canada and "redistricting" in the United States; for simplicity, I will use only the former.

⁴ The Supreme Court of the United States recently invalidated selected parts of the plan, but ruled in favour of the practice of early boundary revision (*League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006) [*Perry*]).

⁵ Smith, *supra* note 1.

⁶ Linda Greenhouse, "Supreme Court to Hear Dispute on Redistricting" *New York Times* (13 December 2005) A1.

⁷ See Adam Cox, "Partisan Fairness and Redistricting Politics", Comment, (2004) 79 N.Y.U.L. Rev. 751 at 772-73; Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000) at 25, 31-47; Daniel Galvin & Colleen Shogan, "Presidential Politicization and Centralization across the Modern-Traditional Divide" (2004) 36 *Polity* 477.

⁸ See David E. Lewis, "Presidents and the Politicization of the United States Federal Government, 1988-2004" (Paper presented at the 2005 Annual Meeting of the American Political Science Association, Washington, DC) [unpublished], online: Dartmouth College Department of Government <<http://www.dartmouth.edu/~govt/docs/Lewis.pdf>>.

bruising marketplace of political rhetoric led by image framers and computer-modelling professionals.⁹

To some, Canada presents a sharp contrast. Much of the history of Canadian politics, including the striking partisanship of the country's first decades, belies any simple comparison.¹⁰ Nevertheless, Peter Hogg's recent claim that Canada's political culture is characterized by "civility and moderation" plausibly describes late twentieth-century and early twenty-first-century Canadian politics.¹¹ What, then, has sent these two countries in sharply divergent directions in recent decades? In contrast with the present landscape in the United States, federal electoral-district readjustment in Canada takes place with little public contention and few suggestions of improper political motivation.¹² Organized by Elections Canada, ten sets of three commissioners—one set for each province—work mostly out of sight to redraw the boundaries of federal ridings after each decennial census.¹³ This obscure administrative process governs readjustment and enjoys a reputation for nonpartisanship when it is thought of at all.

⁹ See David Lublin & Michael McDonald, "Is It Time to Draw the Line? The Impact of Redistricting on Competition in State House Elections" (2006) 5 *Election L.J.* 144 at 154; Mark Monmonier, *Bushmanders and Bullwinkles: How Politicians Manipulate Electronic Maps and Census Data to Win Elections* (Chicago: University of Chicago Press, 2001); Samuel Issacharoff, "Gerrymandering and Political Cartels" (2002) 116 *Harv. L. Rev.* 593 at 624 [Issacharoff, "Gerrymandering"]; Gary C. Jacobson, "Partisan Polarization in Presidential Support: The Electoral Connection" (2003) 30 *Congress & the Presidency* 1.

¹⁰ See R. MacGregor Dawson, "The Gerrymander of 1882" (1935) 1 *Canadian Journal of Economics and Political Science* 197; Peter B. Waite, "Chartered Libertine? A Case Against Sir John Macdonald and Some Answers" (1975–76) 3:32 *Manitoba Historical Society Transactions*, online: Manitoba Historical Society <<http://www.mhs.mb.ca/docs/transactions/3/charteredlibertine.shtm?>>; Terence H. Qualter, *The Election Process in Canada* (Toronto: McGraw-Hill, 1970); W.E. Lyons, "Legislative Redistricting by Independent Commissions: Operationalizing the One Man-One Vote Doctrine in Canada" (1969) 1 *Polity* 428 at 432.

¹¹ Peter Hogg, "Opening Remarks to Ad Hoc Committee on Supreme Court Appointment" (27 February 2006), online: Department of Justice Canada <http://www.canadajustice.ca/en/dept/pub/scc/jud_interview.html>. Hogg may be right about the politics of such tasks as judicial selections and boundary readjustment. He presumably would distinguish these examples from others, such as debates on the floors of legislatures, where aggressive and uncivil conduct are inevitably "what comes of politics ... in a free society" (David Smith, "A Question of Trust: Parliamentary Democracy in Canada Today" (Distinguished Researcher Award Lecture, delivered at the University of Saskatchewan, 22 October 2003) at 4, online: University of Saskatchewan <http://www.usask.ca/research/about/distinguished_researcher_award/DistResAward.doc>).

¹² See John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (Montreal: McGill-Queen's University Press, 2001) at 8, but notice infrequent exceptions at 144–49; Christopher S. Elmendorf, "Representation Reinforcement Through Advisory Commissions: The Case of Election Law" (2005) 80 *N.Y.U.L. Rev.* 1366 at 1393; Jean-Pierre Kingsley, "The Administration of Canada's Independent, Non-Partisan Approach" (2004) 3 *Election L.J.* 406 at 406–07; Richard L. Hasen, "Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown" (2005) 62 *Wash. & Lee L. Rev.* 937 at 985.

¹³ *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-2, ss. 4–6 [EBRA].

This article will look at the problem of “democratic regulation”—the interpretation and application of the ground rules of political power in a democracy—and will turn its attention to Canada’s electoral-district readjustment regime in particular. Successes in the Canadian context are striking in light of the pronounced risk of partisan conflict. Electoral-district readjustment featured vigorous attempts to gerrymander for a full century before the advent of Canada’s Federal Electoral Boundaries Commissions (FEBCs).¹⁴ Overtly partisan decision making was thus previously the rule and remains so in the United States and, to a lesser extent, in some provinces with commissions of their own.¹⁵ In drawing electoral regions or defining other rules of politics, we encounter the risk of “entrenchment”. Lawmakers who control the rules of their own election can “chok[e] off the channels of political change”¹⁶ to remain in office against the “preferences of their constituents.”¹⁷ Democratic regulation therefore raises an acute challenge for institutional design: which systems of decision making will best safeguard impartiality despite the outsized incentives partisans face to manipulate procedures and lock in their own authority? The international and provincial comparisons suggest a significantly more complex set of factors at work than the bare presence of commissions or the presumptively mild Canadian political culture.

Canada’s approach of delegating readjustment to independent administrative bodies is a subject of rising interest in U.S. legal commentary. Some American scholars have looked for comparative insights from Canada, the United Kingdom, and Australia—all countries with independent democratic regulators widely viewed as impartial.¹⁸ Like other authors, I adopt a comparative perspective. However, I am not primarily interested in further lessons for reforming the U.S. regime of democratic regulation, but rather focus on what such comparisons recommend for the future of Canadian democratic regulation. I begin in broad agreement with Hogg. He appears right to characterize cultures of civility and moderation as among the foremost safeguards of impartiality in Canadian democratic regulation. However, how pervasive are these elements of Canada’s political culture? As the brief history outlined above suggests, the impartial readjustment system is a relatively recent—and perhaps tenuous—development. Indeed, a number of social scientists describe marked Canadian trends of intensifying political contest and declining public trust in

¹⁴ See Lyons, *supra* note 10 at 429.

¹⁵ See text accompanying notes 138, 139.

¹⁶ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980) at 103.

¹⁷ Michael J. Klarman, “Majoritarian Judicial Review: The Entrenchment Problem” (1997) 85 *Geo. L.J.* 491 at 498. See also Sam Hirsch, “The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting” (2003) 2 *Election L.J.* 179 at 179; Colin Feasby, “Freedom of Expression and the Law of the Democratic Process” (2005) 29 *Sup. Ct. L. Rev.* 237.

¹⁸ See Elmendorf, *supra* note 12 at 1386-1405; Hasen, *supra* note 12 at 945, 983-90.

institutions.¹⁹ Do informal norms of political culture then offer a reliable bulwark against partisanship? Will they continue to do so given the present atmosphere favouring reform of public administration in general²⁰ and readjustment bodies in particular?²¹ These risks take on additional relevance in light of Canadian reformers' inclination to compare and to borrow from the regulatory tools of Canada's very visible neighbour.²²

Responding to these concerns, this article will assess the use of administrative decision making to solve partisanship problems and will ask two main questions. First, many recommendations for the reform of readjustment draw on a model of formal legal "constraint"²³ on partisan behaviour, but is this approach adequate? Institutional and legal design based on a constraint model subjects decision makers to a host of processes and formal rules in order to limit discretion and the potential for its abuse. Oversight bodies therefore closely scrutinize decision making. Additionally, numerous clear rules lay out conditions for discretion's exercise. A question that remains wide open is how well traditional scholarship on administrative impartiality, most often rooted in constraint models, applies to democratic regulation. I will assert that the traditional scholarship must redirect itself in order to address the special problems raised by administrative bodies as democratic regulators. Proposals for more nuanced design—design sensitive to the complex interactions between law and administrative culture in the context of democratic regulation—are better but rarer.

¹⁹ David E. Smith, "A Question of Trust: Parliamentary Democracy and Canadian Society" (2004) 27 *Canadian Parliamentary Review* 24 at 24-27 (on more polemical Canadian electoral politics); Éric Bélanger & Richard Nadeau, "Political Trust and the Vote in Multiparty Elections: The Canadian Case" (2005) 44 *European Journal of Political Research* 121 at 121-25 (on declining Canadian political trust); Margaret Levi & Laura Stoker, "Political Trust and Trustworthiness" (2000) 3 *Annual Review of Political Science* 475 at 481-83 (citing global declines). Analysts show how trust and trustworthiness interdepend, the latter in part a consequence of the self-fulfilling effects of the former. See John Braithwaite, "Institutionalizing Distrust, Enculturating Trust," in Valerie Braithwaite & Margaret Levi, eds., *Trust and Governance* (New York: Russell Sage Foundation, 1998) 343 at 344-47.

²⁰ See e.g. Commission of Inquiry into the Sponsorship Program & Advertising Activities, *Restoring Accountability*, vols. 1-4 (Ottawa: Public Works and Government Services Canada, 2006) [*Restoring Accountability*]; "Harper Promises 'New Era of Accountability'" *CBC News* (1 February 2006), online: <http://www.cbc.ca/story/canada/national/2006/02/01/harper-gomery-060201.html> ["New Era"]; David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), c. 23.C; Donald J. Savoie, *Breaking the Bargain: Public Servants, Ministers and Parliament* (Toronto: University of Toronto Press, 2003).

²¹ See Part II, Section C.

²² Lorne Sossin, "Boldly Going Where No Law has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance" (2005) 42 *Osgoode Hall L.J.* 363 at 402-03 [Sossin, "Boldly Going"].

²³ This term appears across several areas of administration and democratic regulation. See e.g. Bruce Ackerman, "The New Separation of Powers" (2000) 113 *Harv. L. Rev.* 633 at 640 (advocating the creation of a "democracy branch" for democratic regulation); Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986) at 20 (on judicial review of administrative power generally).

Though primarily a work of administrative-law scholarship, this article will address a special case at the intersection of administrative law and political theory, with implications that remain underexamined despite their importance.²⁴ Impartial democratic regulation relies, I will assert, not only on formal constraint rules but also on informal norms of trust and trustworthiness in a decision-making culture.²⁵ “Impartiality”, which I will define in detail below, is an instance of trustworthiness.

A second question follows from the first. If informal norms are responsible for much of the work of political administration, then securing impartiality is particularly fraught. Such norms do not readily allow for direct legal manipulation. What, then, are our options for regulating the impartiality of democratic administrators? To address this question, I will begin with the work of Lawrence Lessig, who some years ago offered important additions to the tool kit of cultural regulation. Lessig discussed how lawmakers and institutional designers can shape informal norms to pursue discrete policy goals.²⁶ But a weakness in Lessig’s approach lies in the restricted set of contexts to which he found his own work applying—a set that seems to exclude problems as complex as those of impartiality and entrenchment. I will examine one particular method to which Lessig makes only tantalizingly cursory reference: the use of ambiguity in law.²⁷ In the rich and growing social-science literature on public trust and institutional trustworthiness, a subset of works describes types of institutions and law that have tended to promote trust and trustworthiness, and a number of contributors have begun examining the role of ambiguity. I will draw together these disparate contributions and outline how ambiguous institutional and legal design can be especially useful in the context of democratic regulation and entrenchment.

In this article, then, I will look to electoral-boundary readjustment in practice to suggest how ambiguity helps sustain impartiality in Canada’s federal readjustment commissions. To be sure, regulatory ambiguity is only one of several plausible explanations. However, this underexamined approach appears to have played a leading role in the successes of Canadian administrative readjustment. A decision-making culture characterized by substantial impartiality developed quickly after the commissions’ entry into the Canadian political landscape.²⁸ Readjustment thus serves as a rich setting in which to explore the regulation of impartiality—with cautionary American and provincial comparisons outlining the risks that attend often well-

²⁴ Elmendorf expresses surprise at a dearth of scholarship on this issue (*supra* note 12 at 1376).

²⁵ For the sake of simplicity, I will use “trust” and “trustworthiness” to stand in for several similar or related terms in the literature, such as “civility and moderation” and “social capital”. See generally Hogg, *supra* note 11; Jason Mazzone, “The Social Capital Argument for Federalism” (2001) 11 S. Cal. Interdisciplinary L.J. 27 at 57-58; Putnam, *supra* note 7 at 19 (“social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them”); Richard H. Pildes, “The Destruction of Social Capital Through Law” (1996) 144 U. Pa. L. Rev. 2055.

²⁶ Lawrence Lessig, “The Regulation of Social Meaning” (1995) 62 U. Chicago L. Rev. 943.

²⁷ *Ibid.* at 1015.

²⁸ See Lyons, *supra* note 10 at 458-59.

intentioned reforms. In one commissioner's words, the Canadian system's recognized impartiality is premised on "ambiguity" and on the "mythology ... of the neutral fair system."²⁹ But this state of affairs is "fragile" and "[t]he whole premise can fall apart pretty quickly."³⁰

The article will proceed as follows. Part I will provide an overview of readjustment procedures in the United States and Canada. Part II will critique the reliance on constraint that prevails in proposed reforms of electoral-boundary readjustment in recent years. The next two parts will then look more closely at the two national readjustment systems, examining how different institutional models impact impartiality. Part III will outline alternatives to constraint in institutional design, focusing in particular on ambiguity. Finally, Part IV will consider the limits of ambiguity approaches, detailing the range of cases in which these methods can improve the impartiality of democratic regulation.

I. Background: Two National Readjustment Systems

A. U.S. Readjustment

In the United States, systems for drawing electoral districts for the federal House of Representatives vary from state to state. State legislatures most often readjust federal boundaries through normal acts of legislation.³¹ However, some states give commissions control over readjustment. These commissions are often politicized: membership is usually split between commissioners affiliated with the United States' two main political parties, either equally or in proportion to the parties' legislative representation, and commissioners typically promote the interests of their party.³² A few apparently non-partisan state commissions offer intriguing exceptions.³³

There is federal administrative oversight of readjustment to the extent that the *Voting Rights Act* of 1965³⁴ gives a group of lawyers in the United States Justice Department the task of preclearing proposed electoral-rule changes.³⁵ The lawyers vet the changes, looking for deleterious impacts on the voting patterns of historically

²⁹ Interview of Ritu Khullar, Federal Electoral Boundaries Commissioner (Alberta) (28 September 2006) [unpublished, on file with author]. See also Interview of Ron Landes, Federal Electoral Boundaries Commissioner (Nova Scotia) (24 July–12 September 2006) [unpublished, on file with author]; Interview of David Smith, Federal Electoral Boundaries Commissioner (Saskatchewan) (9 August 2007) [unpublished, on file with author]; Interviews of four Federal Electoral Boundaries Commissioners preferring anonymity (2006–07) [unpublished, on file with author].

³⁰ Khullar, *ibid.*

³¹ See generally Michael P. McDonald, "A Comparative Analysis of Redistricting Institutions in the United States, 2001–02" (2004) 4 *State Politics and Policy Quarterly* 371.

³² *Ibid.*

³³ See *ibid.*

³⁴ 42 U.S.C. § 1973c (2000) [VRA].

³⁵ *Ibid.*, s. 5.

disadvantaged groups.³⁶ The preclearance process applies to nine states in their entirety, most of which are in the South, and to parts of seven more states scattered across the country.³⁷ Justice Department lawyers can approve the proposed changes or refer cases deemed suspect for final determination by the courts. Under a separate process of the *VRA*, litigants in all states can refer cases to the federal courts without Justice Department involvement.³⁸

Litigation occurs often.³⁹ The Supreme Court of the United States laid down new gerrymandering tests in every decade from the 1960s to the 2000s. Beginning with the establishment of justiciability⁴⁰ and the rule of one person, one vote,⁴¹ the court repeatedly augmented or replaced earlier rules. Newer rules have included a strict test for declining numbers of elected representatives from minority groups,⁴² a prohibition on any district “bizarre on its face”,⁴³ and a test for declining minority-group representation in light of the “totality of the circumstances”.⁴⁴ However, the case law and the power to enforce the *VRA* rest on the equality protections of the *Constitution*’s Fourteenth Amendment⁴⁵ rather than any wider-ranging guarantee of impartiality.⁴⁶

B. Canadian Readjustment

Canada has adopted a different set of legal solutions. At the federal level, the *Electoral Boundaries Readjustment Act*,⁴⁷ certain constitutional provisions,⁴⁸ a handful of court decisions,⁴⁹ and assorted customary rules⁵⁰ govern readjustment. An

³⁶ See *ibid.*

³⁷ 28 C.F.R. § 51, App. (2007).

³⁸ *Supra* note 34, s. 2.

³⁹ See Pamela S. Karlan, “The Fire Next Time: Reapportionment After the 2000 Census” (1998) 50 *Stan. L. Rev.* 731 at 762 [Karlan, “Fire”].

⁴⁰ *Baker v. Carr*, 369 U.S. 186 (1962).

⁴¹ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁴² *Beer v. United States*, 425 U.S. 130 at 208ff. (1976).

⁴³ *Shaw v. Reno*, 509 U.S. 630 at 644 (1993).

⁴⁴ *Georgia v. Ashcroft*, 539 U.S. 461 at 480 (2003).

⁴⁵ U.S. Const. amend. XIV.

⁴⁶ See Issacharoff, “Gerrymandering,” *supra* note 9 at 598, 600.

⁴⁷ *Supra* note 13.

⁴⁸ See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 8 (requiring a census of the population of Canada in 1871 and every ten years thereafter), s. 40 (setting out initial ridings at Confederation), s. 51 (requiring readjustment of House of Commons seat totals, and apportionment to the various provinces, following the decennial census; therefore implicitly mandating electoral map adjustment), s. 51A (requiring that every province have no fewer House of Commons seats than it has Senate seats), s. 52 (granting Parliament power to expand the total number of House of Commons seats), reprinted in *R.S.C. 1985, App. II, No. 5*.

⁴⁹ For a discussion of court decisions, see text accompanying note 143.

administrative body, Elections Canada, has jurisdiction over most electoral issues, from readjustment to the oversight of campaigns.⁵¹ The thirty members of the FEBCs do the work of readjustment across the country, guided at arm's length by Elections Canada. For every province there is one commission made up of three commissioners. The province's chief justice appoints a judge to chair the commission, while the Speaker of the House of Commons appoints the other two members from among the province's residents. Once constituted, each commission prepares proposals while drawing on Elections Canada resources. Notices invite public and parliamentary participation in open hearings after publication of the proposals. This period sees (a) the Speaker of the House of Commons table the proposed ridings in a committee of the House of Commons, (b) a thirty-day period of availability for review by MPs and the filing of objections, (c) a further thirty-day period of evidence collection and review by the committee, (d) the return of the proposal to the Chief Electoral Officer and thereafter the provincial commissions, and (e) a final thirty-day period during which the commissions render their final decisions independently of, but with attention to, Parliament and any public input that was received.⁵² At the conclusion of hearings commissioners usually modify their proposals. The commissions then enact the final boundaries by regulation.⁵³

While a handful of court decisions in Canada address boundary drawing, few spell out substantive criteria for readjustment.⁵⁴ The number of all readjustment cases is small in comparison with American litigation, even allowing for differences of size between the two countries. The leading Canadian case is the Supreme Court of Canada's *Reference Re Prov. Electoral Boundaries (Saskatchewan)*,⁵⁵ which considers the right to vote under Section 3 of the *Canadian Charter of Rights and Freedoms*⁵⁶ and outlines criteria for electoral-boundary drawing. Criteria include "geography, community history, community interests and minority representation",⁵⁷ as well as "practical considerations" like the difficulty of legislators in fulfilling their "ombudsman" problem-solving roles across vast northern ridings.⁵⁸ This "list is not closed,"⁵⁹ and the deeper set of values that govern the process include "effective

⁵⁰ See e.g. Louis Massicotte, *Establishing the Rules of the Game: Election Laws in Democracies* (Toronto: University of Toronto Press, 2004) at 97-98 (outlining customs such as joint selection of the chief electoral officer by all political parties).

⁵¹ *Canada Elections Act*, S.C. 2000, c. 9, ss. 13-21 [CEA]. The CEA creates the offices of the Chief Electoral Officer and his or her staff (*ibid.*). Much of the remainder of the CEA details their responsibilities.

⁵² *EBRA*, *supra* note 13, ss. 3-6, 14, 19-25.

⁵³ *Ibid.*, ss. 24-25.

⁵⁴ See text accompanying notes 141-43.

⁵⁵ [1991] 2 S.C.R. 158, (*sub nom. Reference re Electoral Boundaries Commission Act*) 81 D.L.R. (4th) 16 [Carter cited to S.C.R.].

⁵⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

⁵⁷ *Carter*, *supra* note 55 at 184.

⁵⁸ *Ibid.* at 187-88.

⁵⁹ *Ibid.* at 184.

representation,”⁶⁰ as well as “respect for the inherent dignity of the human person, commitment to social justice and equality, respect for cultural and group identity, and faith in social and political institutions that enhance the participation of individuals in society.”⁶¹ The *EBRA* lays out some similar substantive guidelines for federal readjustment. The “rules” to be followed include “the community of interest or community of identity in or the historical pattern of an electoral district in the province ... and a manageable geographic size for districts in sparsely populated, rural or northern regions of the province.”⁶² These rules are both general readjustment criteria and the criteria that govern departures from the statute’s one person, one vote default where the commission considers “such a departure necessary or desirable.”⁶³

C. Impartiality as the Goal of Readjustment

From these background notes, a distinction between the aims of each national system begins to emerge. Impartial judgment is a primary goal of electoral-boundary readjustment schemes in both Canada and the United States.⁶⁴ However, each country leans toward one of two separate notions of impartiality.⁶⁵ The first notion is one of “balance”. Impartiality in U.S. democratic regulation is most often understood as the product of finely tuned tensions, between the two pre-eminent political parties⁶⁶ or between contending social factions, especially white versus black or Latino.⁶⁷ An impartial decision is therefore generally an average or a compromise between opposing partisan groups. This generalization appears to hold true in most but not all states.⁶⁸

⁶⁰ *Ibid.* at 172.

⁶¹ *Ibid.* at 188.

⁶² *Supra* note 13 at s. 15(2)(a, b).

⁶³ *Ibid.* Except in exceptional circumstances, no district should range beyond plus or minus 25 per cent of the average size of all districts. Note that in practice in a given district, deviation from the average is the rule (Landes, *supra* note 29).

⁶⁴ Issacharoff notes that the gerrymandering doctrines elaborated by the Supreme Court of the United States, while premised on constitutional anti-discrimination doctrines, are driven by the Court’s broader but inchoate sense of the unfairness of entrenchment (Issacharoff, “Gerrymandering”, *supra* note 9 at 598, 600). Partisan entrenchment is an extreme example of partiality.

⁶⁵ This is a useful but simplifying dichotomy necessarily omitting other potential definitions.

⁶⁶ Often we see assertions such as that of O’Connor J. in her concurring opinion in *Davis v. Bandemer*: “There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves” (478 U.S. 109 at 152 (1986) [*Bandemer*]). Thus even when impartiality appears for the moment to have been abandoned in practice, the opposing party or electorate will perhaps even the score in time. The success of Democrats in the 2006 mid-term election offers some support for this perspective.

⁶⁷ See Issacharoff, “Gerrymandering”, *supra* note 9 at 598, 600.

⁶⁸ See generally McDonald, *supra* note 31. As I will show, impartiality as balance pervades most American scholarship on readjustment. However, readjustment in certain exceptional states is in practice more in line with the second notion of impartiality.

A second understanding of impartiality is more robust, if harder to conceptualize and put into practice. Impartiality according to this definition means a lack of attachment to or predisposition toward an interest, ideology or social or political faction.⁶⁹ In addition, impartiality in this sense is usually broader-ranging. It implies a lack of partiality not only along one or a few dimensions—such as Democratic and Republican—but along many. For example, Canada's FEBC process apparently avoids no particular form of partiality, but is rather geared toward decision making that is generally without favour—for example, to a given party, ideology, region, or ethnic or linguistic group.⁷⁰

The latter of the two notions is not only more robust, but perhaps also truer to what we usually mean in speaking of impartiality. One might question whether decisions emerging from highly polarized decision-making bodies—bodies where partial decision makers serve as mutual counterweights—are properly understood as impartial at all.⁷¹ In these cases, individual decision makers are certainly not conceived of as impartial, though their collective decisions sometimes are. The notion of a compromise between factions suggests a negotiated result. In contrast, the ideal of “broad” impartiality—and it is surely only an ideal⁷²—implies rational judgment, not arbitrary agreement between partial decision makers.⁷³ On the broader of the two notions, impartial decision making takes into account most of the relevant

⁶⁹ There are many formulations along these lines, citing impartiality as avoidance by decision makers of politics, policy, partisanship, and personal preference. See e.g. Hasen, *supra* note 12 at 979, 982; Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* (Oxford: Oxford University Press, 2006) at 8, 10 [Rosen, *Democratic Branch*]; Kenneth Kernaghan, “Political Rights and Political Impartiality: Finding the Balance Point” (1986) 29 *Canadian Public Administration* 639; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 82 D.L.R. (4th) 321; Lublin & McDonald, *supra* note 9 at 156. Note that “neutrality” often connotes something similar.

⁷⁰ This calls for some further explanation. The major point is that “broader-ranging” impartiality avoids favouring not one or two, but several or many social groupings. However, in Canada, regions and ethnic and linguistic groupings are in fact important in the decision-making process; as will be seen, they are often kept intact when electoral boundaries are drawn. But the regime gears toward preserving such groups generally, rather than favouring one group over others.

⁷¹ An example is the Supreme Court of the United States, whose members frequently organize into two camps separated by a wide ideological gulf (Frank I. Michelman, “Suspicion, or the New Prince” (2001) 68 *U. Chicago L. Rev.* 679 at 680 [Michelman, “Suspicion”]).

⁷² The FEBCs are inevitably imperfect. However, as discussed in this article, having chosen the more idealistic of two potential meanings of impartiality, Canada's FEBCs are substantially impartial in practice.

⁷³ In concrete terms, evenly divided partisan commissioners commonly draw boundaries that maintain the status quo in the legislature (e.g. 40 Democrats, 40 Republicans). See generally McDonald, *supra* note 31. Alternatively, a slight majority of one party on a commission can push through significant changes (now e.g. 45 Democrats, 35 Republicans). Such variability demonstrates how decision making by partisan balance can be arbitrary, in the sense that community history or other rational readjustment criteria play a reduced role.

perspectives and substantive factors bearing on an issue.⁷⁴ An ethic of broadly impartial decision making entails, at a minimum, that decision makers commit to hearing and rationally considering the full range of relevant facts and arguments. Unless otherwise indicated, I will use the broader meaning of impartiality from here on.

Neither of these definitions is uncontroversial.⁷⁵ However, they provide some context as we turn to the approaches Canada and the United States have adopted in efforts to ensure impartial readjustment.

II. Regulating Impartiality in Traditional Administrative Law

Administrative law and scholarship recognize several safeguards for impartiality. These safeguards appear substantially unaltered in much of the literature on readjustment administered by commissions. But as I will demonstrate in this part, the traditional safeguards are insensitive to or muddle the distinctive problems of administration in the context of democratic regulation.

A. Impartiality in Traditional Administrative Law

Administrative law and commentary commonly make reference to at least six impartiality safeguards. (1) *Transparency*. Open views of the decision-making processes of agencies, commissions, and the like are thought necessary for impartiality.⁷⁶ Abuses of power might be less likely under the light of scrutiny.⁷⁷ And revealing internal procedures can lead to more rational decision making.⁷⁸ (2) *Public Participation*. A right of members of the public with relevant interests to speak at hearings is understood in part as an impartiality safeguard. The contributions of individuals and groups from civil society can enhance the impartiality of procedures

⁷⁴ See Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42 McGill L.J. 91 at 107; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 47-48, 174 D.L.R. (4th) 193 [*Baker* cited to S.C.R.].

⁷⁵ Of the various kinds of partialities that broad impartiality, as noted above, might lack, ideology is the most difficult and contentious. On a basic level, ideology is unavoidable because laws express ideologies, as do the character and the constitution—in all senses of the word—of a state. However, impartiality means avoiding, in particular, narrow or rigid ideology. The primary ideology to which impartial decision makers should be committed is intellectual openness (Nedelsky, *ibid.*).

⁷⁶ See Keith Hawkins, “The Use of Legal Discretion: Perspectives from Law and Social Science” in Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) at 11; *Restoring Accountability*, *supra* note 20; *Baker*, *supra* note 74 at paras. 35-44; Mullan, *supra* note 20, c. 23.

⁷⁷ See *Northwestern Utilities Limited v. Edmonton (City of)*, [1979] 1 S.C.R. 684 at 706, 89 D.L.R. (3d) 161; *Baker*, *supra* note 74 at para. 38.

⁷⁸ See *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 at para. 38, 147 D.L.R. (4th) 93 (C.A.) [*Williams* cited to F.C.]; *Baker*, *ibid.* at para. 39; Mullan, *supra* note 20 at c.13.O.3.

by broadening the range of views available to decision makers.⁷⁹ Public participation also supports transparency.⁸⁰ (3) *Representativeness*. According to some views, decision makers should reflect in their own ranks the distribution of perspectives or identities in the society they serve. Broadly representative bodies accommodate interests beyond those of the mainstream or elites.⁸¹ (4) *Independence*. Impartiality is commonly understood as requiring administrators to decide in independent settings, without fear of sanction or other interference from influential partisans.⁸² In addition, the rule that no one should be a judge in their own cause disqualifies decision makers who have “an interest in [a] case through a social, economic, or political relationship with one of the parties to the dispute.”⁸³ (5) *Reconsideration and Review*. Recourse to further decision making by the same or different decision makers, allowing consideration of claims of bias or denial of other procedural guarantees, is a further impartiality safeguard.⁸⁴ (6) *Rational Organization, Simplicity, and Clarity*. The rules guiding administrative discretion should, a final argument goes, be rationally organized, simple, and clear; power should be centralized and coordinated and there should be a “framework of constraining principles”⁸⁵ at work. In contrast, relatively chaotic administration obscures the channels of, and responsibility for, decision-making. Clarity and coherence, cost-benefit analyses, and top-down control produce rational arrays of rules and accountable decision-making.⁸⁶

⁷⁹ Participatory rights—for example, rights to notice and an opportunity to respond—can ensure that decision makers hear from all affected individuals. In courts and some administrative tribunals, the natural justice rule of *audi alteram partem* requires, inter alia, on notice, an open hearing “before the decision-maker” (Hon. Hugh F. Landerkin, “Custody Disputes in the Provincial Court of Alberta: A New Judicial Dispute Resolution Model” (1997) 35 Alta. L. Rev. 627 at 654). See also Mullan, *ibid.* at 675; Frank I. Michelman, “Brennan and Democracy: The 1996-97 Brennan Center Symposium Lecture” (1998) 86 Cal. L. Rev. 399 at 423 [Michelman, “Brennan”].

⁸⁰ See Jean-Luc Bilodeau, “La participation des administrés à l’élaboration des normes de portée générale dans le cadre de la régulation du marché des valeurs mobilières” (1999) 33 R.J.T. 449 at para. 30.

⁸¹ See Elena Kagan, “Presidential Administration” (2001) 114 Harv. L. Rev. 2245 at 2264-66. Note that representativeness may conflict with independence and the rule of *nemo iudex in parte sua*.

⁸² See Lorne Sossin, “Speaking Truth to Power? The Search for Bureaucratic Independence in Canada” (2005) 55 U.T.L.J. 1 at 2, 6-15, 19-24 [Sossin, “Truth to Power”]; *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1980] S.C.R. 282 at 332-33, 68 D.L.R. (4th) 524.

⁸³ K.D. Ewing, “A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary” (2000) 38 Alta. L. Rev. 312 at 314 (on the rule of *nemo iudex in parte sua*). This is also a rule of administrative justice “commonly known as the rule against bias” (Landerkin, *supra* note 79 at 654).

⁸⁴ See Mullan, *supra* note 20 at 675.

⁸⁵ Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986) at 20. See also Kenneth C. Davis, *Administrative Law Text*, 3d ed. (St. Paul, Minn.: West, 1972) at 226.

⁸⁶ See Sossin, “Truth to Power”, *supra* note 82 at 2 (civil service “rules, principles and conventions” should be “more fully elaborated”); Richard H. Pildes & Cass R. Sunstein, “Reinventing the Regulatory State” (1995) 62 U. Chicago L. Rev. 1 at 8.

B. The Case of Democratic Regulation

The impartiality safeguards noted above, all based on a model of formal constraint of discretion, apply in a straightforward manner to much of the normal business of administrative regulation, such as standard making or adjudication on the environment, immigration and refugee claims, health, and much more. This changes when administrative decision makers are not just another set of organs elaborating and implementing the policies of government, but are regulators of government itself. It is important to consider exactly how thinking about impartiality should change when administrators serve in this way as branches of government; though we commonly call them governmental branches,⁸⁷ administrators fully assume this status only when they are integral units in a system of mutual regulation—capable of directing power and not merely receiving direction.⁸⁸ By regulating politics, administrators cease being discrete decision makers hived off from more senior power holders and instead share space at the peak of governmental hierarchy.⁸⁹

How, then, should the constellation of impartiality safeguards outlined above differ in the case of democratic regulation? As already noted, some observers view informal norms of trust and trustworthiness as the indispensable safeguards of impartiality in democratic regulation. Trust at its most basic level is an expectation of good conduct by decision makers.⁹⁰ The expectation can be held by an individual or in common by members of the public.⁹¹ Trust in the context of electoral-boundary readjustment is an expectation of impartiality, and impartial processes of democratic regulation are trustworthy processes.⁹² A useful resource in the design of impartial institutions is therefore the sizeable literature characterizing norms of trust and trustworthiness. Such norms are informal, richly complex, and widely varied. They are informal in the sense that no ceremony marks their creation or evolution, and nowhere are they set down in writing. The literature describes public trust in and trustworthiness of political institutions as taking the forms of rules, values, and

⁸⁷ See e.g. *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 598, 33 D.L.R. (4th) 174, 1 W.W.R. 577 [*Dolphin Delivery* cited to S.C.R.].

⁸⁸ This is similar to the dialectical power relations among the traditional branches: executive, legislative, and judicial.

⁸⁹ Though decision making entrusted to democratic regulators is ostensibly limited to boundary drawing or other discrete political rule making tasks, influence over electoral outcomes represents an open-ended power to steer general policy in certain directions. Administrative democratic regulators are perhaps weaker than other branches of government, given that the former exercise an indirect and intermittent power. However, the regulators' substantive influence is potentially broad at these intermittent junctures. Their influence also persists and is generally irreversible over several electoral cycles; on this temporal scale, their power surpasses that of legislatures, executives, and sometimes courts.

⁹⁰ See Karen Jones, "Trust as an Affective Attitude" (1996) 107 *Ethics* 4 at 5.

⁹¹ See Philip Pettit, "Republican Theory and Political Trust" in Braithwaite & Levi, *supra* note 19, 295 at 296-99.

⁹² See Tom Tyler, "Trust and Democratic Governance" in Braithwaite & Levi, *supra* note 19, 269 at 269-70. To be sure, there are several alternative definitions of trust that are relevant in other contexts.

symbols,⁹³ as well as social meanings⁹⁴ and agreements,⁹⁵ and social bonds, networks, organizations, and loyalties.⁹⁶ These norms help determine which forms of politics will gain public favour or disfavour: civil versus polemic; moderate versus extreme; impartial versus partisan.

Although their origins are obscure and their nature is diverse and intangible, norms of trust and trustworthiness may steer decision makers toward impartiality more powerfully than other kinds of rules. This suggestion appears implicitly but strongly in the Supreme Court of Canada's approach of hands-off judicial review in *Carter*,⁹⁷ the Court's last decision on boundary drawing and one that now largely belongs to a bygone era. Indeed, the notion that impartial democratic regulation primarily relies on trust and trustworthiness seems to be on the wane in Canada. Reforms increasingly fixate on the more tangible methods of regulating politics, especially those subjecting discretion to clear and rational arrays of rules. As I outline in Section C, most newer works on administrative approaches to readjustment feature the conventional raft of impartiality safeguards. Authors focus more on constraint tools such as transparency, accountability, and democratic scrutiny than on trust and trustworthiness.⁹⁸ The Canadian author Mark Carter has asserted a "need for a *Charter* jurisprudence" to elaborate rules for and "more clearly restrict" the management of legislative readjustment according to a "more consistent vision" that "promises to structure and place limits upon the scope of interpretive discretion."⁹⁹ The courts have generally not fulfilled his wish. However, as discussed below, in the years since *Carter*, courts have toyed with tightening the decision's loose "effective

⁹³ See Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge: Cambridge University Press, 1999) at 2.

⁹⁴ See *ibid.*; Lessig, *supra* note 26.

⁹⁵ See Daniel Fitzpatrick, "Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access" (2006) 115 Yale L.J. 996 at 1001, 1003.

⁹⁶ Trust and trustworthiness are, in a word, "polynormative" (*ibid.* at 1001). On the widely varied forms into which trust and trustworthiness solidify, see e.g. Levi & Stoker, *supra* note 19; Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Free Press, 1995) at 26; Putnam, *supra* note 7 at 19-22; Charles Tilly, *Trust and Rule* (Cambridge: Cambridge University Press, 2005) at 39. With some simplification, the rubric of "norms" captures these many forms.

⁹⁷ *Carter*, *supra* note 55 at 185 (adopting a flexible "effective representation" language and assuming fair readjustment by provincial riding redistribution commissions, even absent strict judicial oversight).

⁹⁸ See e.g. *Restoring Accountability*, *supra* note 20; "New Era", *supra* note 20; Mullan, *supra* note 20; Savoie, *supra* note 20; Sossin, "Boldly Going", *supra* note 22 (citing other works); Michael Ignatieff, *The Lesser Evil* (Princeton: Princeton University Press, 2004) at 51-52; Mark Carter, "Reconsidering the *Charter* and Electoral Boundaries" (1999) 22 Dal. L.J. 53 at 59-60, 71; Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Procedure and House Affairs*, vols. 1-4 (Ottawa: Public Works and Government Services Canada, 1995) [*Milliken Report*]; Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol. 1 (Ottawa: Supply and Services Canada, 1991), c. 7 [*Lortie Report*].

⁹⁹ Carter, *ibid.*

representation” standard. And a series of proposals and studies on readjustment have applied pressure for tighter constraints.

The main assumptions behind these efforts are twofold. First, administrators tasked with regulating politics will tend to hoard power for themselves or their allies. Second, these administrators must therefore be subject to limits on their authority. These assumptions should be uncontroversial at a basic level. And indeed they enjoy a celebrated pedigree: rooted in the liberal tradition, the constraint model has long informed the design of political institutions such as those of the United States, England, and Canada.¹⁰⁰ But the approach is problematic if we push it too far, and especially if it crowds out alternative approaches to regulation.

There are at least three reasons why constraint can be inadequate in the context of democratic regulation. First, focusing on constraint rather than trust and trustworthiness has often simply been futile. Three of the most compelling American critics of constraint tools in democratic regulation are Samuel Issacharoff, Pamela Karlan, and Gerald Rosenberg. Each shows that constraint approaches have not worked or will likely cease to work.¹⁰¹ Issacharoff and Karlan use the metaphor of hydraulics to evoke the tendency of electoral-campaign financing or partisanship, for example, to flow out of the formal legal channels that are designed as constraints.¹⁰² Issacharoff goes so far as to recommend against the renewal of the VRA’s Justice Department review provisions,¹⁰³ which had been set to expire in 2007.¹⁰⁴ In his view, the most serious exclusions of African Americans and other minority groups from political participation are now mostly at an end. Issacharoff therefore argues that the system of VRA scrutiny from above now only stunts the development of a mature

¹⁰⁰ For early literature on the two constraint assumptions see e.g. Alexander Hamilton, James Madison & John Jay, *The Federalist Papers*, ed. by Isaac Kramnick (London: Penguin, 1987), No. 48 (Madison) at 309 [*The Federalist*] (noting “the encroaching spirit of power”); *ibid.*, No. 47 (Madison) at 303. The Federalists were animated by a dark vision of the “nature of man” (*ibid.*, No. 10 (Madison) at 124). See also Thomas Hobbes, *De Cive or The Citizen* (New York: Appleton-Century-Crofts, 1949); David Hume, “Of the Independency of Parliament” in *Essays: Moral, Political and Literary* (London: Oxford University Press, 1963) 40. Even *Magna Carta* originally came with an oversight council of 25 barons (*Magna Carta*, 1215, c. 61, translation reprinted in J.C. Holt, *Magna Carta* (Cambridge: Cambridge University Press, 1965) at Appendix IV). See also, more recently, Ignatieff, *supra* note 98 at 52.

¹⁰¹ The authors use varying terminologies suggesting the notion of constraint. See e.g. Issacharoff, “Gerrymandering,” *supra* note 9 at 612 (advocating a “rescue” of U.S. doctrines on gerrymandering from “constricting language”).

¹⁰² Samuel Issacharoff & Pamela Karlan, “The Hydraulics of Campaign Finance Reform” (1999) 77 *Tex. L. Rev.* 1705 at 1713-15. See also David Butler & Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* (New York: Macmillan, 1992) at 149-50.

¹⁰³ VRA, *supra* note 34, s. 5.

¹⁰⁴ Congress renewed the VRA in 2006 (*Fannie Lou Hamer, Rosa Parks, and Loretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, Pub. L. No. 109-246, 120 Stat. 577).

Southern politics that transcends race.¹⁰⁵ For his part, Rosenberg collects a number of studies on judicial control of electoral-boundary readjustment that cover the period in the Warren Court era when readjustment became a justiciable issue and judges stepped forcefully into the field. Rosenberg concludes that there was at best a “spotty” record of actual reform.¹⁰⁶ Only some states experienced increases in legislator turnover and saw their assemblies undergo shifts in party distribution.¹⁰⁷ Most famously, some legislatures, stripped of the power to map out unequal districts, turned instead to gerrymandering within the new constraints imposed and enforced by the courts.¹⁰⁸

Constraint can be especially ineffective at governing democratic regulators, for whom entrenchment is a constant temptation. Entrenchment is a concern for boundary readjustment, campaign-financing regulation, constitutional amendment, judicial selections, and any other area where decision makers can both make and benefit from significant changes to procedural rules.¹⁰⁹ Additionally, impartiality in democratic regulation markedly defies clear definition,¹¹⁰ which is a requirement for any workable formal legal rule against partisanship in democratic regulation.

¹⁰⁵ See Samuel Issacharoff, “Is Section 5 of the Voting Rights Act a Victim of Its Own Success?” (2004) 104 *Colum. L. Rev.* 1710 at 1714 [Issacharoff, “Section 5”]. With the *VRA*’s early successes in enforcing African-American voting rights, new black voters became an easily identified population that was overwhelmingly Democratic, and race became a marker enabling party-based gerrymandering.

¹⁰⁶ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1993) at 298. The Supreme Court of the United States first found the readjustment issue to be justiciable, under selected conditions, in *Baker v. Carr* (*supra* note 40).

¹⁰⁷ See Rosenberg, *ibid.* at 296-303. See generally Richard G. Niemi & Laura R. Winsky, “The Persistence of Partisan Redistricting Effects in Congressional Elections in the 1970s and 1980s” (1992) 54 *Journal of Politics* 565 at 571.

¹⁰⁸ Rosenberg, *ibid.* at 301.

¹⁰⁹ Changes that are “significant” are those that are long-lasting, self-perpetuating, or otherwise important. Electoral-boundary manipulation is a good example of all three: it is long-lasting because readjustment normally occurs on a ten-year cycle; it is self-perpetuating because a political party elected with help from gerrymandered districts can be well positioned to continue manipulating boundaries; and it is important because general elections determine the policy directions of the state. Note also that some decisions benefit not the decision makers—at least not directly—but their political party.

¹¹⁰ See Peter Schuck, “The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics” (1987) 87 *Colum. L. Rev.* 1325 at 1345-48; Issacharoff, “Gerrymandering,” *supra* note 9 at 596, 602-05. Some rules constrain governmental abuse that is not political but rather personal, such as accepting bribes or taking government funds for personal use. See e.g. F.C. DeCoste, “Political Corruption, Judicial Selection, and the Rule of Law” (2000) 38 *Alta. L. Rev.* 654 at 672-73 (discussing personal versus public corruption). These forms of abuse are relatively easy to define, if not always crystal clear. But we are harder pressed to define the conduct that a constraint rule against political partisanship would disallow. A straightforward legal prohibition against partisanship can have some success: judges might easily spot the most egregious results of partisanship in decision making, such as the outline of the 25th congressional district of Texas. But most cases are harder cases. Courts in the United States at one time attempted to fashion direct rules against partisan gerrymandering, but

How does the problem of ineffective constraints apply to readjustment commissions? Authors proposing new commissions generally expect the bodies themselves to serve as constraints on governmental powers.¹¹¹ Like the constraints described by Issacharoff, Karlan, and Rosenberg, commission proposals place excessive faith in the ability of new decision-making organs to readjust electoral boundaries impartially.¹¹² Some authors recognize that new decision-making bodies face the same risks as the old, and that domination of commission membership by partisans may still occur.¹¹³ But examples below will suggest how reform projects favouring new readjustment bodies typically reflect faith in more, rather than better, procedure to thwart entrenchment and partisanship. Even authors who declare themselves wary of entrenchment on commissions make this error. I do not mean to overstate the tendency toward governmental abuse of discretion; indeed, my own focus on trust solutions to entrenchment problems suggests that the fear of such abuse in Canada is often overestimated. The point of the present criticism is that new decision-making branches per se do not secure impartiality or avoid entrenchment, notwithstanding the popularity of this assumption. To be sure, entrenchment in a system of more, rather than fewer, branches of government takes more effort, as it is harder to spread entrenchment across many branches. But perhaps equally, more branches also present more potential points of origin of entrenchment.¹¹⁴

have all but given up trying after almost two decades of effort. See *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769 (2004) [*Vieth*]. Not long before *Vieth*, the Supreme Court of the United States had ruled in *Bandemer* that the issue of partisan gerrymandering was justiciable (*supra* note 66). But the same court in *Vieth* considered ensuing efforts to define workable partisanship tests unsuccessful. Nevertheless, the court allowed that judges could keep trying.

¹¹¹ This point requires some clarification. Commissions inevitably “constrain” lawmakers by depriving the latter of powers to decide on the rules that govern, for example, their own elections. This is constraining or limiting a power, rather than eliminating or replacing it, because lawmakers typically retain some role in the process—appointing members, making submissions before commissions, or attempting to influence readjustment commissions.

¹¹² See e.g. Jeffrey Rosen, “Divided Suffrage” (1995) 12 Const. Commentary 199 [Rosen, “Divided”] at 201.

¹¹³ Elmendorf, *supra* note 12; McDonald, *supra* note 31 at 385-91. Note that “entrenchment”, defined above as the manipulation of rules by political insiders to avoid electoral defeat, is a matter of degree. In Canada and the United States, for all the risks that electoral-system manipulation poses, we are still far from outright domination of politics by a single party. The risk is rather one of significant mismatch between popular preferences and electoral outcomes, due to the conscious manipulation of political-process rules.

¹¹⁴ Domination of any single branch can spread to some or all of the other branches. In the recent history of the United States, we have seen much creeping entrenchment of this kind: from a majority Republican Senate, which confirmed conservative judges (based on the advice and consent power to vet judicial nominees); from the judiciary (and governorships) to the presidency (e.g., in the partisanship of the 2000 Florida presidential recount and the subsequent Supreme Court of the United States opinion); from the presidency to the judiciary (e.g., at the Supreme Court of the United States); and from the presidency and judiciary to the House of Representatives (e.g. in the increased partisanship of the Department of Justice and in a weakening gerrymandering jurisprudence, both of which give freer reign to Congressional district gerrymandering). These chains of influence represent

The second problem with constraint is that the approach is not only commonly ineffective, but can also diminish trust. Trust and trustworthiness in governance may be incompatible with law and procedure strongly symbolizing distrust and the inevitability of partisanship.¹¹⁵ Some legal constraints will always be necessary.¹¹⁶ But while governmental abuse is inevitable, the relevant question is how prevalent incidents of abuse are, and what therefore the nature and level of the response should be. On sober examination we should find that in fashioning constraints that are not sensitive to the degree of risk, we craft remedies that are worse than the risks themselves. This tendency appears to be strongest after revelations of significant abuses of governmental powers, as in the case of Canada's federal-unity sponsorship program of 1995–2003.¹¹⁷ Constraint solutions, taken too far, can assume away law's potential to produce impartial decisions.¹¹⁸ Examples in the next section will illustrate this point. In a system dominated by constraint and symbolizing distrust, there is little room for the complex and intangible norms of trust and trustworthiness that can sustain impartiality.¹¹⁹

Third and finally, the elaboration of new procedural rules based on the constraint model often steers political decision making and discourse away from substantive

the translation of even transient majorities—for example, in the Senate, courts or governorships—into majorities, in other branches, that resist easy reversal. See e.g. Jack M. Balkin & Sanford Levinson, “Understanding the Constitutional Revolution” (2001) 87 Va. L. Rev. 1045 at 1085-86. See also Rosen, *Democratic Branch*, *supra* note 69 at 4. Reversing a course toward entrenchment can require extraordinary shifts in popular party support, exceeding thresholds set artificially high by gerrymandered districts or other obstacles in election laws (Lublin & McDonald, *supra* note 9 at 156).

¹¹⁵ See Braithwaite, *supra* note 19 at 351.

¹¹⁶ Methods relying on constraint and trust in institutional design often coexist. For example, in *Carter*, the Supreme Court of Canada does not abandon all commitment to reviewing readjustment commissions for abuses of power, but rather commits only to giving the commissions considerable leeway (*supra* note 51).

¹¹⁷ This corruption scandal prompted changes in the regulation of the conduct of government. See *Restoring Accountability*, *supra* note 20. Another case is the now-defunct Special Prosecutor law passed in the United States after Watergate. During the Clinton administration, Congress allowed the law to quietly expire, having seen it bring a culture of scrutiny in U.S. government to regrettable extremes. Special Prosecutor Kenneth Starr's investigation of the so-called Whitewater affair set up the conditions for Clinton's unsuccessful impeachment—a high-water mark of partisan political combat in the United States. See 28 U.S.C. § 599; Mark Tushnet, “The New Constitutional Order and the Chastening of Constitutional Aspiration” (1999) 113 Harv. L. Rev. 29 at 59-61 (analyzing the impeachment and its partisan origins).

¹¹⁸ See Khullar, *supra* note 29 (“so long as people believe in the myth [of impartiality], and govern themselves accordingly, then the myth becomes a reality”).

¹¹⁹ Braithwaite claims that “[t]here are grave dangers in following the advice of Thomas Hobbes and David Hume and designing institutions that are fit for knaves, based on distrust. The trouble with institutions that assume that people ... will not be virtuous is that they destroy virtue” (*supra* note 19 at 351 [endnotes omitted]). Interestingly, Hume was also an early theorist of trust, viewing—like many modern writers—trust as facilitating complex forms of social and state action. In a culture where significant distrust prevails, we do not risk such undertakings (David Hume, *A Treatise on Human Nature*, ed. by David Fate Norton & Mary J. Norton (Oxford: Oxford University Press, 2000) at 189). See also Pildes, *supra* note 25.

considerations, such as the geography, community history, and minority-representation criteria for electoral-boundary readjustment. Instead, constraint engenders a fixation on process. New constraint rules are meant to limit the leeway for partisan decision making and entrenchment. But because political combatants, as noted, manage to steer around constraints, elaborating new rules of constraint often does little more than shift the locus of political battles. Conflict resumes under these new and often narrower procedural rules. Manipulating procedural constraints can then become a main focus of political energies.¹²⁰ This was starkly illustrated in the United States as President George W. Bush revealed his intentions to appoint ideological partisans to federal appellate courts in 2004–05. Once vacancies opened on these courts, partisan conflict on the matter began, centering first around the possibility of a vote on the Senate floor and moving quickly to the issue of minority filibustering. In response to the possibility of filibusters, Republican senators, who were in the majority at the time, threatened changes to Senate filibuster rules. However, a bipartisan “Gang of Fourteen” centrist senators then agreed to vote against changes to filibuster procedures except in “extraordinary circumstances”—thereby laying down a rule governing rules governing filibusters governing judicial appointments.¹²¹ Later the contest over judicial appointments edged toward a fifth layer of rule making, as debate turned to the boundaries of “extraordinary circumstances”.¹²² In debate among politicians and in broader public discourse, the appointments controversy now focused on this discrete procedural problem.¹²³

In this judicial-appointments episode, new rules merely replaced existing ones; new constraints did not stop, but rather shifted, battles over entrenchment. At each step the parties fought under the rule laid down most recently. While elaborating ever-more precise rules of constraint restricted the leeway for such battles, the process also narrowed and focused the resulting conflict. This pattern can introduce clarity to a process and thereby facilitate exploitation of the process. In such cases, the momentum of partisan conflicts over democratic regulation does not halt, but rather increases. The benefit of elaborating new constraint rules is often temporary at best: there is a chaos period, or a lag phase, during which parties adapt to shifting and still-uncertain rules. Impartiality might well thrive in this brief calm, but the drawbacks are considerable. Periods of lag and calm in the United States have declined as partisan efforts have been systematized and professionalized, escalating turnover rates for new rules that are then exploited and rendered obsolete.¹²⁴ This rapid turnover and the narrowing of battlegrounds for procedural dominance engender a focus on

¹²⁰ See e.g. Rosenberg, *supra* note 106 at 300; Issacharoff, “Section 5”, *supra* note 99.

¹²¹ Carl Hulse, “Compromise in the Senate: The Nominees; Many Republicans Are Already Eager to Challenge Agreement on Filibusters” *The New York Times* (25 May 2005) A18.

¹²² *Ibid.* This cycle ended with the takeover of the Senate by Democrats in 2006.

¹²³ See Charles Babington & Susan Schmidt, “Filibuster Deal Puts Democrats In a Bind” *Washington Post* (4 July 2005) A1.

¹²⁴ See Pamela Karlan, “The Rights to Vote: Some Pessimism About Formalism” (1993) 71 Tex. L. Rev. 1705 at 1726-37 [Karlan, “Rights to Vote”]; Hasen, *supra* note 12 at 949.

process.¹²⁵ These problems appear intractable: given a cycle of partisan rule making, legislators or judges seeking a way out most often turn to new rules of constraint. The hope is that a new rule will wrest decision making from the cycle.¹²⁶ In a partisan system, new rules frequently falter just like their predecessors. Nevertheless, we see the approach followed determinedly cycle after cycle.

As noted above, impartial decision making is receptive to the full spectrum of relevant substantive concerns. Impartial decision makers therefore decide without fixating on the rules of process. They are aware of and follow, but do not focus on or attempt to manipulate, the rules of procedure that govern their work. On the impartiality ideal, decision makers are attentive to appropriate substantive criteria rather than strongly conscious of process or focused on the downstream effects of their decisions on particular parties.¹²⁷ In the case of impartial boundary readjustment, decision makers would especially ignore the effects of their decisions on the performance of political parties in elections. However, regulating in favour of such ideal decision making presents a Catch-22: in aiming to reduce behaviour fixated on process, straightforward attempts to deploy new rules of process to constrain abuse—including new regulatory branches or the traditional safeguards of administrative impartiality—can be self-defeating by drawing further attention to process.¹²⁸ In order to prevent abuse of process, we must be subtler. A rule against process exploitation should appear natural, unconnected to any partisan camp, authored by no one in particular, and thus separate from or above normal politics.¹²⁹ Such rules would command adherence without opening further avenues for rule exploitation. As I will

¹²⁵ Part of the problem is that substantive argument becomes process's rhetorical proxy. As Karlan notes, groups battling for procedural dominance over decision-making systems invoke ostensibly impartial substantive reasons for rule changes. She predicts that "[j]ust as the political parties learned to use one person, one vote, the Voting Rights Act, and the Shaw principle [applying strict scrutiny to readjustment geared to increasing minority-representation] as 'stalking horses' for pursuing partisan ends, so too they will learn to use [the newer legal standards of] *Grove* and *Lawyer*" ("Fire", *supra* note 39 at 762).

¹²⁶ In the Senate judicial-appointments case, with each of five procedural manoeuvres, the parties did not appear to predict counter-attacks, such as that the threat of filibuster could provoke the so-called "nuclear option" of changing filibuster rules.

¹²⁷ See Lorraine Weinrib, "Appointing Judges to the Supreme Court of Canada in the Charter Era: A Study in Institutional Function and Design" in *Appointing Judges: Philosophy, Politics and Practice: Papers* (Toronto: Ontario Law Reform Commission, 1991) 109 at 132.

¹²⁸ See examples in Part IV.

¹²⁹ Roberto Mangabeira Unger has noted that even though such norms are of course human artefacts, they suggest origins in the "underlying natural order" (*Social Theory: Its Situation and Its Task* (Cambridge: Cambridge University Press, 1987) at 1). In Lessig's words, an informal norm does not appear "contingent or contested" but rather "feels natural" and is "accept[ed]" or "taken for granted" (*supra* note 26 at 958-59 [emphasis in original]). See also Harold Hongju Koh's remarks in Stephen J. Toope *et al.*, "Contemporary Conceptions of Customary International Law" (Panel discussion at the Annual Meeting of the American Society of International Law, Washington D.C., 2 April 1998), (1998) 92 *Am. Soc. Int'l L. Rev.* 37 at 38.

show further below, rules based on informal norms of political culture can have these features.

C. Traditional Administrative-Law Models and Democratic Regulation

In Part IV, I will consider democratic-regulation models that can foster informal norms of impartial decision making. But to close out the present part, I will first show that traditional administrative-law approaches based on the constraint model predominate in works on reforming electoral-boundary readjustment. Three main contributions present practical proposals backed by sustained theoretical accounts. These include two from American authors who are concerned with the polarized and dysfunctional state of politics in that country. Richard Hasen and Christopher Elmendorf provide thoughtful and creative solutions in the form of administrative bodies that are meant to address the entrenchment problem in readjustment. Hasen proposes a set of commissions reined in by elaborately articulated standards for impartial conduct. Elmendorf advocates the creation of an “advisory commission” whose lack of binding authority mitigates the risk of entrenchment. The Canadian author Mark Carter addresses commission oversight much more as a critic. From a position firmly rooted in the constraint model, he suggests a shift toward more searching judicial involvement. In addition, I will give attention to the popular advocacy of an American organization, Common Cause, whose membership is largely drawn from the academic community. I will also reference certain Canadian reports, studies, and comments, each of which, to some degree, promotes reform.¹³⁰ These various sources illustrate the intellectual dominance of constraint assumptions—though tentative gestures toward alternatives are made in Hasen and Elmendorf’s works.

In proposals for changes to administrative-readjustment procedures, we see the following familiar administrative-law safeguards:

(1) *Transparency*. Mark Carter criticizes the “room in which to hide” that remains for gerrymandering after the *Carter* decision’s loose standards of review of commission decision making.¹³¹ Additionally, a House of Commons committee report by former Speaker Peter Milliken advocates opening up the selection process for FEBC commissioners. Potential commissioners should, Milliken argues, nominate themselves for membership by applying to the Speaker of the House of Commons.¹³² And in another recommendation designed to keep influential partisans from exercising power behind closed doors, Common Cause proposes the creation of new state readjustment commissions whose members would “be prohibited from all ex-

¹³⁰ In addition to the sources cited in this section, several sources call in passing for commission solutions to readjustment problems. See Rosen, “Divided”, *supra* note 112; Klarman, *supra* note 17 at 529 (offering, briefly, one of the earliest proposals for an independent readjustment commission); Issacharoff, “Gerrymandering”, *supra* note 9 at 644.

¹³¹ Carter, *supra* note 98 at 58.

¹³² *Milliken Report*, *supra* note 98, vol. 3 at 33:17.

parte communications” with elected officials and lobbyists.¹³³ Commission hearings would also be publicized, and all records of debates and of information that is relied on would be widely distributed.¹³⁴

(2) *Public Participation*. Opportunities for public participation are key to Elmendorf’s approach.¹³⁵ They are similarly central to the Common Cause *Guidelines*, which call for public comments and questions. These recommendations view public participation as a means of scrutinizing and constraining discretion to avoid its abuse.¹³⁶

(3) *Representativeness*. Some approaches see impartiality safeguards split the composition of an agency between or among political parties, either in equal numbers or in proportion to their legislative representation. Representativeness of this kind is a common approach to political balance in the United States.¹³⁷ Some Canadian commissions charged with drawing ridings for the provincial legislatures employ party-representation techniques.¹³⁸ These bodies have sometimes run less smoothly than their federal counterpart; for example, members of one rancorous “bipartisan” commission in Alberta in the 1990s were unable to reach agreement over final boundaries.¹³⁹ Elmendorf suggests the creation of a readjustment commission for the United States that comprises an “ideologically representative cross section of the citizenry.”¹⁴⁰ He is also sympathetic to an approach mandating bipartisan membership.¹⁴¹ Similarly, Common Cause cites bipartisanship as a possibility.¹⁴² In these assorted recommendations, we see the often self-fulfilling assumption, described in the previous section, that individual decision makers will render partisan decisions, and that the process will feature procedural manoeuvring.¹⁴³

¹³³ Common Cause, *California Common Cause Redistricting Guidelines* (August 2005), s. 3 [Common Cause, *Guidelines*], online: Common Cause <<http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=366007>>.

¹³⁴ *Ibid.*

¹³⁵ *Supra* note 12 at 1376.

¹³⁶ *Supra* note 133, s. 3. An alternative rationale for public participation can be enhancing the democratic legitimacy of the process.

¹³⁷ State electoral commissions generally split representation evenly between the two parties or offer a numeric advantage to the state’s majority party (Hasen, *supra* note 12 at 974-76). In another example, the six commissioners of the Federal Elections Commission (in charge of implementing federal election rules, including campaign-finance legislation) include three Republicans and three Democrats. See e.g. Gerard Clark & Steven Lichtman, “The Finger in the Dike: Campaign Finance Regulation After McConnell” (2006) 39 *Suffolk U.L. Rev.* 629 at 656.

¹³⁸ Alberta, Newfoundland, Nova Scotia and Prince Edward Island have employed party-representation methods. See Courtney, *supra* note 12 at 107-10, 293.

¹³⁹ See *ibid.* at 111-12.

¹⁴⁰ *Supra* note 12 at 1407.

¹⁴¹ *Ibid.* at 1408-10.

¹⁴² See e.g. *supra* note 133, s. 1. See also John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (San Francisco: Encounter, 2004) at 147.

¹⁴³ See Hasen, *supra* note 12 at 989.

The Common Cause *Guidelines* also recommend more complex forms of representativeness, reflecting the “geographic, racial, ethnic, gender, and age diversity” of a jurisdiction.¹⁴⁴ We may read this benignly as a means of including otherwise marginalized perspectives, or alternatively as an expression of the constraint model, with representatives of various social factions meant to hold each other in mutual check and to battle out compromises.¹⁴⁵

(4) *Independence*. Most proposals, including those of Hasen,¹⁴⁶ Elmendorf¹⁴⁷ and Common Cause,¹⁴⁸ assume the necessity of commission independence. This position should be uncontroversial at a basic level. But in the context of regulating political power, independence safeguards face particularly acute troubles. American examples, such as most of the existing state readjustment commissions, demonstrate that partisans can almost always degrade independence by bypassing constraint safeguards.¹⁴⁹ The traditional legalistic formulae for administrative independence are less important to impartial outcomes than is a culture of trust and trustworthiness. Indeed, the separation of certain governmental powers is not a feature of some systems that have generally been successful in avoiding entrenchment. The Westminster model, which fuses the executive and legislature, is an example of this.¹⁵⁰

(5) *Reconsideration and Review*. Mark Carter’s proposals contemplate pervasive judicial involvement in the administrative readjustment process.¹⁵¹ In addition, the Common Cause *Guidelines* allow for “judicial review of plans” and reconsideration by the commissions.¹⁵² We have already seen that judicial involvement extends

¹⁴⁴ *Supra* note 133, s. 1.

¹⁴⁵ The latter suggests the weaker of the two conceptions of impartiality introduced above.

¹⁴⁶ *Supra* note 12 at 984.

¹⁴⁷ *Supra* note 12 at 1380, 1405-06, 1408, 1412-14.

¹⁴⁸ *Supra* note 133, s. 1.

¹⁴⁹ There are two general cases exemplifying this point. First, to bring greater independence to a process, we can create new bodies to carry out contentious tasks, such as electoral-boundary drawing. The problem then becomes how to appoint to the body independent-minded members rather than partisans. (This is a problem of the regress of partisanship from one point to another.) Second, a solution to the first problem is often thought to be bipartisan selections to the independent body. However, this solution generally produces bipartisan—rather than non-partisan—bodies, which as noted are often dysfunctional. To be sure, some multipartisan selection processes work well, such as Canada’s method of all-party parliamentary selection of the Chief Electoral Officer (see Massicotte, *supra* note 50 at 97-98). But the deciding factor here seems to be that the selection process is already characterized by broad trust and trustworthiness. This, then, brings us back to the problem with which we started—that the strongest safeguard against partisanship is a well-developed set of norms of trust and trustworthiness.

¹⁵⁰ See Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992) at para. 7.3(a). The Cabinet holding sway over Parliament can manipulate political rules and seek selective party benefit; while this has happened often in Canada, it has not produced long-term single-party entrenchment. See *supra* note 10.

¹⁵¹ *Supra* note 98.

¹⁵² *Supra* note 133, s. 5.

throughout readjustment in the United States. In Canada, some recent cases suggest an increasing judicial willingness to intervene. Recently in *Raïche v. Canada (A.G.)*,¹⁵³ the Federal Court of Canada subjected the work of the FEBC for New Brunswick to judicial review. The court applied a standard of simple reasonableness, having considered adopting the lower patent-reasonableness threshold.¹⁵⁴ At the same time, the case affirmed a substantively flexible approach; the FEBC's error, in the court's view, was in limiting itself to electoral-district population variations of no more than plus or minus 10 per cent—in contrast with the more generous plus-or-minus 25 per cent range in the governing legislation.¹⁵⁵ Other courts have affirmed the longstanding flexible framework of *Carter*. But as in *Raïche* their support is sometimes grudging or mixed; courts appear ready to step in more often to review readjustment, especially should the Supreme Court of Canada revisit *Carter*.¹⁵⁶

(6) *Rational Organization, Simplification, and Clarity*. Under this final heading, the key assumptions of each author become clearest. Does a plan place hope in the creation of a new administrative branch per se to solve the entrenchment risk, without sufficient regard to specifics? Does the plan treat impartiality as a value that is directly manipulable under a regime of ever more elaborate formal rules? Each of the surveyed proposals, being premised on a wariness of power and anticipating an attitude of mutual distrust among decision makers, ultimately calls for a constraint approach. Among these proposals there is general agreement that lines of exercise of power should be (a) simple, clear, and rationally organized, (b) centralized, coordinated and coherent, and (c) subject to cost-benefit analyses and top-down control.

That constraint appears in the various U.S. proposals might not be surprising, given the persistence of this model in the American intellectual tradition.¹⁵⁷ But Mark Carter's constraint proposals for Canada are the most extreme. In addition, John Courtney, the leading observer of Canadian readjustment, laments, more mildly to be sure, that Parliament and the courts can only do so much to offer "clarification" in "statutes and guidelines".¹⁵⁸ The *Milliken Report* and the report of an inquiry headed by Pierre Lortie both outline reforms to tighten controls on the boundary-drawing

¹⁵³ 2004 FC 679, [2005] 1 F.C.R. 93, 120 C.R.R. (2d) 133 [*Raïche*].

¹⁵⁴ *Ibid.* at paras. 54-65.

¹⁵⁵ *Ibid.* at paras. 67-72, 82; *EBRA*, *supra* note 13, s. 15(2)(b).

¹⁵⁶ Cases following the flexible standard include *City of Charlottetown v. Prince Edward Island* (1998), [1999] 168 Nfld. & P.E.I.R. 80, 168 D.L.R. (4th) 79 (P.E.I.S.C. (A.D.)); *East York (Borough of) v. Ontario* (1997), [1998] 36 O.R. (3d) 733, 45 C.R.R. (2d) 237 (C.A.); *Friends of Democracy v. Northwest Territories*, [1999] N.W.T.J. No. 28 (N.W.T.S.C. (A.D.)); *Reference Re Electoral Boundaries Commission Act (Alberta)* (1991), 120 A.R. 70, 86 D.L.R. (4th) 447 (C.A.) [*Boundaries Commission* cited to A.R.]. In *Boundaries Commission* in particular, the court appeared reluctant to apply the precedent (*ibid.* at 454).

¹⁵⁷ See *supra* note 100.

¹⁵⁸ Courtney, *supra* note 12 at 259. Courtney generally believes that the Canadian commissions merit trust in handling the "elusive and imprecise" standards that remain (*ibid.*).

process in Canada. Reforms would include narrower population-variance allowances and, most notably, more explicit definitions of standards such as “communities of interest”.¹⁵⁹ And in a recent study, Michael Pal and Sujit Choudhry echo these sentiments, criticizing the “lack of discipline imposed by the Charter [case law] on the drawing of electoral boundaries.”¹⁶⁰ The various works thus present a modest inversion. American authors are increasingly seeking alternative solutions. These authors look with frustration at the escalating dysfunction of their own national system, a development that presents cautionary lessons as the constraint model captures more Canadian imaginations. Hasen and Elmendorf’s solutions take tentative steps past rationalization and constraint. Their plans deserve serious consideration. But despite their intentions, neither author effects a complete break, and their remaining reliance on constraint gives reason to doubt the likely efficacy of their plans.

Within each proposal, then, a project of constraint predominates. As noted, Mark Carter believes there is a “need for a *Charter* jurisprudence” to elaborate rules for readjustment and “more clearly restrict[]” its management.¹⁶¹ The notion of a “more consistent vision” that “promises to structure and place limits upon the scope of interpretive discretion” is an example of rationalization and rule making elaborated to curtail ambiguity.¹⁶² Common Cause similarly employs the language of “clear process.”¹⁶³ But Hasen’s work provides the most prominent example, proposing rules tweaked toward perfection as a means of limiting discretion.¹⁶⁴ He recommends “[r]emoving the opportunity for partisan election officials to make discretionary decisions,”¹⁶⁵ in part by implementing “periodic election law audits,” thereby

¹⁵⁹ *Milliken Report*, *supra* note 98, vol. 3 at 33:25; *Lortie Report*, *supra* note 98 at 150, 157-58.

¹⁶⁰ Michael Pal & Sujit Choudhry, “Is Every Ballot Equal? Visible-Minority Vote Dilution in Canada” (2007) 13:1 *Choices* 1 at 14-16. The authors phrase this as a general fault in the *Charter* case law. But their primary concern is minority-vote dilution: the electoral votes of visible and other minorities concentrate within urban ridings, each of which encompasses more voters than does the average rural riding. I am sympathetic to their more particular critique. *Carter* justified rural–urban constituency size disparities primarily in light of MPs’ difficulties in serving physically vast rural ridings. However, I wonder whether, in the fifteen years since *Carter*, developments such as unprecedented advances in information technology now weaken this justification. Smaller urban–rural disparities therefore make sense generally. However, it remains important that FEBCs have the flexibility to draw boundaries in light of the many substantive considerations—such as the cohesive communities of *Raiche* (*supra* note 140)—that keep the commissions busy for up to two years of deliberations. Some of these considerations would necessarily become difficult to implement given narrower population variances.

¹⁶¹ *Carter*, *supra* note 98 at 59-60.

¹⁶² *Ibid.* at 71. Note that *Carter* addresses and ultimately rejects critiques of rights-based judicial oversight of readjustment. But he narrowly addresses and shoots down only the critical-legal-theory view that the “legal system operates so as to maintain unequal and oppressive social relations” (*ibid.* at 62).

¹⁶³ *Supra* note 133, s. 5.

¹⁶⁴ Hasen, *supra* note 12 at 944.

¹⁶⁵ *Ibid.* at 983.

progressively eliminating “potential ambiguities” from the law.¹⁶⁶ To Hasen, ambiguities are failures of vigilance, presenting decision makers with irresistible opportunities for partisanship and entrenchment. A reliance on the perfectability of formal law to control conduct animates his approach.

But Hasen himself acknowledges that his proposed set of legal constraints upon discretion would occasionally let partisan abuses slip past. He therefore offers a second, institutional solution: a readjustment commission for each state. Citing the track records of Canada and Australia, Hasen proposes to import their commission solutions.¹⁶⁷ It is, from the outset, an instance of faith in the self-evident wisdom or “common-sense”¹⁶⁸ of creating new institutions per se. However, to his credit, Hasen’s solution of a new administrative apparatus goes somewhat beyond the bare adoption of a new branch and into the specifics of design. Hasen even touches on the question of how trust develops in decision-making institutions. Here he offers his most compelling ideas—meant explicitly to “restore some public trust in the process of election administration.”¹⁶⁹

A first idea, and the weaker of two, looks much like his earlier formal-constraint proposal. He reasons that “the fundamental principles of neutral election administration are not subject to serious debate”;¹⁷⁰ by laying these out in law, it is possible to develop trust and trustworthiness within a new commission. But there are problems with this approach. Hasen proposes that trust be legislated by laying out in law the features of an ideal impartial decision maker. However, the familiar Catch-22 applies: because part of the challenge of impartiality is getting decision makers to fixate less on process, elaborating new process rules that call directly on decision makers to act impartially often falters, as we saw in the previous section.

Hasen seems aware of the difficulty of legislating impartiality. He therefore writes that laws should set out the features of trustworthy decision makers and not decision making: “[N]eutral election administration is easier to achieve than neutral redistricting principles.”¹⁷¹ But can we separate the decision maker’s impartiality from concrete meanings or manifestations of impartiality? How does a decision maker acting “as free from fraud as possible”¹⁷² approach a given boundary-drawing problem? These are not quibbles over the meanings of words that are indeterminate at their margins, but rather problems of basic terminological emptiness. Some parts of Hasen’s proposed checklist for impartial administrators are reasonable and workable.

¹⁶⁶ *Ibid.* One method is to “articulate a consensus set of election administration principles that nonpartisan administrators could apply” (*ibid.*). Note that with the language of limiting ambiguity here, Hasen advocates an approach almost explicitly opposite to the ambiguity methods proposed below.

¹⁶⁷ *Ibid.* at 945, 983-90.

¹⁶⁸ *Ibid.* at 974.

¹⁶⁹ *Ibid.* at 983.

¹⁷⁰ *Ibid.* at 988.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

For instance, he provides that a commissioner should not “co-chair a presidential committee.”¹⁷³ But most parts are problematic: what does it mean to say that administrators should not “do anything to favor one candidate, party, or issue”?¹⁷⁴ These are features not of impartial administrators, but impartial administration, and the routine slide from the former to the latter seems inevitable. Almost anything a decision maker does—drawing a black-majority township into or out of an electoral district, for example—favours one candidate, party, or issue. While Hasen therefore means to avoid defining impartial decision making in elaborate detail, being aware of the pitfalls of such efforts, his focus on impartial decision makers is not likely to be more effective.

A second trust-generating design feature is more elegant and more plausible, though still primarily intelligible as a form of constraint. Hasen proposes to select commissioners through 75 per cent super-majority votes in the state legislatures, thus effectively requiring support from both political parties.¹⁷⁵ The plan is a constraint proposal in that it assumes distrust between the parties and systematizes and reinforces the same. However, the proposal is also intended as trust-generating, conceivably installing non-partisan decision makers to begin rehabilitating the American readjustment system. Nevertheless, this part of Hasen’s plan also appears flawed. Legislators must divine in advance which selectees will act “above politics”¹⁷⁶—selecting perhaps for inoffensive but middling administrators. Other authors propose institutions that promote good decision making irrespective of the particular identities of the decision makers. On these approaches, the success of the system depends less on getting the selection process right at the outset. But the foremost problem with Hasen’s plan remains the formidable constraint presented by the super-majority requirement. The use of constraint mechanisms to build trust is a creative, if fraught, approach. Would kicking off a process with a method of member selection premised heavily on mutual party animus undercut the main subsequent aim of inculcating trust? Super-majority requirements potentially recast each individual legislator as a powerful swing voter—a formula for intensified politicization and gridlock.¹⁷⁷

Christopher Elmendorf’s alternative administrative solution to the problem of readjustment is an Advisory Commission (AC) that would draw new district maps and urge legislators to adopt them.¹⁷⁸ Elmendorf cites two key rationales for creating a body whose decisions are advisory rather than formally binding. First, the AC would need to work for its trust. Because advisory decisions can be ignored, the plan sets up

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.* at 984.

¹⁷⁶ *Ibid.*

¹⁷⁷ Individual dissenters can wield inordinate power to dictate terms by threatening to withhold votes. See John O. McGinnis & Michael B. Rappaport, “Supermajority Rules and the Judicial Confirmation Process” (2005) 26 *Cardozo L. Rev.* 543 at 550.

¹⁷⁸ Elmendorf, *supra* note 12 at 1371, 1380.

a “competition for authority” between the AC and legislators.¹⁷⁹ Like Hasen, Elmendorf explicitly means for this dynamic to engender trust. The AC would be “authorized to place its concerns on the legislature’s agenda or a referendum ballot, and positioned to compete with legislators for the voters’ trust.”¹⁸⁰ Elmendorf’s plan aims to build trust and trustworthiness as the competing authorities demonstrate that they are trustworthy: that they habitually issue impartial decisions apparently driven by appropriate substantive criteria for readjustment.¹⁸¹ A second reason for the AC’s advisory function is that if partisans nevertheless do assume control of the commission, the body’s non-binding decisions may safely be ignored.¹⁸²

The plan has a mark in its favour given its goal of pushing democratic regulation beyond constraint and toward trust solutions. However, apart from its advisory role, the AC’s structure is undistinguished and would likely still engender partisanship problems. The AC does little else to improve on the constraint model, placing too much faith in the solution of adopting a new decision-making body per se. We see some of this misplaced faith in Elmendorf’s proposal of bluntly combining trust and constraint approaches. He imagines trust developing in a milieu where constraint now strongly dominates. As we saw, the momentum of constraint can be difficult to halt. This momentum formalizes democratic regulation: constraints—formal, direct, explicit, and premised on distrust—breed more of the same. In American democratic regulation, we have thus seen processes increasingly centred around formal rules. These are rules whose authority is relatively clear: explicit agreements between political parties, enforceable legislation, regulation, and court judgments.¹⁸³ In such a formalizing process weaker informal norms of institutional culture are lost, along with their richness, subtlety, intermediacy, flexibility, and comparative efficacy. Effectively regulating informal norms of trust would mean adopting procedures in which trust is stable because it is not susceptible to the push and haul of politics and the constraint model. Decision making premised on trust and trustworthiness should remain largely separate from any constraint rules. How regulation can be designed in this way will be a major concern of Parts III and IV.

Looked at more concretely, there are two specific problems with Elmendorf’s AC. First, the AC is meant to enjoy trust and exert sway as a matter of subtle degree. The AC would be expected to bind in proportion to its demonstrated impartiality. But such a fine balance appears unlikely within a context of robust constraint. This

¹⁷⁹ *Ibid.* at 1382.

¹⁸⁰ *Ibid.* at 1371.

¹⁸¹ *Ibid.* at 1382-83.

¹⁸² *Ibid.* at 1436.

¹⁸³ A recent example was the United States Attorney General’s firing of eight leading federal prosecutors, apparently for their weak loyalty to the President and the Republican party. Responding to the scandal, the President stated that U.S. attorneys serve at his pleasure. See Michael Abramowitz, “Bush Asserts Increased Confidence in Gonzales” *Washington Post* (24 April 2007) A3. While perhaps true as a matter of formal law, the observation dramatically devalues the unwritten principle of prosecutorial impartiality.

particular hybrid of trust and distrust is likely to be unstable as trust norms yield to encroaching formal rules. A second concrete problem follows from a distinction between decisions meant for selective adoption and full adoption. Consider first a kind of commission that issues numerous recommendations from which legislators may pick and choose. Some such recommendations are impliedly optional, or are aspirational and await a time when governments can afford to adopt them. For example, the American 9/11 Commission proposed more changes to national-security procedures than can realistically be implemented.¹⁸⁴ Generally, advice subject to second-guessing defeats the purpose of trust in advice, except in the limited sense that the advice provides helpful information to guide other decision makers.¹⁸⁵ At the other extreme is a strong notion of trust: we may trust the whole decision and adopt all its parts. Given the potential for entrenchment in the democratic-regulation context, it is generally preferable for the whole of a decision to be binding.¹⁸⁶ It may often be reasonable for legislators to second-guess other kinds of administrative decisions, but selective trust poses special risks for democratic regulation. A process that subjects trust in democratic regulation to competition encourages legislators to challenge the very trust in commissions that can keep legislators from entrenching their own power.

Elmendorf predicts success for his plan by relying on foreign examples for empirical backing, noting that trust in democratic regulation has survived and flourished outside the United States.¹⁸⁷ However, in most of these cases regulators did not have to develop trust in an environment of robust formal constraint. Even if applied to contexts such as Canadian readjustment, where constraint has yet to become the regulatory tool of choice, Elmendorf's innovation would probably present an unstable marriage of trust and distrust. The plan presents a contradiction of concepts: trust is meant to emerge within an institution designed to "enhance ... political contestation,"¹⁸⁸ with powers counterpoised to prompt constraint, a struggle for dominance, and a hawkish mutual distrust between decision makers.¹⁸⁹

¹⁸⁴ U.S., *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (New York: W.W. Norton, 2004), cc. 12-13.

¹⁸⁵ See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 28-31 [Raz, *Morality*] (utterances may "provide information about the balance of reasons as they exist [in favour of a particular action] separately and independently of such utterances" at 29).

¹⁸⁶ A wholly binding AC would effectively not be advisory and would lack the asserted benefits of the latter.

¹⁸⁷ Elmendorf, *supra* note 12 at 1372, 1386-90 (referencing Australia, Canada, Germany, and the United Kingdom).

¹⁸⁸ *Ibid.* at 1371.

¹⁸⁹ See e.g. *ibid.* at 1383-84. Analysts generally characterize decision making based on trust as rational and cooperative, not combative. See e.g. Denise Scheberle, *Federalism and Environmental Policy: Trust and the Politics of Implementation*, 2d ed. (Washington D.C.: Georgetown University Press, 2004); Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, N.J.: Princeton University Press, 2002) at 167.

D. Departing from the Constraint Model

We have already seen two alternatives to constraint. One simple alternative is a laissez-faire approach granting wide decision-making latitude to democratic regulators. Issacharoff's opposition to renewing parts of the VRA is an example. As already noted, he views constraints as straightjackets: remove them, and perhaps a mature Southern politics that is more impartial and less reliant on administrative and judicial intervention will develop. Equivalently in Canada, keep the straightjackets off, and let existing norms of impartiality in democratic regulation continue to work unhindered. In contrast with the laissez-faire model, a second alternative sees institutions actively designed to engender norms of trust and trustworthiness. As we saw above, both Hasen and Elmendorf nod toward this approach.

Attempting deliberately to generate, through law, norms mediated outside of law—to regulate informal cultural norms of trust and trustworthiness—is among the thorniest challenges of institutional design. Few forms of regulation are more certain to produce unintended consequences than those functioning at the interface between law and culture.¹⁹⁰ And most such active regulation must usually begin with formal rule making, the primary tool available to governments. However, looking back at a number of cases in which governments regulated cultural practices, Lawrence Lessig finds a number of successful challenges to existing norms—for example, norms against interracial mixing and norms favouring duelling or gender discrimination.¹⁹¹ Indeed, I will outline further examples in Parts III and IV, including examples from the readjustment context. Ambiguity in Canada's FEBC readjustment procedures helps to account for their early and sustained successes in developing impartial decision making.¹⁹² Governments can in some cases change or create informal institutional norms, even if such results are seldom guaranteed.

¹⁹⁰ Lessig himself notes that “[g]overnments, as other institutions, are inept; changes are very often not as intended” (*supra* note 26 at 957). See also Richard H. Pildes, “The Unintended Cultural Consequences of Public Policy” (1991) 89 Mich. L. Rev. 936 at 938-40; Issacharoff & Karlan, *supra* note 102; Rosenberg, *supra* note 107; Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (New York: Basic, 2005) at 100-01.

¹⁹¹ Lessig, *supra* note 26 at 964-72, 989-91.

¹⁹² Like any history, the fullest account is one of multiple concurring influences, worth bearing in mind even as we isolate and focus on apparent primary causes. There may be several parallel explanations, all of which inevitably interrelate. Courtney cites a set of three causes: first, a 1950s–60s shift toward a politics regarding the interests of the country as a whole; second, numerous unstable minority Parliaments over this same period; and third, a mood for change developed in Quiet Revolution-era Quebec, site of one of Canada's first readjustment commissions (*supra* note 12 at 44-52, 55). To Courtney's history we might add, fourth, the broadly-acknowledged differences in structure as between parliamentary and presidential democracies; but these, though relevant, may not explain why Canada diverged in the 1960s. Fifth, Canada's multi-party system might encourage polarization less than does the American two-party system; but this difference, too, held before the 1960s. Sixth, French marginalization inside Quebec subsided in the 1960s, forcing a national politics of engagement and accommodation. Finally, the United States experienced a more dramatic series of political scandals in recent decades. See generally David Farrell, *Comparing Electoral Systems*

In any case, regulating to promote trust and trustworthiness is an approach worth trying, or that we must try in light of the limitations of regulation by constraint. As I have argued, informal norms of trust and trustworthiness control partisanship at least as well as formal constraints do. Indeed, it is often the case that only the latter are able to diminish partisanship. But active regulation is also preferable to laissez-faire approaches. In a United States South that is now heavily politically polarized, it is doubtful that leaving readjustment in the hands of legislators would bring impartiality. As we saw, boundary readjustment through normal legislation can seldom be seen as impartial.¹⁹³ Readjustment must be carried out by third-party commissions. But the status quo for federal readjustment in Canada may also be inadequate. At the outset of this article, I listed the stresses facing the existing system, including declining trust and a rising culture of scrutiny of government. These coincide with frequent studies and committee reports advocating reforms to readjustment according to the constraint model.¹⁹⁴

In the next two parts, I will focus on understanding the institutional features of the Canadian readjustment process that have helped to generate its trustworthiness and impartiality—features that therefore merit preservation or even extension. I will rely in part on interviews with individual FEBC commissioners, who spoke to me about the strengths and faults of their commissions. I will also draw on the interdisciplinary literature describing specific institutional forms that have previously seen the emergence of trust and trustworthiness in democratic regulation. Actively designing institutions to build trust and trustworthiness is at once one of the most promising models of democratic regulation and the least explored in legal scholarship.

III. Regulating Norms of Impartiality in Democratic Regulation

Authors have often sought to explain the conditions under which legal change can bring about desired social change.¹⁹⁵ Lawrence Lessig offers ideas that are among the most detailed, insightful, and distinctively relevant to impartial democratic regulation. Further on, I will bring in other authors and other ideas not contemplated by Lessig. However, Lessig's work is a helpful stepping-off point. His approach

(London: Prentice Hall, 1997); Paul R. Abramson, *Political Attitudes in America: Formation and Change* (San Francisco: W.H. Freeman, 1983).

¹⁹³ *Supra* notes 1-10, 14 and accompanying texts. This has been true of readjustment by legislatures in both the United States and Canada.

¹⁹⁴ *Supra* notes 19-22 and accompanying text.

¹⁹⁵ Some authors bring to bear the tools of economic analysis. See e.g. Rosenberg, *supra* note 107. Other authors isolate the democratic legitimacy of institutions as essential for successful social regulation. See e.g. William N. Eskridge Jr., "Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics" (2005) 114 *Yale L.J.* 1279 at 1285-87, 1312-13; Pettit, *supra* note 91 at 296-99; Rosen, *Democratic Branch*, *supra* note 69 at 14; Mullan, *supra* note 20, c. 8(A); Tom R. Tyler, "What is Procedural Justice? Criteria Used By Citizens to Assess the Fairness of Legal Procedures" (1988) 22 *Law & Soc'y Rev.* 103 at 129.

touches briefly on a general and promising set of solutions to problems of democratic regulation. This part introduces ambiguity as a tool of democratic regulation by beginning with Lessig's ideas on the subject and then considering several additional rationales for ambiguous legal and institutional design. In Part IV, I will detail the limitations and potential scope of ambiguity methods.

A. *Lessig and Ambiguity*

Lessig describes four methods by which governments deliberately reshape social norms. Two of these methods, which he labels "behavioral techniques", change the meanings associated with particular actions "indirectly by inducing certain behavior that, over time, will affect these meanings."¹⁹⁶ One behavioural technique is "ritual". Ritual sees a behaviour mandated by law fortify a particular social norm. For example, American schoolchildren daily salute the flag; this state-mandated policy, which the Supreme Court of the United States has affirmed as constitutionally permissible, aims to inculcate patriotism.¹⁹⁷ Another behavioural technique is that of "inhibition", which is ritual's opposite. Following this approach, laws repress a particular behaviour. Lessig gives the example of segregation, which "is both an instance of racial harm and a behavior that reinforces the social meaning of inequality."¹⁹⁸ As he notes, "Prohibiting segregation is a way of undermining practices that reinforce social meanings of stigma and inequality."¹⁹⁹

Two more methods are "semiotic". These "change[] meaning[s] directly, by interfering with existing meanings."²⁰⁰ The first such method is that of "tying". Tying is an "attempt[] to transform the social meaning of one act by tying it to, or associating it with, another social meaning."²⁰¹ Sanctioning an act by criminalizing it or advertising its ills, in either case with the intention of stigmatizing and deterring the conduct, is one form of "tying" open to legislators. Examples include attempts to control duelling in the old American South (discussed below) and cigarette smoking more recently. Both demonstrate the complexity of social regulation since neither was entirely successful.

Last on Lessig's list is the semiotic technique of ambiguity. Lessig is probably right to view this one as "the most interesting."²⁰² Here the social-norm

architect tries to give the particular act, the meaning of which is to be regulated, a second meaning as well, one that acts to undermine the negative effects of the first. In this sense, while tying is about establishing that X is like Y,

¹⁹⁶ Lessig, *supra* note 26 at 1008. Lessig cites "social meanings" throughout, but for present purposes differences between this term and "social norms" are not significant.

¹⁹⁷ *Ibid.* at 1014.

¹⁹⁸ *Ibid.* at 1013.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.* at 1008.

²⁰¹ *Ibid.* at 1009.

²⁰² *Ibid.* at 1010, 1015.

ambiguation is about establishing that X is like Y or Z. It simply adds a link without denying an existing link, and thereby blurs just what it is that X is.²⁰³

Returning to the case of duelling, Lessig writes that straightforward prohibitions failed more often than the alternative of ambiguous regulation.²⁰⁴ He notes that “what held dueling together was solidarity among an elite class” of Southern gentlemen.²⁰⁵ “Simply banning dueling,” he claims, “would not necessarily challenge that solidarity.”²⁰⁶ A man who declined a duel on grounds of its illegality and who was consequently viewed as a coward risked his place at the heights of the social ladder. Lessig draws on histories illustrating another, somewhat more effective regulatory option: barring duellers from public office. Since holding such office was “a duty of the elite,” the message of duelling thereby came to include not only the dishonour of declining a challenge but also the dishonour that would result from accepting it.²⁰⁷ Lessig explains:

The state’s action here served to ambiguate a gentleman’s duty, and thereby facilitated the transformation of the social meaning of dueling itself. Against the background that the state has reconstructed, to choose to duel would be to choose to serve private interests over collective duty.²⁰⁸

Lessig’s categories are fascinating in themselves, though his examples illustrate only part of what makes ambiguity as interesting as he suggests. In exploring how Lessig’s basic outline of norm-regulation techniques can relate to political decision making, I wish to diverge from his work and to build further. What is disappointing in Lessig’s recognition of the broader implications of ambiguity is the narrow range of cases in which he imagines this technique applying. The example of duelling is not one that demonstrates the benefits of *ambiguous* social meanings—of meanings that are multiplied and rendered inconsistent. It is simply a case of meaning Y (dishonour) negating and replacing meaning X (honour). The aim of the regulation barring access to public office for duellers was to turn a social meaning of honour into one of dishonour. What then does ambiguous regulation do that simpler techniques negating or creating meaning, such as tying, cannot? Good examples of the full use of ambiguity would see ambiguity itself, rather than ambiguity as a by-product or transition stage of negation, put to work as a tool of legal regulation. Such uses do exist and display some of the real promise of “obscuring what was clear” that Lessig inchoately identifies.²⁰⁹ The tool can be a powerful one, not least in the context of democratic regulation.

²⁰³ *Ibid.* at 1010.

²⁰⁴ *Ibid.* at 970.

²⁰⁵ *Ibid.* at 971.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.* at 972.

²⁰⁹ *Ibid.* at 1015.

In the remainder of this part, I first outline the ways in which the FEBC system is an ambiguous one. I then examine four rationales for designing ambiguities into law and institutions. All are ways in which ambiguity can help to build trust, trustworthiness, and impartiality. Throughout, I offer examples from an assortment of past projects of institutional design. But the major examples will be the Canadian FEBCs. Extensive ambiguity appears to have helped develop the strong culture of impartial decision making of the FEBC system.

B. Forms of Ambiguity

Ambiguity in law and institutional design can be a result of numerous and diverse (1) procedures, (2) substantive criteria, and (3) decision-maker roles. The extraordinarily complex FEBC system illustrates each of these types.²¹⁰

1. Procedural Ambiguity

From the description of FEBC readjustment above, we see that decision making runs an obstacle course of diverse and redundant stages. There is a mixture of advisory and direct influences: parliamentarians and members of the public make recommendations, and commissioners finally decide. There is a combination of partisan and generally impartial contributions. There are open and in camera sessions. The stages of the Canadian process are numerous and their total duration extensive. Together, they typically exceed the minimum consultation periods defined by statute and typically last two years or more.²¹¹

2. Substantive Ambiguity

The FEBC system features a diversity of broad and sometimes incommensurable substantive criteria for commissioners to consider.²¹² The principles set out in *Carter* and in legislation are pitched at different levels of specificity and breadth, as well as clarity and vagueness. The practical problems of representing a large rural riding are concerns, but so are “human dignity” and “social justice”. Many principles overlap or conflict with others even in the abstract: geography, community history, community interests, practical problems of representation, numeric parity among ridings, and effective representation.²¹³ Others overlap in their application, as where multiple

²¹⁰ Courts have made note of “the complexity of the electoral-boundary readjustment process” (*Raïche*, *supra* note 153 at para. 32). See also *Carter*, *supra* note 51.

²¹¹ Elections Canada, *Representation in the House of Commons of Canada* (Ottawa: Elections Canada, 2002) at 14.

²¹² *Raïche*, *supra* note 153 at para. 32 (“[t]he commissions are required to balance conflicting policies”).

²¹³ The most common conflict of principles is that between numeric parity of ridings (the one person, one vote default) and the principle that large rural ridings should have populations well below the average, given the difficulty of representing vast under-populated areas.

communities with distinct histories occupy the same region. The rules for numeric apportionment of voters among ridings alone are elaborately complex.²¹⁴ In contrast, “[n]o equivalent rabbit-warren of representational protection exists in the United States.”²¹⁵ There is in general a marked indeterminacy in the correct application of readjustment criteria.²¹⁶ The substantive guidelines of the process can be applied in many alternative ways,²¹⁷ and have an “elusive and imprecise quality about them.”²¹⁸

3. Role Ambiguity

Commissioners are drawn from a diversity of professional cultures with surprisingly little in common. The most recent round of readjustment saw judges and political scientists, who still predominate, sitting with members who included a social worker and an RCMP officer.²¹⁹ Furthermore, the extensive opportunities for public participation noted above add a key additional dimension of role ambiguity; as I will note below, public submissions before the FEBCs are often highly persuasive.

C. The Uses of Ambiguous Decision-Making Systems

There are several reasons why institutional architects might adopt ambiguous design features such as the above. In what follows, I outline four reasons that are particularly relevant to impartial democratic regulation.²²⁰ Although the reasons overlap at several points, each brings some precision to the insight that “ambiguous help[s] promote a fairer system.”²²¹

1. Preventing Fixation on Process

We previously saw that a problem for impartial regulation is keeping decision makers from focusing on process, and that constraint solutions often aggravate this

²¹⁴ Courtney, *supra* note 12 at 29-31.

²¹⁵ *Ibid.* at 29.

²¹⁶ An anonymous commissioner, *supra* note 29.

²¹⁷ Elections Canada observes that applying these substantive criteria is an “enormous task”, which requires “a delicate balancing act that must take into account human interests as well as geographic characteristics” (*supra* note 210 at 13). See also *Raïche*, *supra* note 153 at para. 32 (balancing readjustment criteria is “not an exact science”).

²¹⁸ Courtney, *supra* note 12 at 259.

²¹⁹ See Federal Elections Boundaries Commission, online: Elections Canada <www.elections.ca/scripts/fedrep/elect_com.htm>.

²²⁰ Among other notable contributions is Cass Sunstein’s theory of “incompletely theorized agreements”. Sunstein notes that some judicial decisions avoid aggravating political tensions by issuing one-off judgments while keeping underlying reasons ambiguous (Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford: Oxford University Press, 1996) at 37-38, 102-06, 108-10 [Sunstein, *Legal Reasoning*]).

²²¹ Khullar, *supra* note 29. The commissioner colourfully describes the FEBC’s ambiguity as part of a recurring approach: “Some might say it is the Canadian way of muddling through” (*ibid.*).

problem. Constraints draw attention to process and often catalyze cycles of partisan procedural manipulation. A first reason for preferring ambiguous design, then, is that it can help avoid the traps of regulation by constraint. Lessig writes that ambiguous regulation “functions not by clarifying, but by blurring.”²²² In short, ambiguity “confuses”.²²³ “[W]hile we ordinarily think of law as functioning to clarify obligations and norms,” he notes, “here it functions by obscuring what was clear.”²²⁴ One application that Lessig does not contemplate is the use of ambiguous rules of decision making to avoid the hazards of constraint. Commissioners note that the thoroughly ambiguous FEBC rules provide no overriding theory or central authority.²²⁵ The rules therefore present little of the clarity and focus that elsewhere prompt decision makers to compete and try to win changes to procedure that are favourable to themselves. By avoiding rule clarity and the partisanship it catalyzes, ambiguity can be a practical means of promoting impartiality.

Importantly, ambiguous rules can also go some way toward solving a difficult problem: avoiding the clear rules that catalyze partisanship but keeping commissions nonetheless bound by rules. In this way, ambiguous rules potentially improve on the laissez-faire approach that Issacharoff and others promote. Issacharoff, as we saw, advocates withdrawing key constraint rules under the VRA to encourage the development of informal norms of impartial democratic regulation.²²⁶ That constraint rules often catalyze partisan conflict is a powerful argument against them. But it does not necessarily commend an alternative laissez-faire strategy of withdrawing most rules. Decision making ought in general to remain rule-bound, in part for the straightforward reason that democratic regulation should not be arbitrary. A commission should not, for example, select boundaries without a stipulated set of governing criteria and procedures.²²⁷ Regulation should pursue rational ends such as allowing cohesive social groups to vote together as constituents in a single riding. A laissez-faire solution may or may not see decision makers develop boundary-drawing practices that are based on rational criteria. In contrast with laissez-faire approaches, ambiguous regulation does not eliminate rules, but rather maintains them and makes them more numerous, complex, and conflictual.

2. Promoting Broad Impartiality

Avoiding arbitrary decision making is just one reason why keeping an ambiguous set of rules in place can be advantageous. Ambiguous rules may also promote impartial judgment in accordance with the broader of the two models of impartiality

²²² Lessig, *supra* note 26 at 1010.

²²³ *Ibid.* at 1016.

²²⁴ *Ibid.* at 1015.

²²⁵ See Part IV.B.3.

²²⁶ Issacharoff, “Section 5”, *supra* note 105.

²²⁷ The most extreme laissez-faire model would return carriage over readjustment to legislatures acting through regular acts of legislation.

outlined in Part II. Recall that decision making following the broad model draws on diverse and even incompatible sources: facts and arguments of numerous kinds and from numerous contributors, heard by various decision makers, and embodied in complex networks of informal norms. Decisions following the alternative, balance model of impartiality are products of compromise between mutually opposed groups or interests.

Ambiguous rules are more consistent with broad impartiality than with impartiality as balance for at least three reasons. First, ambiguous rules do not artificially simplify decision making as both constraint and balance impartiality tend to. Broad impartiality—nuanced and richly varied—is inherently ambiguous. Clearly articulating what would make a decision maker more impartial in a given context is often not feasible. One commissioner says of the FEBCs, for example, that their “criteria inevitably cannot be clearer.”²²⁸ Considerations thought essential to the process include defining discrete communities and fitting them within electoral boundaries. These considerations conflict with a host of other criteria, depend on judgments about the value of assorted communities, and yield no obvious single boundary line.²²⁹ Indeed, ambiguous and contested criteria and procedures predominate in almost any context of democratic regulation.²³⁰ Legislation therefore seldom sets out with any precision the standards that inform broadly impartial decision making. More commonly, indistinct informal customs embody these elusive standards and their “[c]uriosities, anomalies and contradictions.”²³¹ Yet there is a powerful inclination among reformers to systematize and simplify. From time to time we see calls for clarifying language, as in Milliken’s and Lortie’s proposals to give more definite meaning to “communities of interest”,²³² and Hasen’s preference for a

²²⁸ An anonymous commissioner, *supra* note 29 (“[i]t just cannot happen”). Courtney similarly acknowledges that “clarification” of “statutes and guidelines” of the FEBCs is not likely to remedy their imprecision and elusiveness (*supra* note 12 at 259).

²²⁹ For example, FEBC commissioners generate computer models to consider how a slight boundary shift affects district demographics. See Interview of Jean-Pierre Kingsley (5 July 2007) [unpublished, on file with author]. Based on seemingly simple hard numbers, this process is actually profoundly complex when several ethnic, linguistic, socio-economic, or other groups occupy and effectively compete over one geographic space, especially in major urban centres. Other factors are still less deterministic and less amenable to numeric analysis, such as local history and considerations of social justice.

²³⁰ See e.g. judicial appointments (Weinrib, *supra* note 127 at 110) and defining election campaign rules (Issacharoff & Karlan, *supra* note 102). More generally and across many contexts, some commentators now view considerable ambiguity as inevitable and doubt whether rule of law principles of clarity and predictability are realistic. See e.g. Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969) at 33-94 (the noted rule of law principles); Sunstein, *Legal Reasoning*, *supra* note 220 at 102-06 (casting doubt on the principles).

²³¹ Elizabeth Longford, “Prelude” in Lord Longford, *A History of the House of Lords* (Thrupp, U.K.: Sutton, 1999) 10 at 10 (informal norms of governance).

²³² *Milliken Report*, *supra* note 98, vol. 3 at 33:25.

seamless web of impartial criteria for regulating politics.²³³ Impartiality as balance similarly elucidates and refines questions up for determination. But it thereby arranges complex policy considerations along an artificially small number of clear poles, such as Democrat versus Republican, or white versus black or Latino.²³⁴ In its tendency to polarize and distort complex issues into reductive and binary terms,²³⁵ this form of decision making is thus incompatible with the nuance of broad impartiality.²³⁶

Ambiguous rules do not constrain decision making or subject it to a clear series of conditions. The rules are written down, but beyond this basic clarity they are markedly open-ended. They set out criteria and procedures that only guide decision making at the outset, without clarifying how the rules should interact with one another—or how they should apply to redistricting.²³⁷ Says one commissioner, “While we were aware we were to consider community of interest or identity and history pattern, how we would do that was left up to us.”²³⁸ Ambiguous rules, even though they are written, are therefore most similar to the contradictory, vague—in short, ambiguous—informal norms of democratic regulation. The former, then, avoid the artificial simplifications of both balance impartiality and constraint.

Second, ambiguous rules also appear actively to promote broad impartiality. They can improve on most of the traditional strategies of formal regulation, which define impartiality in ever-more precise terms, counterbalance decision makers of opposite views, or simply exhort commissioners to be impartial. A *laissez-faire* regulation strategy does little to ensure that decision making will develop following the broader impartiality model. And a bare exhortation to be impartial may be little more likely to ensure broad impartiality than *laissez-faire*.²³⁹ In contrast, ambiguous rules can go a step further and lead decision makers through numerous processes of deliberation, as is typical of broad impartiality. Complex sets of rules like those of the FEBCs can direct decision makers to range broadly in their work. Each substantive rule pushes

²³³ None of these reformers goes the next step and states a full range of specific rules. Note also that these are examples of the constraint approach to regulation. Balance impartiality is at root a variety of constraint, in light of the similarities outlined in this section.

²³⁴ See Pildes, *supra* note 25 at 968. For the example of the U.S. Federal Elections Commission, see *supra* note 137.

²³⁵ See Jacobson, *supra* note 9 at 27; Michelman, “Suspicion”, *supra* note 71 at 680.

²³⁶ See Pildes, *supra* note 25 (noting how formal laws of democratic regulation can displace more nuanced norms of trust and trustworthiness).

²³⁷ On the distinction between “guiding” rules and constraining rules see e.g. Joseph Raz, “The Rule of Law and Its Virtue” (1977) 93 Law Q. Rev. 195 at 198; T.R.S. Allan, “The Rule of Law as the Rule of Reason: Consent and Constitutionalism” (1999) 115 Law Q. Rev. 221 at 225-27.

²³⁸ An anonymous commissioner, *supra* note 29.

²³⁹ Some observers, such as Canada’s former long-serving Chief Electoral Officer, Jean-Pierre Kingsley, believe in the effectiveness of such exhortations (Kingsley, *supra* note 228). Note that the *EBRA* does not explicitly state impartiality is its goal, though the point is certainly implicit. But in this implicit sense all readjustment commissions call on decision makers to be impartial, including some that are in practice impartial and also others that are not.

deliberation in a new direction and each procedural step pushes decision makers into discourse and cooperation with other participants. Going beyond a vague exhortation to be impartial, FEBC rules instead direct decision makers to deliberate and interact broadly—to act like broadly impartial decision makers.

Broad impartiality avoids focusing on procedural exploitation, unduly rigid ideology, or narrow sets of social interests. Open therefore to any cogent and relevant argument, it is in this sense relatively rational.²⁴⁰ In practical terms, being “exposed to the full blast of ... sundry opinions,”²⁴¹ and to each other, decision makers should be more sensitive to perspectives that they otherwise would not encounter. Analysts often make this suggestion, albeit more typically in the context of the broader public arena.²⁴² A rational model of decision making should, in turn, be particularly egalitarian because it is amenable to all helpful submissions of fact and argument, including public submissions. As Joseph Raz describes this ideal, fact and argument persuade according to their inherent informational or rational value, and not as a function of the contributor’s formal power.²⁴³ Indeed, in comments that Courtney broadly affirms,²⁴⁴ FEBC commissioners report being strongly influenced by citizen submissions regarding facts on the ground in a given community.²⁴⁵ One commissioner reports, “We took very seriously the objections and proposals presented to us and tried to accommodate community sentiment as we understood it from the hearings. We extensively redrew our initial map in response to public submissions.”²⁴⁶ In fact, another commissioner notes that “[b]y and large we welcomed the submissions, more so from the public than the politicians.”²⁴⁷ Still

²⁴⁰ The literature contrasts partisanship with “impartial”, “principled” or “reasoned decision on an issue on its merits” (Hasen, *supra* note 12 at 974-79, 982; Kari Palonen, “Four Times of Politics: Policy, Polity, Politicking, and Politicization” (2003) 28 *Alternatives* 171). See also Nedelsky, *supra* note 74. Economic notions of rationality based on self-interest offer another, very different understanding.

²⁴¹ Michelman, “Brennan”, *supra* note 79.

²⁴² Mazzone, *supra* note 25 at 51 (“[A] person who, because of her participation in civic networks, is accustomed to negotiation and compromise may be less demanding and less selfish in her daily transactions with others than someone who has never learned similar cooperative habits”); Jon Elster, “The Market and the Forum: Three Varieties of Political Theory” in James Bohman & William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass.: MIT Press, 1997) 3 at 12 (describing similar effects in the context of democratic discourse).

²⁴³ *Morality*, *supra* note 185 at 29.

²⁴⁴ *Supra* note 12 at 136.

²⁴⁵ There are of course exceptions. One commissioner reports learning that four unusually knowledgeable constituents who made submissions had been coached by members of an affected political party (An anonymous commissioner, *supra* note 29).

²⁴⁶ An anonymous commissioner, *supra* note 29. Two commissioners recall public submissions, on issues such as ease of transportation in ridings and keeping “communities more intact,” being highly influential (Two anonymous commissioners, *supra* note 29). See also Kingsley, *supra* note 229 (public submissions “significantly impact” the process).

²⁴⁷ An anonymous commissioner, *supra* note 29 (“[t]he politicians’ submissions were more political and were received as such”). Parliamentarians’ submissions are influential primarily when “echoed by

another commissioner relates that the submissions were “[a]bsolutely crucial” and led to “huge changes. ... Public submissions are key inputs into the whole thing.”²⁴⁸ These reports suggest that at least some ambiguous processes satisfy the prediction of relatively rational decision making sensitive to cogent public contributions.

Third and finally, an ambiguous system makes balance impartiality difficult to sustain. A complex set of incommensurable and unpredictable rules scrambles the delicate balances of power on which this form of impartiality is premised. With a chaotic multiplicity of rules and players such as that of the FEBCs, it may be harder to sustain conceptual simplifications, clear polarities, and counterbalanced interests. To illustrate this point, I will begin with the case of the Supreme Court of the United States. Observers typically recognize the polarization of its deliberations between two political blocs: “conservative” and “liberal.”²⁴⁹ The neatness of this distinction is striking, imposed as it is on a much more plural range of ideologies held by members of the court and the broader public. The United States Senate’s two-party polarization seems to bring order to an otherwise chaotic array of libertarians and moral conservatives, liberals and class-conscious leftists, originalists and textualists, and many others.²⁵⁰ In comparison, polarization is less likely given a set of poles whose number and relative positions are obscure and ever-changing. When ambiguous arrangements disrupt conceptual simplifications, a decision maker’s personal alignment with a single umbrella ideology is less tenable. Justices of the Supreme Court of Canada evidently maintain an intelligible but relatively broad set of ideological perspectives. The set is large and chaotic enough to frustrate, at least in part, alliances and ideological cohesion among the judges. Indeed, Canada’s highest court issues decisions that are generally less predictable in their results than those of the Supreme Court of the United States.²⁵¹

If decision makers cannot sustain conceptual simplifications, they may be more likely to address the substance of an issue relatively free of predisposition. For this reason it again follows that ambiguous systems should produce relatively rational judgment. Additionally, because ambiguity scrambles alliances and policy simplifications, decision making should be relatively cooperative. This is a characteristic often ascribed to trusted, trustworthy, and impartial decision making.²⁵² In comparison with balance impartiality and constraint approaches, it should be uncommon to see decision makers compete as mutually distrustful partisans.²⁵³ In

community input” (*ibid.*). Some “had useful observations, but many just wanted to make the Commission the target of attacks, and that was not helpful” (*ibid.*).

²⁴⁸ An anonymous commissioner, *supra* note 29.

²⁴⁹ Jacobson, *supra* note 9 at 27.

²⁵⁰ *Ibid.*

²⁵¹ See generally Peter McCormick, “Follow the Leader: Judicial Power and Judicial Leadership on the Laskin Court, 1973–1984” (1998) 24 *Queen’s L.J.* 237 at 268; “Birds of a Feather: Alliances and Influences on the Lamer Court 1990–1997” (1998) 36 *Osgoode Hall L.J.* 339.

²⁵² See *supra* note 189.

²⁵³ Part of the intent—and certainly the effect—of balancing opposed decision makers off of each other is to have them hold each other in mutual check. Each is watchful for offences by the other, and

practice, many commissioners report not perceiving each other as competitors, but rather deciding cooperatively through collective deliberation and even consensus. As one commissioner notes, “Decision making was highly cooperative. We listened to one another’s suggestions and ideas and made decisions based on what seemed to work best. It was consensus reasoning.”²⁵⁴ The same appears to have been the case in several FEBCs.²⁵⁵

3. Precluding Partisanship

Under the previous two headings, an assumption was that decision makers intend in good faith to make impartial decisions when possible.²⁵⁶ An alternative assumption is more cynical, and more common. The bulk of writers who analyze ambiguous decision making systems start from the premise that decision makers are partisans. These analysts assert that the efforts of partisans are less effective amid ambiguity. Given ambiguous procedures and legal norms, partisan decision makers might be less able to predict how manipulating procedures will affect their own fortunes.²⁵⁷

A helpful example comes out of a recent work by Adam Cox, who presents one of several new contributions characterizing ambiguity as a tool of legal regulation.²⁵⁸ His contribution is also a rare application of ambiguity scholarship to readjustment in particular. Cox praises the longstanding rule mandating a long period of time, a “temporal floor”, between rounds of readjustment. One intention is to “curb the effects of partisan gerrymandering” by “promot[ing] beneficial uncertainty in the redistricting process.”²⁵⁹ Cox explains that “[w]hile redistricting authorities can make some predictions about voting behavior, ... the accuracy of those predictions decreases as one moves further in time from the point of prediction.”²⁶⁰ The observation is a clever one. It identifies a familiar element of readjustment as a source of ambiguity. Readjustment is at root a response to the changing demographics of electoral districts. Long periods between the drawing of district maps and their use in elections can produce marked unpredictability; most North-American electoral districts undergo sizeable demographic shifts over a ten-year timeframe.²⁶¹ Until recently in both Canada and the United States, readjustment occurred on a fixed

each seeks to block and counter the attempts of others to gain the upper hand in democratic regulation. See e.g. Steven Calabresi & Kevin Rhodes, “The Structural Constitution: Unitary Executive, Plural Judiciary” (1992) 105 Harv. L. Rev. 1153 at 1156; *The Federalist*, *supra* note 100, No. 48 (Madison) at 311.

²⁵⁴ An anonymous commissioner, *supra* note 29.

²⁵⁵ See Khullar, *supra* note 29 (“the three of us worked well together, and I guess also shared some fundamental values of how to approach the task”). See also Kingsley, *supra* note 228.

²⁵⁶ They will seize the opportunity to manipulate rules in their favour perhaps only if opponents otherwise will do so.

²⁵⁷ Issacharoff calls this “ends-oriented manipulation” (“Gerrymandering,” *supra* note 9 at 595).

²⁵⁸ *Supra* note 7.

²⁵⁹ *Ibid.* at 769.

²⁶⁰ *Ibid.* at 769-70.

²⁶¹ See generally Pal & Choudhry, *supra* note 160 at 4-5.

decennial timetable. However, over the past few years, Texas and four other states have sought to readjust districts outside the traditional cycle.²⁶² In its recent ruling on the Texas readjustment controversy, the Supreme Court of the United States held that a decennial floor rule is not constitutionally required, potentially weakening this temporal-ambiguity feature in the United States.²⁶³ But the floor rule fortunately remains a constitutional requirement in Canada.²⁶⁴

Offering another intriguing example, Jason Mazzone identifies how some forms of federalism generate ambiguities precluding partisan decision making:

An ambiguous division of power ... creates uncertainty regarding which government, national or state, will eventually make the decisions on a particular matter. This ambiguity in turn casts doubt on the merits of pursuing one avenue of influence rather than another.²⁶⁵

Finally, in a growing subset of ambiguity cases, commentators elevate an insight of John Rawls from thought experiment to practical tool of regulation. In Rawls' celebrated hypothetical case, founders of a political community, being oblivious to their own identities, elaborate its features without self-interest.²⁶⁶ A number of later authors imagine concrete applications. These mostly appear in contexts where entrenchment is a live risk, such as at a time of constitutional amendment. In one recent effort to rewrite the founding document of a developing state emerging from conflict, international advisors called for a "Rawlsian moment".²⁶⁷ The country's first elections were to be held only after passage of the new constitution, which would spell out the powers of incumbent governments.²⁶⁸ To the advisors' disappointment, the elections went ahead before completion of the constitution, and the elected party wrote, as predicted, wide governing powers into the new document. Several works address analogous effects in other contexts, ranging from the determination of health care rights to the design of basic constitutional rules.²⁶⁹ In Canadian electoral-boundary readjustment, John Courtney notes that the perennial minority governments of the 1960s probably helped prompt Parliament to create the FEBCs.²⁷⁰ With that decade's uncertain electoral prospects for political parties, incumbents could not rely on holding power for long, and could count even less on controlling the next

²⁶² See Cox, *supra* note 7 at 751-52.

²⁶³ See Perry, *supra* note 4.

²⁶⁴ *Constitution Act, 1867*, *supra* note 48, s. 51. However, it should be noted that Parliament breached the rule, apparently for partisan purposes, with a two-year delay in the early 1990s (Landes, *supra* note 29).

²⁶⁵ *Supra* note 25 at 57-58.

²⁶⁶ *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

²⁶⁷ For this account I am indebted to John Barker of the University of Cambridge, a member of the Malawi advisory group.

²⁶⁸ *Ibid.*

²⁶⁹ See e.g. Russell Korobkin, "Determining Health Care Rights from Behind a Veil of Ignorance" (1998) U. Ill. L. Rev. 801; Adrian Vermeule, "Veil of Ignorance Rules in Constitutional Law" (2001) 111 Yale L.J. 399.

²⁷⁰ *Supra* note 12 at 44-52.

readjustment. The parties' unpredictable futures apparently provided some incentive to place readjustment in the hands of independent commissions, and to bring more impartiality to readjustment.

In Part IV, I will discuss how the FEBC system's elaborate set of ambiguous features generates unpredictable outcomes and, among other effects, precludes partisanship. It is sufficient for now to note that the unpredictable system would confound attempts to draw partisan lines. "Most of the time, we don't even know the effect anyway," one commissioner states, referring to how readjustment impacts election outcomes.²⁷¹

4. Developing Informal Decision-Making Norms

An important benefit of ambiguous systems is their potential to promote the development of informal norms of trust, trustworthiness, and impartiality. Formal rules, however cleverly designed, generally leave open loopholes that committed partisans may seek and exploit: the unusual shapes of gerrymandered districts are prominent examples. However, the FEBCs' ambiguous design apparently promotes impartiality that is reinforced in norms of trust and trustworthiness—or, in the words of one commissioner, in the "mythology [of] the neutral fair system. ... The ambiguity and mythology work[]" in concert in this way.²⁷² Indeed, we might expect at least some of the effects outlined above—ending process fixation, promoting broad impartiality, and precluding partisanship—to produce corresponding changes in the attitudes and habits of decision makers. Sustained over time, these aspects of impartial decision making may solidify into informal norms as members of the public and decision makers themselves come to expect impartial decision making.²⁷³ The idea of discernible institutional cultures developing over long periods of time is widespread.²⁷⁴ Lessig's own illustration of "behavioral" regulation,²⁷⁵ as we saw, raises the examples of racial-segregation prohibitions and policies mandating a daily salute to the flag in schools. Both regulated behaviours inculcate attitudes that in turn reinforce desired behaviours by developing lasting informal norms. It must be noted, however, that Lessig does not explore the behavioural side of ambiguity methods, but rather places them within his "semiotic" category.²⁷⁶ Nevertheless, if ambiguous

²⁷¹ An anonymous commissioner, *supra* note 29. Another anonymous commissioner adds that "decisions [do] not appear to be ... geared to manipulating electoral outcomes" (*supra* note 29).

²⁷² Khullar, *supra* note 29. In addition, an anonymous commissioner cites the importance of developing "symbolic legitimacy" (*supra* note 29).

²⁷³ As noted, trust and trustworthiness are premised on decision makers' and others' expectations of good decision making (Braithwaite, *supra* note 19 at 344-47; Jones, *supra* note 90). Note the alternative possibility that partisans will find and exploit loopholes before trust develops.

²⁷⁴ See e.g. Heather Gerken, "Second-Order Diversity" (2006) 118 Harv. L. Rev. 1099 at 1147.

²⁷⁵ Lessig, *supra* note 26 at 1008. See also e.g. the remarks of Koh in Toope *et al.*, *supra* note 129 at 38 (describing a process of "norm internalization, driven by legal process" [emphasis in original]); Mazzone, *supra* note 25 at 57-58.

²⁷⁶ Lessig, *ibid.*

systems produce decision making that is at first impartial in effect, the behavioural insight suggests that cultures of impartiality should develop over time.

Less straightforwardly, ambiguous systems can facilitate the development of complex relations among decision makers that characterize trust, trustworthiness, and broad impartiality. As we saw, commentators commonly describe trust and trustworthiness as sustained in dense networks of rules, values, symbols, social meanings, agreements, social bonds, organizations, and loyalties. An ambiguous complex of rules and participants can lay the groundwork for developing these informal norms. That groundwork can in turn put decision makers in a position to begin cooperating and deciding rationally.²⁷⁷ This idea has precedents in a number of contexts. For example, Mazzone points to how “Progressive Era reformers ... sought to increase [trust in the public arena] in the United States by creating networks of voluntary associations.”²⁷⁸ Mazzone and another author, Denise Scheberle, creatively and persuasively reread the dynamics of governance in the United States by suggesting how dispersing power into complex forms can engender trust, and by concentrating on the development of trust amid U.S. federalism.²⁷⁹ Theories of urban planning provide a further, and better known, example out of a loosely analogous context. Some authors call for municipalities to adopt relatively complex arrangements of physical structures, businesses, public services, and demographics. The aim is to mimic—and thereby perhaps to seed—the dense networks of interpersonal interactions and trust, and the richness and variety of advantages, that usually characterize communities that are safe, economically viable, and appealing.²⁸⁰

Returning to the FEBCs, we have seen that these bodies feature a host of complexities, such as broad consultation, diverse decision makers, and a richly convoluted substantive decision-making framework. By engaging its assorted participants together in this circuitous process for over two years, the FEBC system may have encouraged the development of informal networks of trust among its participants. These participants include the commissioners, organized civil-society groups such as farmers’ representatives, municipal-government representatives (who are among the most common participants in the federal readjustment process),

²⁷⁷ We have already seen a number of examples of informal rules, values, symbols, and social meanings in references to cultures of cooperation; to impartiality as a distinct, if tenuous, mythology, to public perceptions of FEBC trustworthiness, and to egalitarian ethic regarding submissions to the FEBCs, which in turn invites robust public involvement. Under the present heading, I will focus more on agreements, social bonds, organizations, and loyalties among decision-making participants.

²⁷⁸ *Supra* note 25 at 36.

²⁷⁹ Denise Scheberle suggests that one of the many effects of complex federalism can be enhancing relations of trust. Looking at case studies in environmental regulation, Scheberle traces the development of trust amid networks of interactions among federal and state governments—sometimes finding surprising levels of cooperation (Scheberle, *supra* note 176). To be sure, neither author suggests that trust pervades at every level of U.S. governance.

²⁸⁰ See e.g. Peter Katz, *The New Urbanism: Towards an Architecture of Community* (New York: McGraw-Hill, 1994).

representatives of First Nations governments, individuals speaking as members of identity groups such as the New Brunswick Acadians, other interested individuals, and MPs affected by proposed changes.²⁸¹ A simpler decision-making system might see just a few decision makers exercising clear decision-making control, thereby overshadowing the roles of diverse public and private participants.²⁸² The example of the FEBCs suggests that in some cases of democratic regulation a valuable design strategy may be to avoid unambiguous lines of top-down control. Relatively numerous and variegated power arrangements can prompt the development of the complex normative networks that can in turn help solidify trust, trustworthiness, and impartiality in decision making.

IV. The Scope and Limits of Ambiguous Systems

A. Extending Ambiguous Regulation

We have seen that ambiguity methods address the risk of entrenchment by counterintuitively blurring the lines within which decision makers exercise power. An important question is how far we can push this strategy. Going beyond Lessig's conception, decision making can feature not one but many sources of ambiguity to yield the benefits outlined in the previous part. However, some writers assume that

²⁸¹ See *supra* notes 227-32, 237-39. See also Federal Elections Boundaries Commission for Alberta, "Part III: Summary of Submissions and Post-Hearing Decisions" in *Report of the Federal Electoral Boundaries Commission for Alberta* (15 January 2003), online: Elections Canada <http://www.elections.ca/SCRIPTS/FEDREP/alberta/report/part3_e.htm> (citing involvement of municipal representatives); Federal Elections Boundaries Commission for Manitoba, *Report of the Federal Electoral Boundaries Commission for Manitoba* (15 January 2003), online: Elections Canada <http://www.elections.ca/SCRIPTS/FEDREP/manitoba/report/report_e.htm> (citing involvement of Manitoba's Southern Chiefs' Organization); Federal Elections Boundaries Commission for New Brunswick, *Report of the Federal Electoral Boundaries Commission for New Brunswick* (10 January 2003), App. C, online: Elections Canada <http://www.elections.ca/SCRIPTS/FEDREP/newbruns/report/appc_e.htm> (citing involvement of Patton MacDonald, a representative of New Brunswick farmers).

²⁸² Note that this suggests a further form of evidence of robust public influence in the ambiguous FEBC processes. Adopting reasoning apparently in the mode of rational-choice analysis, Mazzone argues that trust develops when "dividing power between the national government and the states provides greater opportunities for citizen groups to influence politics and for individual citizens to participate in public life" (*supra* note 25 at 27). Mazzone argues that federal divisions of power thereby engender "trust", "cooperation", and "social justice". However, evidence for this particular claim appears to be mixed. Mazzone claims that "[g]roups like the American Association of Retired Persons ("AARP") ... are likely to dominate in a [unitary] system" (*ibid.* at 44). In contrast, federal systems require such large groups to focus on many sites of influence—for example, on fifty state governments—and "federalism provides opportunities for smaller, weaker organizations to compete for influence and pursue their agendas. In a federalist system, it is easier for smaller organizations to mount opposition to even powerful groups because [larger groups'] resources will be more diffused" (*ibid.* at 45). Whether Mazzone is right depends on a number of particulars, such as the actual size, and therefore the state-level influence, of groups such as the AARP.

extensive ambiguity and unpredictability produce poor functionality.²⁸³ I address such concerns in this part. I outline limiting conditions for the extensive use of ambiguity as a tool of democratic regulation and provide examples illustrating these conditions both generally and more specifically within the contexts of readjustment in Canada and the United States. Successful applications of the ambiguity methods I have outlined appear to meet three conditions: equivalence, stability, and comprehensiveness.

B. Conditions for Extended Ambiguity

1. Equivalence

Ambiguous systems should firstly fulfill an “equivalence” condition: roughly speaking, they must function equally as well as clearer and more predictable alternatives.

Democratic-regulation cases often meet this condition. In scholarship on such cases, there has been a longstanding recognition that no single model of government accommodates all the factors that potentially contribute to good democratic design.²⁸⁴ For example, a perennial question is how to ensure that voters will express their own substantive electoral preferences, rather than preferences influenced by “irrational” considerations such as group allegiances and polls.²⁸⁵ A common practice in Canada is the polling blackout as elections near.²⁸⁶ However, an alternative can be to adopt a circuitous route from individual votes to electoral outcomes.²⁸⁷ This approach is less likely to raise free expression concerns and is somewhat common in voting systems in other countries—for example, in “mixed” systems in which voters simultaneously vote via “majoritarian” and “proportional” voting models.²⁸⁸ An ambiguous voting

²⁸³ See e.g. Karlan, “Fire”, *supra* note 39 at 733-35, 741, n. 7; Sunstein, *Legal Reasoning*, *supra* note 220 at 102-06. In one interesting work, M. Elizabeth Magill analogizes the confusing American case law on the separation of legislative, executive, and judicial powers to the chaos of the “three-body problem” known to physicists (M. Elizabeth Magill, “The Real Separation in Separation of Powers Law” (2000) 86 Va. L. Rev. 1127 at 1128-29). In another context see generally Fitzpatrick, who discusses chaotic informal norms of property use generating failure in property-rights regimes (*supra* note 95).

²⁸⁴ See Kenneth Arrow, “A Difficulty in the Concept of Social Welfare” (1950) 58 Journal of Political Economy 328 at 328-331.

²⁸⁵ See e.g. André Blais & Robert Young, “Why do People Vote? An Experiment in Rationality” (1999) 99 Public Choice 39 at 39-40; Guy Lachapelle, *Polls and the Media in Canadian Elections: Taking the Pulse*, vol. 16 (Toronto: Dundurn Press, 1991) at 13-14.

²⁸⁶ See J. Andrew Fraser, “The Blackout of Opinion Polls: An Assault on Popular Sovereignty” (1995) 4 Media and Communications Law Review 365 at 379-80.

²⁸⁷ See Richard Johnston *et al.*, *Letting the People Decide: Dynamics of a Canadian Election* (Montreal: McGill-Queen’s University Press, 1992) at 197-98 (factors controlling strategic voting).

²⁸⁸ New Zealand, Italy, and Israel, among others, employ mixed systems. See Pippa Norris, “Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems” (1997) 18 International

system of this kind can make the connection between a vote and electing a particular government more unpredictable, in turn diminishing considerations of process and strategy. Citizens are more likely, then, to vote based on their substantive policy preferences. Importantly, the more unpredictable process still leaves unimpeded the right to cast a vote;²⁸⁹ the example illustrates how different options for voting-system design can function equally well.

Some ambiguity techniques will not satisfy the equivalence condition. For example, certain regulatory problems cannot be approached piecemeal. There are many cases where ambiguous systems prevent coordination or institute through discrete steps decisions that should be made at the level of the complex whole. Indeed, ambiguity is often a burden for federal systems. One example is the problem of urban revitalization in Canada and the difficulties of reaching agreement among the three levels of government. Redevelopment plans can stall for years as ambiguously divided powers frustrate any coherent plan.²⁹⁰ But the full story of federalism is complex and, as already noted, federalism can have positive effects such as precluding partisanship.

a. *Equivalence in Readjustment*

How might a readjustment regime as ambiguous as Canada's be less effective than simpler systems, even if it is more impartial? There are at least two possibilities.²⁹¹ The first and primary consideration should be whether the FEBCs follow appropriate substantive readjustment criteria as well as other systems do. By nearly all accounts the FEBCs diligently follow the rules that govern them.²⁹² As in the case of voting, there are rules producing unpredictable outcomes—due here to the elaborate and conflictual criteria and procedures as well as the diverse participants involved. The FEBCs nevertheless consistently readjust electoral maps by following the substantive criteria set out in cases and legislation. As noted in the previous part, rules continue to guide readjustment, even if the rules are ambiguous as a whole. However, we cannot indefinitely continue adding substantive criteria to a

Political Science Review 297. Note however that mixed systems can also be simple, for example if they distribute legislative seats based primarily on the proportional vote.

²⁸⁹ Note however that there is arguably democratic value in voting strategically—and generally in the power not only to express a position but also to exert concrete influence over which political party triumphs in an election. There is no correct answer in this debate; where one comes out in it depends on how much weight one ascribes to the different democratic values in conflict. However, the debate illustrates the broader point about the equivalence of several design options.

²⁹⁰ The city of Toronto has faced this problem since basic plans for a renewed waterfront were announced in 2000. Antagonistic federal, provincial, and city governments have attempted in vain to coordinate and have made at best only halting progress. See Jennifer Lewington, "Waterfront Revitalization Gets New Lease on Life" *Globe and Mail* (28 July 2004) A9.

²⁹¹ A third possibility is that ambiguous systems are ineffective given the "room in which to hide" that flexibility and ambiguity might give partisans aiming to manipulate procedures (Carter, *supra* note 98 at 58). However, the main thrust of this article aims to refute that argument.

²⁹² See Courtney, *supra* note 12.

readjustment system; the criteria must play rational roles, such as directing commissioners to consider the locations of cohesive groups. Given the expansiveness of the current set of substantive criteria for readjustment, the list of criteria cannot likely become longer without veering toward irrelevance.

A number of years ago Issacharoff interestingly called for the randomization of readjustment.²⁹³ The computer-generated maps he contemplated would have little relation to the locations of cohesive communities and other traditional readjustment factors. This approach would sacrifice most other ends of readjustment to the cause of impartiality. The merits of the approach cannot be dismissed entirely, given the partisan state of much American readjustment. But circumstances in Canada do not call for such radical solutions. The *Raïche* case, for one, demonstrates the importance to certain cultural minorities of unified representation and of members voting together as coherent units in elections.²⁹⁴ In the controversy leading up to *Raïche*, many New-Brunswick Acadians forcefully argued against their transfer to an Anglophone riding.²⁹⁵

A second possible consideration affecting equivalence is the democratic legitimacy of different readjustment systems. Legislatures arguably bring larger measures of democracy to the task of readjustment. Robert Post argues that only elected representative bodies have the legitimacy to define the basic ground rules of a democracy.²⁹⁶ The FEBCs are appointed bodies, and their ambiguous procedures effectively block internal decision making from public view and in this sense prevent public accountability. Nevertheless, the commissions' democratic legitimacy appears, if anything, to be stronger than that of legislatures. One important consideration is that representative democracy is not the only way in which a democracy can function. Taking citizens' submissions directly, where it is feasible to do so, can be more effective. As we saw in the previous part, the ambiguous FEBC system places all contributors, from MPs to lay citizens, on roughly equal footing. The commissions' democratic bona fides are in this respect arguably at least as strong as Parliament's. We also previously saw a more straightforward democratic argument for FEBCs. Throughout much of Canada's history, Parliament often did not write the ground rules of the democratic process in a fair manner. There is no legitimate democratic

²⁹³ Samuel Issacharoff, "Judging Politics: The Elusive Quest for Judicial Review of Political Fairness" (1993) 71 Tex. L. Rev. 1643 at 1647, 1693-95.

²⁹⁴ *Supra* note 153. The desire for joint representation raises intriguing questions about the function of a democratic vote. When a community votes as a discrete unit, there is no guarantee that members will vote together for any given party. Nevertheless, the voters involved in litigation and other forms of advocacy, including the 2656 Acadians who signed a petition sent to the province's FEBC, apparently saw voting together as a way to preserve their community.

²⁹⁵ *Ibid.* at paras. 11-15.

²⁹⁶ Robert Post, "Democracy, Popular Sovereignty, and Judicial Review" (1998) 86 Cal. L. Rev. 429 at 432.

prerogative permitting legislators to gerrymander unfettered, and thereby to remain in power contrary to public wishes.²⁹⁷

2. Stability

The stability and “prospectivity” of rules are facets of the rule of law.²⁹⁸ There is a risk that an unusually complex process will fall apart over time and stop guiding governance. On the other hand, even chaotic systems can be stable systems. A decision-making process can persist over time, consistently yielding a given type of decision even if the details of decisions are unpredictable.

I return first to the example of voting systems. These can function in a dependable manner, establishing governments according to a reliable election cycle even if an election result cannot be determined in advance. Ambiguity as a tool for regulating politics must, in general, be similarly stable because entrenchment is a constant risk, not a fleeting possibility. Merely transient ambiguities such as those described by Lessig—intermediate states that dissipate once cultural change has occurred—therefore have limited value. Thus in the judicial-selection conflict at the United States Senate, ambiguities that arose during lag periods when parties adjusted to unfamiliar rules were quickly resolved and clarity ensued. But other cases offer examples of stable ambiguity in democratic regulation. An early and interesting example is that of the French administrative divisions, or “départements”, which were designed by the Abbé Sièyes during the Revolutionary era and persist to the present day. These geographic subunits “violated the territorial integrity of [existing] provinces”—which were far fewer in number and reflected regional loyalties—with the deliberate intention of reducing cleavages within the nation.²⁹⁹ In the words of a modern commentator, the plan’s supporters “adopted this ambiguous strategy of decentralizing the administrative system in order to regenerate the state.”³⁰⁰ The system did clarify things in one sense: “Through this hierarchical organization of space, the rights of citizens and the unity of the nation would be guaranteed.”³⁰¹ But the new structure also deliberately cut across geographic lines and historic communities, dividing the country into several-hundred units in order to blur divisions and durably construct French national unity.

²⁹⁷ See Klarman, *supra* note 17 at 498 (noting that legislatures tend to make anti-majoritarian attempts to entrench their own power).

²⁹⁸ Fuller, *supra* note 230 at 33-94.

²⁹⁹ Ted Margadant, Book Review of *La formation des départements : la représentation du territoire français à la fin du 18e siècle* by Marie-Vic Ozouf-Marignier, (1991) 63 *Journal of Modern History* 396 at 397.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

a. *Stability in Readjustment*

Though readjustment in Canada is ambiguous in the ways we have seen, it is by most accounts stabler than its American counterpart. On a simple level, the well-established pattern of the FEBCs sees districts take shape on a ten-year cycle, albeit with some delays.³⁰² We have already seen that the ten-year cycle has been jeopardized in some American states.

More importantly, the American commitment to constraint in readjustment appears, as in the context of judicial selections, to have generated unstable patterns of chaotic lag periods characterized by ambiguity, followed by resolution and clarity. U.S. readjustment is complex but not lastingly ambiguous. Courts and other bodies have frequently elaborated new rules that produce periods of procedural ambiguity. But these periods have been transient. As Issacharoff and others relate, an initial period of gains in black voting in the United States was followed by a rise of VRA litigation by partisans,³⁰³ as political parties moved forcefully into the judicial arena to combat one another. Tests centred on racial representation increasingly became mere points around which broader political contests focused. The centrality of race in conflicts under the VRA has thus diminished since the 1960s and the civil-rights era.³⁰⁴ Partisan contest has spread from the courts to the VRA administrative-oversight process. Here we are now seeing the VRA enforcement branch displace its long-standing corps of trusted Justice Department lawyers.³⁰⁵ Observers had recognized in these lawyers an ethic of impartial decision making, which rested on a well-established civil-service culture.³⁰⁶ Though there is a cost in political capital to be paid for transgressing informal rules of impartiality, the recent political history of the United States has seen these costs diminish, with transgression itself being

³⁰² See Courtney, *supra* note 12 at 144-48.

³⁰³ Issacharoff notes that the VRA's early success initially succeeded in breaking up single-party dominance in the South, but that this success was in part responsible for the later "partisan tinge" of VRA intervention, as the results of intervention in what then became a two-party system carried significance for the electoral performance of each party ("Section 5", *supra* note 105).

³⁰⁴ Even Republicans, whose electoral successes among the African-American community are limited, have brought VRA challenges to readjustments, ostensibly for their minority representation-diluting effects. See *Page v. Bartels*, 144 F. Supp. 2d 346 (N.J. 2001). Additionally, "causes of action under [the] one person, one vote" doctrine have had the "incongruous result of producing plaintiffs whose motivation for litigation is almost entirely divorced from the doctrinal basis for their suit" (Karlan, "Fire", *supra* note 36 at 736).

³⁰⁵ See Mark Posner, "The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do?" (2006) at 13-15, online: American Constitution Society for Law and Policy <<http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf>> (describing several forms of politicization, including "precluding career staff from making s. 5 recommendations" and elevating the influence of political staff in their place"). On the more recent attorney firing controversy in the United States, see also text accompanying note 188.

³⁰⁶ Posner, *ibid.* at 6. Posner served for several years at the Department of Justice on VRA preclearance submissions.

normalized.³⁰⁷ When the political will to breach impartiality norms developed, the system failed to respond and protect itself. Partisan manipulation became common and helped to rewrite the norms of democratic regulation.³⁰⁸

3. Comprehensiveness

Ambiguity as an effective tool of democratic regulation appears to require not one or two, but rather many ambiguous rules—outstripping Lessig’s limited scenarios of two norms in conflict. Thus Cox’s floor rule, mentioned above, did not end gerrymandering on its own in the United States, nor even in Canada before the 1960s. More useful would be a broadly complex and unpredictable process, of which a floor rule, for example, might be one contributing part. Most importantly, there should be few if any exceptional sources of clarity. These can sustain partisan conflict even in an otherwise ambiguous system. Comprehensiveness appears to mark a key distinction between the Canadian readjustment scheme and its largely dysfunctional American counterpart.

a. *Comprehensiveness and Umpired Readjustment*

There are mixed features of ambiguity and clarity in U.S. readjustment. As we saw, the American case law is now complex and even incoherent;³⁰⁹ some substantive rules are markedly ambiguous, such as the test for bizarrely shaped districts.³¹⁰ On the other hand, legislative majorities control most readjustment, including readjustment by commission, leaving little mystery as to which political party will come out on top in the process. In addition, we saw that the grounds for court and administrative review remain conceptually narrow, focusing on minority disenfranchisement rather than on fairness at large.

Most importantly perhaps, the readiness of a central umpire to settle readjustment disputes focuses and clarifies the disputes. The administrative-review mechanism of the VRA is statutorily required to be expeditious and is “substantially faster, simpler and cheaper” than the judicial alternative.³¹¹ It is also the venue of choice in the overwhelming majority of cases in states covered by the VRA.³¹² But even the judicial process provides substantially more simplicity, clarification, and central coordination than most features of the Canadian system. Courts review federal Canadian

³⁰⁷ More generally in recent years, breaking a culturally based rule of impartiality on one hand has carried with it a meaning of political impropriety, while on the other hand it has often led to a retroactive redefinition of the rule as having been weak, optional, or outmoded. See Hasen, *supra* note 12 at 957-58.

³⁰⁸ *Ibid.* See also Karlan, “Fire”, *supra* note 39 at 736.

³⁰⁹ See *ibid.* at 733-35, 741, n. 7.

³¹⁰ See *supra* note 43.

³¹¹ Posner, *supra* note 305 at 7.

³¹² See *ibid.*

readjustment infrequently, and reverse FEBC decisions rarely.³¹³ Moreover, the FEBCs are radically decentralized administrators, as I discuss below. The U.S. model of umpiring by a central body can render a system inescapably clear and open to exploitation. In the present decade, litigation over election disputes has burgeoned dramatically,³¹⁴ a trend that Karlan believes will continue as the “proliferation of constraints on the reapportionment process” moves political contests into the courts.³¹⁵ Waiting on a court or administrative body to resolve disputed electoral ground rules presumably adds some unpredictability to the system. However, a central arbiter lies ready to take over decision making in all instances. Such clear and ready litigation provides a focus for partisan conflict.

b. Comprehensiveness and Decentralized Readjustment

Models of decentralized power appear *prima facie* to improve on umpiring and its effect of aggravating partisan conflict. The Canadian FEBC process is comparatively decentralized in two important respects. First, there is little countrywide coordination. Few cases in the courts produce nationally-prominent disputes over electoral boundaries. The ten provincial readjustment commissions work “highly independently of one another.”³¹⁶ “We were not,” reports one commissioner, “aware of the specifics of [other FEBCs’] proposals nor the approaches they were taking in their decision making.”³¹⁷ Input by parliamentarians provides a potentially unifying national perspective. However, most input and objections filed are in practice province- or riding-specific.³¹⁸ Additionally, Elections Canada is a “passive procedural overseer” of readjustment with neither a dispute settlement function nor any other substantive decision-making responsibility.³¹⁹

The process is decentralized by design. Debates in Parliament at the inauguration of the FEBCs in 1964 show that the government of Lester B. Pearson was aware of the confusion ten disparate commissions would bring to readjustment.³²⁰ Further, in the early days a single national representation commissioner authored first-draft maps for the FEBCs to work from, but critics warned against “centralized control over all the maps”³²¹ and the office came to an end in 1979.³²² In comparison, frequent

³¹³ See Part III.2.

³¹⁴ See Hasen, *supra* note 12 at 958.

³¹⁵ “Fire,” *supra* note 39 at 735.

³¹⁶ An anonymous commissioner, *supra* note 29.

³¹⁷ *Ibid.* See similarly Khullar, *supra* note 29.

³¹⁸ See Elections Canada, *supra* note 211.

³¹⁹ Landes, *supra* note 29.

³²⁰ *House of Commons Debates*, Vol. 2, 1964 (16 April 1964) at 2261-64, 2266-67 (various speakers). Opposition Conservatives opposed a process that would see many distinct provincial interpretations applied to the readjustment criteria of the new act.

³²¹ Norman Ward, “A Century of Constituencies” (1967) 10 *Can. Pub. Admin.* 105 at 113.

³²² Harvey Pasis, “Achieving Population Equality among the Constituencies of the Canadian House, 1903-1976” (1983) 8 *Legislative Studies Quarterly* 111 at 115, n. 4.

litigation in U.S. federal courts under the VRA and the Fourteenth Amendment generates a more or less continuous national discourse over readjustment plans in the various states.³²³ In the Texas gerrymandering battle, the United States Senate majority leader openly masterminded the plan, and in litigation before the Supreme Court of the United States, the administration of President George W. Bush intervened in favour of the plan.³²⁴

Second, there are different levels of central oversight inside each provincial or state process. While state legislative majorities generally control readjustment, in each provincial FEBC no person, and no group of persons with common interests, exercises top-down control. To be sure, the commissioners number only three per province—a total that should ideally increase to reduce chances of partisan manipulation within a given FEBC.³²⁵ However, extensive contributions from the public and parliamentarians effectively expand the ranks of decision makers.

Decentralization can produce procedural ambiguity, but there are exceptions. For example, the judicial-selections system in the United States Senate, which we saw previously, has no ultimate umpire (other than, perhaps, the vague and contested dictates of popular sentiment). Partisans elaborate rules of procedure by agreement, a method that has produced the many layers of rules that we saw. These rules are not ambiguous in effect, however, because they respond to balances of power in the Senate and evolve along the shifting contours of a power struggle. For example, as Republicans raised the threat that they would change filibuster rules, a bloc of bipartisan moderates fashioned the noted rule of “extraordinary circumstances”.³²⁶ Better rules would be in place *in advance* of partisan conflict and would have a greater chance of precluding it. A problem with rules that respond to balances of power and specific controversies is that they tend to replace, rather than augment, earlier rules. Much partisan Senate debate in late stages of Justice Samuel Alito’s nomination centred around whether the nomination raised “extraordinary circumstances”.³²⁷ The same procedural confines even channelled public rhetoric.³²⁸ The extraordinary-circumstances rule was, as we saw, only one of several layers of rules. Each had been prominent in a previous stage in the debate, though now extraordinary circumstances were key. We can expect similar phenomena in other cases in which decision makers who are already partisan develop the rules of their own process. A complex system generated out of partisan balance is ultimately rather

³²³ American journals produce a continuous flow of new works on readjustment, most proposing doctrinal tweaks on the constraint model.

³²⁴ See Smith, *supra* note 1; Charles Lane, “White House Defends Texas’s GOP Remapping Plan to Justices” *Washington Post* (2 February 2006) A3. The court used the opportunity to reassert the role of judges as the ultimate arbiters of readjustment (*Perry, supra* note 4).

³²⁵ But note that Landes cites a risk that “larger Commissions will increase the demand for partisan representations” (*supra* note 29).

³²⁶ Hulse, *supra* note 121.

³²⁷ Babington & Schmidt, *supra* note 123.

³²⁸ *Ibid.*

clear.³²⁹ In contrast, the collection of procedures described above makes the Canadian system thoroughly and comprehensively ambiguous, with few clarifying exceptions; in Canada, complex rules were set in place ahead of partisan rule manipulation.

Finally, it should be noted that when authors such as Mazzone and Scheberle contend that complex institutions can generate informal norms of trust, they go against the grain of prevalent reasoning about democratic regulation, especially in the American tradition. Decentralizing power into many hands is an institutional-design strategy long associated with constraint assumptions that are common in commentary—from early notes on institutional design in *The Federalist Papers*, to the works of many current writers.³³⁰ In these works, notions opposite to those of ambiguity animate calls to distribute powers widely: an aim is to maintain tensions among counterbalanced power holders, each of whom acts to oppose and “[restrain]”³³¹ the others in a system of “institutionaliz[ed] conflict.”³³² To this end, institutions maximize the clarity of the setting in which a decision maker acts, enabling watchfulness over, and prompting distrust of, other power holders. But a seemingly small distinction—between rules responding to partisanship and rules laid down in advance of partisanship—may be one key to making complexity comprehensive, and therefore useful as a means of building trust. This can help to explain what is, to many, the FEBCs’ surprisingly developed impartiality.

Interestingly, the Federalists contemplated but eschewed the notion that law can move beyond constraint, and can also shape political cultures:

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects. ...

It is in vain to say that enlightened statesmen will be able to adjust ... clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. ...

The inference to which we are brought is, that the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*.³³³

Conclusion

Predictability and clarity are deeply prized, almost axiomatic principles of legal design, especially in the context of regulating political power.³³⁴ Intentionally

³²⁹ As noted, some provincial-level readjustment commissions have been substantially partisan and dysfunctional after appointing commissioners on political-party lines (Courtney, *supra* note 12 at 111-12).

³³⁰ *Supra* note 259.

³³¹ *The Federalist*, *supra* note 100, No. 48 (Madison) at 311.

³³² Calabresi & Rhodes, *supra* note 252 at 1156.

³³³ *The Federalist*, *supra* note 100, No. 10 (Madison) at 123, 125.

³³⁴ See Karlan, “Fire”, *supra* note 36 at 733-35, 741.

increasing ambiguity as a tool of administrative regulation runs counter to the classical narrative of administrative delegation as a response to the exploding reach and complexity of the business of the state. For example, Michael Taggart writes of Great Britain in the nineteenth and twentieth centuries that

extensive delegated powers sprung, not from some sinister plot hatched by bureaucrats, but from ‘pressing necessity’. The state was doing more. ... The night-watchman state was being replaced quite quickly by the welfare state. If the state was to look after its subjects from the cradle to the grave — which was the wish of the voters ... — then delegation was as inevitable as was the growth of the bureaucracy to implement Parliament’s wishes. Parliament had neither the time nor the capacity to attend to all the necessary details and tasks.³³⁵

Administrative apparatuses, which distance government from public accountability, were (and are) necessary evils. Administrative decision making to some extent preserves rationality and accountability in the face of the enormous scope, pervasiveness, and impact of the various commitments of the state. But in a twist on the traditional narrative, we might also design administrative regulation to increase, rather than accommodate, complexity. We have seen works showing how ambiguous rules can be deployed creatively—through administrative forms especially—to regulate informal norms generally and political impartiality in particular.

A handful of readjustment authors are urging approaches to democratic regulation favouring neither accreting new strata of constraining rules nor passively relying on existing informal norms of impartiality. In the context of the American experience and its perennial problems, these writers advocate a third option of actively regulating informal norms of impartiality. And in a simultaneous but largely separate trend, authors in various disciplines have explored the uses of ambiguity as a tool of regulation. The ambiguity methods outlined in this article can help address problems of democratic regulation. A chief purpose of this article has been to show how the use of ambiguity has worked for Canadian readjustment. A broader goal has been to outline a theoretical framework for continuing the study of the use of ambiguity and its conditions, as applications continue to surface in the literature on democratic regulation.

³³⁵ Michael Taggart, “From Parliamentary Powers to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century” (2005) 55 U.T.L.J. 575 at 584-85.